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NEPA -- STREAMLINE IT BUT DON'T GUT IT

Introduction. Rep. Cathy McMorris (R-Wash.), the Chairwoman of the House NEPA Task Force, said, "If we can make [the NEPA] process more timely and more efficient, I think that would be a win." I agree. In order to streamline NEPA -- to reduce delay while preserving the benefits of the law -- there are steps that can legitimately be taken. As you will see, I make specific *proposals to reduce delay*, which include:

- time limits on the NEPA process -- two potential mechanisms
- implementing NEPA early in the approval process
- concurrent agency reviews
- getting cooperating agencies to cooperate
- adequate resources
- well-trained and decisive agency personnel
- top down direction to expedite
- early assurance of legal compliance
- availability of agency headquarters personnel to expedite NEPA process
- regular meetings among those responsible for the NEPA process
- getting the right level of NEPA documentation
- maximum coordination with State mini-NEPAs, and
- expediting judicial review, including;
 - statutes of limitations,
 - expediting preparation of the administrative record,
 - priority for NEPA suits, and
 - the joinder of NEPA and comparable state claims.

There are also other *measures which it would be a mistake to adopt*, which would gut NEPA rather than streamline it. Specifically:

- Congress should not exempt actions from NEPA.
- Congress should not eliminate or reduce the obligation to consider alternatives.
- Congress should not squeeze the public out of the NEPA process.
- Congress should not curtail judicial review.

Throughout I respectfully suggest that we keep in mind the original intent of the drafters. The Senate's lead author, Henry Jackson of Washington, characterized NEPA as "the most important and far-reaching environmental and conservation measure ever enacted." The ranking Republican, Gordon Allott of Colorado, called it "truly landmark legislation." The lead House author, Congressman John Dingell of Michigan, stressed that "we must consider the natural environment as a whole and assess its quality continuously if we really wish to make strides in improving and preserving it." President Nixon chose January 1, 1970, to sign NEPA into law -- as his first official act of the new decade. In Senator Jackson's words,

The basic principle of the [national environmental] policy is that we must strive in all that we do, to achieve a standard of excellence in man's relationship to his physical surroundings. If there are to be departures from this standard of excellence, they should be exceptions to the rule and the policy. And as exceptions they will have to be justified in light of the public scrutiny required by section 102.

I would respectfully suggest that we would do well to continue to be guided by the framers' words.

In this presentation I will address the issues confronting the Task Force as follows:

- (1) the question whether there is unwarranted delay in the NEPA process;
- (2) the causes of that delay;
- (3) measures that can be taken to reduce delay and otherwise streamline the NEPA process, and;
- (4) discussion of the measures that should not be adopted in the name of streamlining NEPA, measures which would instead undercut the act to the detriment of the nation's environmental protection.

Throughout I should emphasize that as General Counsel of the Council on Environmental Quality I was the lead author of the Federal Government's CEQ NEPA Regulations, which remain in effect a quarter century later after five Presidents with only one amendment to one section. I strongly believe that NEPA and its basic message -- look before you leap environmentally -- serves the American people immensely well. This statute has been an environmental success story. It has been replicated in about half our states, and having served as the model for environmental impact assessment legislation in more than 100 countries, it may be the most imitated American law in history. However, I should also add that I have spent much of the last twenty years assisting clients through the NEPA process and have had my own share of frustrations with unneeded delay in that process. The goal should be to cut the fat but not the muscle.

