

NEPA Draft Report Comments  
c/o Task Force  
Committee on Resources  
[nepataskforce@mail.house.gov](mailto:nepataskforce@mail.house.gov)

February 6, 2006

Dear NEPA Task Force and Committee on Resources,

The following are the comments of Colorado Wild, Sinapu, Center For Native Ecosystems, Wilderness Workshop, Upper Arkansas and South Platte Project, Southern Rockies Ecosystem Project, San Juan Citizens Alliance, Backcountry Snowsports Alliance, Biodiversity Conservation Alliance, San Luis Valley Ecosystem Council, and Rocky Mountain Recreation Initiative on the NEPA Task Force Report of December 21, 2005.

All of the organizations endorsing this comment letter are interested in the management of Federal lands in Colorado and neighboring states and work to protect such lands from environmental degradation. In the course of this work, we regularly review documents prepared pursuant to the National Environmental Policy Act. We