1. **Is there a problem with delay under NEPA?** In many cases there is for the reasons I set out below. My impression is that such delay is most often associated with applicant-sponsored projects (when timeliness may be critical) as distinct from agency-sponsored ones, where timeliness is often less urgent, such as with respect to long-term actions involving planning.
 - By way of anecdotal example, a principal in a highly regarded consulting firm told me of a draft EIS he had prepared for an agency within the Interior Department that had been sitting on an agency official's desk for 3 months awaiting review and that the official had said it would be another 3 months before she could get to it. I happen to know the agency official, and she is a highly competent, responsible professional, but her workload is overwhelming. It is, however, the applicant to the government whose project is the subject of the EIS who suffers.
 - By way of a more pervasive illustration of delay, a couple of years ago the Federal Highway Administration set a goal of reducing its median Environmental Impact Statement (EIS) preparation time from 4 ½ years to 3 years, and its Environmental Assessment (EA) preparation time from 1 ½ years to 1 year. While admirably intentioned and while the FHWA has been a leader in addressing issues of delay under NEPA, even the goals appear to me to assume excessive time. The President's Council on Environmental Quality (CEQ), the agency charged with overseeing NEPA's implementation throughout the government, has issued guidance saying that agencies' EISs should not take over one year to prepare and process and EAs not more than three months. These are far shorter times than the goals the FHWA has set for itself.
2. **What is responsible for delays in the NEPA process?** I would suggest several answers:
 - **Lack of deadlines.** The absence of time deadlines, milestones, and schedules in many NEPA processes enables delay. As I will discuss, I think this the single most important deficiency to be addressed.
 - **Lack of determination.** The simple lack of drive within agencies to do what is necessary to complete the process in a reasonable amount of time. I will return to this subject later, but the lack of command direction to move the process rapidly is critical.
 - **Lack of resources.** Quite simply, if the agency personnel aren't there, they can't do the job in a timely fashion. A 2002 study (Smythe and Isber, *NEPA in the Agencies-2002*) stated that the Army Corps of Engineers cut its Headquarters environmental staff from 12 to 3; the Department of Energy cut its comparable staff from 26 to 14; and the Environmental Protection Agency reduced its headquarters NEPA staff by 20% over a 10 year period. Fewer staff members to do the work -- any work -- will mean that it takes longer to do it. The ones who suffer from the Federal staff shortages are the private businesses or the State or local governments or Indian Tribes which are trying to move projects through the Federal process.
 - **Fear of litigation** can lead to an overcaution which can lead to delay. I should emphasize that this fear is more a matter of perception than of reality. In fact only a small proportion of NEPA actions result in judicial challenges, and experienced agency NEPA counsel can make informed judgments as to which actions are potentially vulnerable and which are not, thereby eliminating needless delay associated with excessive time on non-problematic matters. Each year approximately 450 EISs and 45,000 EAs are prepared on Federal actions. (The EIS numbers cover both Draft and Final EISs, so the number of actions

represented is approximately half the total number.) In the last year for which CEQ has made public statistics on NEPA litigation dispositions (which it assembles in collaboration with the Justice Department) -- 2004 -- 156 NEPA cases were filed, and in only 11 of those cases did the judge grant an injunction. In 2002 150 NEPA cases were filed, and injunctions were issued in 27 of them. In 2003 128 NEPA cases were filed, of which 6 resulted in injunctions. By way of larger comparison, in that same year, 2004, 281,338 civil cases were filed in the U.S. District Courts. During the same year 998 cases were filed in District Courts involving environmental matters. Of these, 548 involved private parties only (i.e., not the U.S. Government), and of the balance, which involved suits to which the United States was a party, the government was the plaintiff in 171 cases and defendant in 279.

Environmental cases therefore represent a miniscule portion of the Federal court caseload, and NEPA cases a modest part of even that small fraction. In summary, with respect to NEPA actions and NEPA litigation, taking the average number of NEPA documents filed annually and the 2004 NEPA injunction figures, a 99.97% rate of NEPA actions successfully completed without injunctions does not provide a factual basis to prompt an excessive caution on the part of agency personnel. Even looking at the relatively modest number of NEPA cases filed, in 2004 in 93% of them the judge did not issue an injunction. Federal judges on the whole use good judgment and do not act in unwarranted manner.

- **Lack of cooperation by other agencies** can contribute to delay. In NEPA's early days the agencies charged with safeguarding natural resources and environmental protection (typically the Environmental Protection Agency, the Fish and Wildlife Service, and what was then the National Marine Fisheries Service (now NOAA Fisheries)) were sometimes perceived as withholding their contribution while an EIS was being prepared and then, when the time came for public comments, castigating the lead agency for an inadequate job and requesting that the document be redone. In an effort to turn this adversarial -- and time consuming -- interaction into a more constructive approach, CEQ in its 1978 NEPA Regulations devised the concept of "cooperating agency," requiring agencies not to withhold their input until the comment stage, but to get involved early on when the EIS was being prepared, contributing their expertise to it and even taking the lead on the portions on which they had a special knowledge. Everybody benefited -- the lead agencies and project proponents saw a constructive collaboration instead of an adversarial comment process. Project proponents also saw objections to their proposals being surfaced early in the process, so they could be evaluated and the project adapted to reflect meritorious objections, ultimately saving time. Those concerned with the environment saw their concerns being interjected into the NEPA process early on, with an EIS reflecting a fuller range of environmental inputs and values, rather than being treated as an add-on at the end.

However, it is fair to say that this emphasis on cooperation needs constant oversight and consistent reinforcement. The natural tendency of agencies to hold off their involvement and husband their resources must be resisted. Top down direction from the highest levels of the Executive Branch to participate in working through the NEPA process -- not avoiding environmental allegiances and responsibilities, but embracing them by insistence on the early involvement of the resource agencies -- is vital. To emphasize -- the purpose is not to silence those agencies -- quite the opposite, it is to ensure their meaningful contribution by insisting on their early involvement.

- **Difficult substantive areas.** Some environmental problems are complex and -- often quite apart from NEPA -- take time to figure out how wisely to deal with them. Examples include:
 - > Air quality conformity. Under the Clean Air Act Congress has provided that EPA adopt national air quality standards which stand as healthy air goals for all Americans. States are then charged with devising State Implementation Plans (SIPs) setting out the steps to be taken in that state to attain those goals. In an

appropriate effort to ensure that Federal agencies do not by their own actions within a given state subvert that state's planning, Congress has also provided that Federal agencies' actions must "conform" to the state's SIP. Such conformity often leads to hard choices, such as how to offset an increase in air emissions -- which may be time-consuming.

- > Wetlands. Congress has provided that permits must be obtained to dredge or fill "waters of the United States." More particularly, wetlands are safeguarded in part by requiring that there can be no fill when there is an upland (i.e., non-wetland) alternative available. This is an "alternatives" requirement independent of NEPA, and it is one which imposes a substantive requirement -- you must avoid the wetland if there is another, upland alternative available. Additionally, both Presidents Bush and President Clinton have followed a policy of "no net loss" of wetlands -- if you fill a wetland, you must create or foster a wetland elsewhere. This leads to a hunt for suitable sites, sometimes using a so-called "mitigation bank," which can also take time.
- > Section 4(f). Similarly in section 4(f) of the Transportation Act, which applies to transportation facilities -- most commonly highways and airports -- Congress has provided that the agency must pursue alternatives which avoid parks and historic structures. Again -- Congress had created an alternatives requirement independent of NEPA, and one with real bite.
- > Indirect impacts. Sometimes the most consequential environmental impacts are not the most immediate ones. For instance, when a new highway is built in an undeveloped area, there will be immediate impacts as part of the construction, typically involving noise and dust. Then there will be the impacts of operating the highway once it is built -- again noise and the air emissions of the vehicles using the road. And, in an undeveloped area, there will be still further impacts as the highway opens a new area to development. These so-called "growth-inducing" impacts may be a good thing -- that may be precisely why the highway was built -- or they may not be -- the inadvertent consequences of a highway built for other purposes. But NEPA at minimum requires that these impacts be examined such that the public can be aware of and responsible authorities can plan for what is to come. The analytical work of Federal agencies is made available to the affected local government.
- > Cumulative impacts encompass another set of effects that NEPA examines. For instance, if the Department of Veterans Affairs were building a hospital for the nation's veterans on a road that could just accommodate the traffic of the patients coming to the hospital, and simultaneously the local government was approving a Home Depot across the street, which would also generate considerable traffic, NEPA's cumulative effects analysis will alert everybody concerned that there is a problem. NEPA does not solve the problem, but it provides the occasion and the traffic data which will lead the Federal agency and the local government and perhaps the state highway agency to sit down together and figure out what is necessary to deal with the problem of the cumulative impacts of the combined effects of the new hospital and the new megastore. Future traffic jams are averted.

Cumulative impacts consist of past, present, and reasonably foreseeable future impacts of the same type. (40 CFR 1508.7). For instance, the FHWA in preparing an EIS on a highway into a newly developing valley (with its attendant air and noise impacts) in analyzing the capacity of the highway will need to analyze the past impacts (e.g., the number of people and destinations already in the valley), the present proposals (e.g., any new projects which are the immediate occasion for building the highway), and the "reasonably foreseeable" future projects (e.g., other developments which are known to be planned for the valley). Only through an accurate analysis of cumulative impacts will the agency be able to get a complete

picture of what is in store for the valley in terms of traffic, air, and noise and so that the highway can be appropriately sized.

- > Often an agency simply does not follow the law, creating problems for itself. I know you have heard testimony -- often conflicting -- about a NEPA case in the 1970s against the Corps of Engineers in New Orleans involving flood control issues. I have no personal familiarity with that case, but in the 1980s I was privileged to represent the State of Louisiana in NEPA litigation against the Corps of Engineers over the dredging of oyster shell reefs -- which act as a natural barrier to coastal erosion -- off the Louisiana coast. The Corps, having found that the impacts of the dredging were "significant," still refused to prepare an Environmental Impact Statement analyzing the impact. In order to safeguard its coast, the State of Louisiana had to go to court to prevent the Corps from flaunting the Congressional command. The State was successful in the U.S. Court of Appeals for the 5th Circuit in New Orleans in enforcing NEPA. *State of Louisiana v. Lee*, 758 F.2d 1081 (5th Cir. 1985). In brief, agency recalcitrance in following the law can be and is itself often a cause of delay.
- > I set out these examples -- some of which arise under NEPA and some under other Congressional enactments -- as only that -- examples chosen from among many to illustrate that there may be complex environmental issues to resolve and what takes time is not necessarily NEPA but the reality of people working together to solve complex problems. (See the excellent testimony presented before the Task Force by Thomas C. Jensen, Chairman, National Environmental Conflict Resolution Advisory Committee, on the importance of collaborative decision-making.)

3. What can be done to reduce delay?

- **Time limits.** Agencies must be encouraged -- perhaps directed -- to set time limits on the NEPA process (and on individual aspects of the process). *If delay is the issue* -- and it often is -- *then time limits are the one answer that directly addresses and reduces the problem.*
 - > With precisely that in mind, when CEQ adopted its NEPA Regulations it provided that an agency *must*, when requested by an applicant, adopt time limits. 40 CFR §1501.8. ("The agency shall set time limits if an applicant for the proposed action requests them . . .") (The full text of §1508.8 is set out as Attachment A to the presentation.) At the same time CEQ did not impose a single universal time limit because the various actions to be evaluated differ so much in their magnitudes. For instance, it simply takes more effort and time to evaluate a TransAlaska Pipeline than it does to examine a single Interstate highway interchange.
 - > That said, the provision has been grossly underutilized, largely, I believe, because applicants are reluctant to antagonize agencies by exercising their right to demand that time limits be set.
 - > As one trade association from the aviation industry put it in urging reform in agency implementation of NEPA, the agency procedures could "instill greater urgency in the process if it integrated words such as 'schedule,' and 'milestones' and 'deadlines' into the process . . ." (Comments submitted by Airports Council International - North America to FAA (2004).)
 - > By way of constructive example, the FHWA, as part of its "Vital Few Environmental Goal," has adopted a policy of "negotiated timeframes" to expedite the NEPA process. The new Safe, Accountable, Flexible, Efficient Transportation Equity Act will accelerate that process.
 - > I believe that new innovations are needed to emphasize time limits. Let me make two suggestions for dealing with the very real problem of delay (which are not mutually exclusive):
 - (a) The most direct solution would be to require the adoption of presumptive time limits, through CEQ or legislatively, such that EISs are required to be completed in a discrete period of time absent special circumstances warranting

lesser or greater time periods. For instance, either CEQ could impose by Regulation or Congress could impose by law a set of 3 or 4 presumptive time limits for the NEPA process (for EISs; same could be done for EAs). (Or, either CEQ or Congress could require each agency to prescribe such categories). Category A might involve 10 months for an EIS process (running from the Notice of Intent (NOI) through the Record of Decision (ROD)); Category B 15 months, and so on. At the outset of the process, perhaps as part of scoping, the lead agency would (in consultation with the applicant (if any) and with agencies with jurisdiction by law or special expertise, and in the case of actions with the potential for controversy, the public), assign the action to one of the time limit categories. Some sort of flexibility for unforeseen circumstances or unusual situations would be needed, but as a general rule those affected by the NEPA process will have a predictable schedule for the completion of the process. The fact of having a time limit will drive the process. This is the single most important measure needed to reduce delay.

- (b) Alternatively or additionally Congress could repeat the approach it has recently adopted in the newly enacted “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users” (SAFETEA). This year Congress enacted and the President signed legislation which contains detailed and well-considered provisions for expediting the NEPA process for transportation projects. 23 U.S.C. §6002. There is no reason why those provision -- already considered and adopted by Congress -- could not be adapted to non-transportation projects. (It should be noted that there are some provisions in the SAFETEA which do not lend themselves to replication for all other activities subject to NEPA. For instance, the Act allows the lead agency to develop the preferred alternative to a higher level of detail than other projects (23 U.S.C. §6002(8)(4)(D)), which is generally not a good idea because it tilts the decisionmaking prematurely in favor of the particular, preferred alternative.) In general those provisions, under the statutory title, “Efficient Environmental Reviews for Project Decisionmaking” (*Id.*) direct the Secretary (of Transportation, but that can be adapted to other agencies) to take charge of an interagency NEPA process and establish a schedule for the completion of the environmental review process for the project under consideration. 23 U.S.C. §6002(g)(1)(B). To ensure that other laws and the agencies charged with their implementation do not take time beyond the NEPA schedule, the law provides that the Secretary is to deliver a progress report to the relevant Congressional Committee (in the SAFETEA the Senate Committee on Environment and Public Works and the House Committee on Transportation and Infrastructure) on the occasion of the later of 180 days after the application was submitted or the date on which the Secretary made all final decisions on the project. Additional reports are due every 60 days.

- **Implementing NEPA earlier in the approval process.** Insofar as NEPA’s consideration of environmental matters is integrated early in an approval process - - as distinct from being an add-on at the end - - NEPA takes less time, and the values it represents are better integrated into the action being taken.
 - > CEQ has long emphasized this goal (40 CFR §§1500.5(a), 1501.2), but the mandate needs constant reinforcement.
- **Concurrent reviews.** Often many Federal agencies have a say in a project’s approval process. It is essential that these agencies undertake their environmental responsibilities concurrently rather than sequentially. That cuts down on delay.
 - > CEQ has also tried to make this happen (40 CFR §§1502.25, 1500.5), but consistent insistence is needed.

- **Getting cooperating agencies to cooperate.** Insofar as agencies other than the lead agency have either special expertise or jurisdiction by law, they too have a role to play in the NEPA process (NEPA, §102(2)(C); 40 CFR §§1501.6 and 1508.5). Any tardiness in their taking action has the potential to delay the whole process.
 - > CEQ has recently and quite laudably spent considerable effort in making the cooperating agency concept work well.
 - > In many cases, resource shortages (discussed below) play a role in cooperating agency contributions to delay (which can be alleviated if the lead agency augments the resources available to the cooperating agency). SAFETEA specifically provides for transportation funds to be made available to State agencies and Indian Tribes which are participating in the environmental review process for activities which contribute to expediting and improving transportation planning and project delivery.
 - > That said, facilitating and expediting the cooperating agency role has promise for accelerating the whole process.
- **Adequate resources.** As I noted above, no job can be performed if there are not adequate personnel assigned to do it.
 - > The expedition with which an agency undertakes its NEPA responsibilities is often directly proportional to the availability of experienced staff to undertake and complete the job promptly.
 - > By way of illustration of action to reduce delay, the Federal Aviation Administration (FAA), an agency with an exceptionally high success rate in defending its NEPA documents in court, acting in response to the Department of Transportation FY 2003 Appropriations Act and to the requests of affected airports brought on 44 more personnel -- 31 environmental specialists and 13 lawyers -- with the avowed purpose of cutting delay. That was a constructive step.
 - > I am fully aware that resources are in short supply these days -- that the many demands on the Nation's exchequer, both foreign and domestic, from Iraq to Katrina, diminish the prospect of additional resources. But that recognition does not make the problem go away. If there is nobody there to do the job, the job doesn't get done, whether the job is NEPA implementation or any other function. In some measure, particularly with projects for which there is a project sponsor, this lack of resources can be addressed by having the project sponsor pay the cost of environmental review. For the sponsor that additional cost may well be dwarfed by the cost of delay. It is to everybody's advantage to allow sponsors to advance the cost of evaluating these applications, understanding, of course, that expedited analysis does not guarantee approval but rather only rapid evaluation. Congressional authorization would make clear that agencies can accept funds for this purpose.
 - > By way of example, some agencies choose to rely in part on outside private contractors to prepare NEPA documents under the supervision of core agency staff. (40 CFR §1506.5). Under so-called "third party contracts" the agency may select and supervise the consultant, but the applicant -- whose interests are furthered by prompt action -- foots the bill. This works to mobilize the resources necessary to do the job promptly, especially when the agency lacks sufficient experienced personnel. It internalizes within the project cost the external cost of environmental evaluation.
- **Well-trained and decisive agency personnel.** The FAA, an agency with a particularly high record of success in court with its NEPA documents, says quite simply: "A highly skilled FAA EIS project manager is the greatest asset for a successful EIS." FAA, *Best Practices Guide* (in my experience the single best guidance put out by any Federal agency

on expediting the NEPA process.) I would suggest several attributes that are needed for agency personnel to deal effectively with and appropriately expedite the NEPA process:

- > They must be trained such that they produce or review NEPA documents that fully implement the law's intent, that protect the public, and that will withstand legal challenge.
 - > They must -- and this is difficult to legislate or to mandate, but is exceedingly important -- have the capacity to make decisions, to say "yes" as well as "no" (or "I need more information"). There must be agency incentives built in for agency officials to move quickly and decisively.
 - > There must, as I said earlier, not only be qualified, decisive personnel, but there must be enough of them. (Generally see CEQ, *The NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation* (Sept. 2003) for detailed recommendations prepared by experienced practitioners within the Federal government concerning how better to make the internal process work more smoothly.)
- **Top-down direction to expedite.** There must be command direction from above -- within both the lead and cooperating agencies -- to move the NEPA process expeditiously. Wholehearted implementation of NEPA's mandates is essential, but timelines are also a vital ingredient of a successful process. (The newly-enacted SAFETEA, President Bush's Executive Order 13274 (Sept. 18, 2002), and guidance promulgated by DOT, the FAA, and the FHWA provides worthwhile examples of such top-down direction to expedite.)
 - **Early assurance of legal compliance.** Delay can come from either an overreaction due to fear of litigation, which stymies decisive action, or from sloppy environmental analysis which results in having to go back and do the job over. Doing it right -- and legally -- saves time. A stitch in time does save nine. As the NEPA process progresses, an agency should be having its legal staff, which must be experienced with NEPA litigation and associated other environmental requirements, consistently giving prompt advice on what is needed for an adequate NEPA document -- neither too much nor too little. Again to quote an aviation industry reform proposal, what is needed by the agency are "procedures for very fast decisions by experienced litigators on legal risk associated with time-consuming elements of NEPA analysis, . . ." (Airports Council International comments.) Quite simply, it is possible accurately to forecast the litigation vulnerabilities of a NEPA document and remedy the deficiencies to reduce those vulnerabilities (and at the same time to see that useless time and effort is not devoted to detailed study of issues not critical to the decision). I have participated in the preparation of many NEPA documents representing applicants (including among others energy companies, highway builders, land developers, airports, and Indian Tribes), and no document on which I have worked has ever been overturned by a court. It can be done. There is no trick. The message is to follow the law and the regulations faithfully. That will serve the law in the manner that Congress intended. Experienced NEPA litigators sometimes get the feeling that much of the carping about NEPA comes from those who have done inadequate jobs in preparing NEPA documents and would like to blame somebody else -- or the statute itself -- when their work is found unacceptable.
 - > To the extent that agencies do not have qualified NEPA lawyers with litigation expertise available in house, the agencies could be required to consult with the U.S. Justice Department prior to finalization of NEPA documents in potentially controversial cases. It is, after all, the lawyers of Justice's Environment and Natural Resources Division who will ultimately be defending these NEPA documents in court. If they are afforded the opportunity to review the documents before their finalization (rather than after a potentially inadequate document has been finalized and becomes the subject of a lawsuit), much aggravation and delay can be headed off. Of course, time limits would be needed for DOJ review (as for every other part of the NEPA process).

By way of analogy, in the Carter Administration all Justice Department NEPA pleadings were reviewed by CEQ's legal staff to ensure consistency throughout the government and to ensure the views of the client agency responsible for interpreting NEPA were brought to bear as Justice crafted its pleadings (rather than simply reflecting the views of the agency being sued). CEQ was given a 48 hour turnaround to transmit its views to Justice. This salutary practice has not been followed, unwisely, I believe, by subsequent administrations.

- **Headquarters personnel available to step in to expedite.** Different agencies have different organizational means of doing their business, which is totally appropriate. But to the extent that an agency relies on a regional or district office to do its NEPA work, having somebody -- informed, empowered, and decisive -- at the headquarters level to whom recourse can be had to break logjams and get a project moving is extraordinarily helpful.
- **Regular meetings.** With complex projects no mechanism works more effectively to move the project along and to involve all the agencies which will ultimately be involved in the permitting than regular meetings -- usually led by the lead agency -- to set and achieve milestones and to evaluate progress.
 - > I have personally been involved in such sets of meetings in projects ranging from a successfully completed expansion of the Philadelphia International Airport to a land development on the Potomac River in Maryland. This system can and does work.
 - > The dynamics of every agency having to show progress every month -- to show what it has done, to state what further information it needs -- function to make projects move at a rapid clip.
 - > That said, such meetings are resource-consumptive and are best used for complex projects with the potential for controversy. Needless to say, assigning a high priority to such projects -- which may be most appropriate given their importance -- does result in less priority for the other projects.
- **Get the right level of NEPA documentation.** As you know, there are three possible levels of NEPA documentation -- (1) a Categorical Exclusion (which, for a qualifying project -- one of a type found by the agency (with the approval of CEQ) not to have significant environmental impacts either individually or cumulatively -- simply says no more NEPA documentation is needed); (2) an Environmental Assessment (EA) (which is supposed to be a brief study to see if a more extensive EIS is needed and which also functions, in the vast majority of cases, as the mini-analysis which is the only NEPA document and which builds environmental factors into decision making; and (3) an Environmental Impact Statement (EIS) (which is the most thorough analysis required under NEPA -- reserved by Congress for those proposals which may significantly impact the human environment). Getting the appropriate level of NEPA documentation right is important -- both to avoid a more complex, lengthier process than the action warrants, and, conversely, to be sure there is adequate analysis such that it will not be necessary to come back and start over.
 - > Current agency practices are widely disparate. For instance, in one year the Federal Highway Administration categorically excluded 90% of its projects, prepared Environmental Assessments /Findings of No Significant Impact (EA/FONSI) on 7%, and EISs on 3%, while the Corps of Engineers prepares 75 to 100 EISs each year and 4,400 EAs, and the Department of Energy prepared 11 Final EISs and 49 EAs over a 2 year period.
 - > Opportunities exist for improvement. For instance, the Food and Drug Administration used to require an Environmental Assessment for each new drug before it came on the market. This involved several hundred thousands of expenditure and several months delay in making the drug available to the public. The primary purpose of an EA, of course, is to determine whether an EIS is needed. Over many years in only one case did the FDA decide such an EIS was warranted (and adopted one prepared by another agency). That record established a firm basis on which the FDA was able to broaden its categorical exclusions to most new

drugs. In brief, actual experience over a period of years showed a lack of significant environmental impact and therefore supported broader categorical exclusions.

- **Insure maximum coordination with State NEPA analogues.** About half of the states have some sort of statute or order based on NEPA, and a smaller number of these states have analogous laws whose reach is more pervasive than NEPA, including Chairwoman McMorris' home state of Washington and Chairman Pombo's and my home state of California. Many actions will be subject to both laws. Duplication can be avoided if the Federal and State (or local) agencies collaborate to prepare one document to comply with both laws. The CEQ NEPA Regulations require exactly that on behalf of Federal agencies. 40 CFR §1506.2. And, indeed, I drafted a comparable state provision for the Council of State Governments which became part of the Council's suggested model legislation and which was adopted by a number of states. Still -- agencies often avoid such cooperation. A firmer push to make them collaborate would be helpful.
 - > I should note that some of the State enactments are considerably more demanding than NEPA. For instance, the California Environmental Quality Act (CEQA) requires not only identifying potential mitigation, but substantively adopting it to remove all significant impacts as a condition of project approval. California's "little NEPA" includes the provision that:

The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects,

Cal. Public Resources Code §21002. Also see the provisions from Massachusetts (Mass. Gen. Laws ch. 30, §61, requiring "a finding that all feasible measures have been taken to avoid or minimize said impact.") and New York (N.Y. Env'tl. Conserv. Law §8-0109(8), requiring a finding that "adverse environmental effects identified in the environmental impact statement will be minimized or avoided"). These State requirements go well beyond NEPA in their requirements for the protection of the environment, but with flexibility Federal managers and their State and local counterparts can work successfully to meld the processes under both Federal and State laws. From the point of view of an applicant who must comply with both acts anyway, one process and one document is more efficient than two.
- **Expediting judicial review.** As I discuss later, judicial review is essential to NEPA's effectiveness and should not be curtailed. That said, there are good reasons for expediting that judicial review. Potential measures include:
 - > **Statute of Limitations.** NEPA has no statute of limitations -- no period within which judicial challenges must be filed. Many courts look to the general statute of limitations for civil suits against the United States, which is six years. The vast majority of NEPA actions are completed well before that time. Some agencies, however, have in their own authorizing legislation statutes of limitations for any challenge against the agency's action which then function as NEPA statutes of limitation. For instance, all actions challenging an Order by the FAA must be brought within 60 days. An action to challenge the decision of the Secretary of the Interior to take land into trust for an Indian Tribe must be brought within 30 days, which similarly equates to a NEPA statute of limitations. The newly enacted Safe, Accountable, Flexible, Efficient Transportation Equity Act provides a 180 day statute of limitations for transportation projects. My own State, California, has a 30 day statute of limitations for its NEPA analogue, the California Environmental Quality Act (CEQA). My own impression is that this relatively short statute does not imperil the opportunity for judicial review in that litigation under CEQA is both

more frequent and more successful than that litigation under NEPA. I should note, however, that those experienced in working with citizens' groups in litigation make the valid point that it often can take such groups more than 30 days to get their acts together to bring a lawsuit. Finally -- a note of practicality. Judicial review under NEPA is "administrative record review," which is to say the judge usually does not take testimony or receive evidence but rather reviews the administrative record that was before the agency to see that it took a "hard look" at the environmental consequences of its proposal. That means there can be no judicial review until the administrative record (discussed below) -- often many thousands of pages -- is compiled by the agency. That usually is not completed within 30 days, so a statute that short is probably not practically effective in reducing delay. A statute in the 90 to 180 day range would be more realistic.

- > **Administrative Record.** I should add that expediting that compilation of the administrative record -- which is within the authority of the preparing agency, working with the Justice Department -- is an essential part of expediting judicial review. Specifically enabling the agencies to call upon applicants for assistance in expediting compilation of the administrative record would be a useful step (perhaps coupled with a provision ensuring that applicants can participate in the litigation affecting the future of their projects).
- > **Priority to NEPA suits.** Both District Courts and Courts of Appeal have dockets to manage and must assign priorities. Congressional direction to give priority to NEPA cases will expedite the disposition of those cases. California has such a legislative requirement for priority to CEQA cases. (It is worth noting, however, that the judiciary can be expected to oppose such a measure, preferring to control its own dockets.)
- > **Joinder of NEPA and comparable State claims.** In those states which have their own environmental impact assessment laws, the possibility exists for two judicial reviews -- in Federal court and in State court -- of what may be one document prepared to comply with both laws. There is no reason for a plaintiff to have two judicial bites at the apple. One makes sense. Two does not. While a State court lacks jurisdiction to apply a Federal law, such as NEPA, against a Federal agency, a Federal court can, using the concept of pendant jurisdiction, hear both the NEPA claim and the related State claim. While I am convinced this can happen under existing law, a Congressional clarification -- even encouragement -- would be useful.

4. **Measures that should *not* be adopted to reduce delay.**

I have discussed at length measures that can and perhaps should be adopted to reduce delay in the NEPA process. There are also other measures -- some embodied in legislative proposals -- which should *not* be adopted to deal with issues of delay. These proposals cut not fat but muscle. They imperil NEPA and all the good that it does.

- **Congress should not exempt actions from NEPA.** A proposed action either does or does not significantly impact the environment. If it does not, under existing law no lengthy studies are needed. If the action does significantly impact the environment, that is what NEPA is there for. There is no reason to exempt actions from the scrutiny Congress has so wisely otherwise ordered.
- **Congress should not eliminate or reduce the requirement to examine alternatives.** The alternatives analysis is what NEPA is about -- looking for better ways of doing things, usually both enabling a project proponent to pursue its goal, but at the same time forcing a search for reasonable alternative means of accomplishing it. "Reasonable alternatives" is existing law -- no more and no less. To look at no alternatives or to look at fewer than "reasonable alternatives" or to focus on one alternative and skimp on others is to negate what NEPA is all about -- the search for better, less environmentally intrusive ways of doing things. For instance, you can build a highway, but look for the alternate route that

avoids an endangered species habitat. You can meet an energy need, but find the least polluting alternative means of doing so. Alternatives are the heart of NEPA and should not be curtailed.

- **Congress should not squeeze the public out of the NEPA process.** The public plays a major role in the NEPA process -- commenting and suggesting and otherwise exercising its opportunity to make the Federal government more responsive to citizen concerns. NEPA, after all, provides the most conspicuous example of when the Federal government must explain the consequences of its actions to its citizens before undertaking those actions. And -- those citizens, often closer to the on-the-ground impacts that are to be evaluated than a geographically remote official or consultant, can have real-world observations to make which can beneficially influence the decision. Measures which are designed to exclude the public or to create time schedules which do not allow for meaningful public involvement further estrange the American public from those in Washington who are its servants. The public's role should not be curtailed.
- **Congress should not curtail judicial review.** Currently the courts -- as commanded by the U.S. Supreme Court -- review Federal agency actions under NEPA under the highly deferential "arbitrary or capricious standard," which gives the agency the benefit of the doubt. This opportunity for judicial review should not be curtailed. Congress, after all, provided no alternate enforcement mechanism for NEPA. Only judicial review under the Administrative Procedure Act (the same statute under which most Federal agency action is reviewable) insures the enforcement of NEPA. If judicial review were not there -- and in the absence of creating some gargantuan independent Federal bureaucracy to oversee the adequacy of other agencies' NEPA documents -- NEPA would be unenforced and would wither away. To remove or curtail judicial review would be to remove or curtail NEPA itself.

Conclusion and Summary

In conclusion, I suspect some of NEPA's critics treat the statute as the proverbial bearer of bad news with the "shoot the messenger" syndrome. Some are unhappy when a NEPA document shows significant adverse environmental impacts and their reaction is "shoot the messenger -- kill NEPA." But making public the bad news -- the adverse environmental impacts -- is NEPA's job. That is what it is supposed to do. The solution is not to shoot the messenger or to kill NEPA. The appropriate solution is to address the environmental problem.

In summary, NEPA is a statute which works well and which serves the American people immensely well. Sometimes, and often in cases involving applicants to the Federal government, its processes take too long. There are measures that could and should be taken to correct that. There are also measures which should not be adopted -- measures which would gut NEPA. It is time to adopt the former but not the latter.

Thank you for the opportunity to appear before the Task Force. I hope and trust my suggestions for improving but not undermining the NEPA process have been helpful, and I stand ready to be of assistance to the Task Force in any other way that might be useful.

Attachment (40 CFR §1501.8, *time limits*)

ATTACHMENT A

(excerpted from the existing CEQ NEPA Regulations)

40 CFR §1501.8 **Time limits.**

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: Provided, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

- (i) Potential for environmental harm.
- (ii) Size of the proposed action.
- (iii) State of the art of analytic techniques.
- (iv) Degree of public need for the proposed action, including the consequences of delay.
- (v) Number of persons and agencies affected.
- (vi) Degree to which relevant information is known and if not known the time required for obtaining it.
- (vii) Degree to which the action is controversial.
- (viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

- (i) Decision on whether to prepare an environmental impact statement (if not already decided).
- (ii) Determination of the scope of the environmental impact statement.
- (iii) Preparation of the draft environmental impact statement.
- (iv) Review of any comments on the draft environmental impact statement from the public and agencies.
- (v) Preparation of the final environmental impact statement.
- (vi) Review of any comments on the final environmental impact statement.
- (vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.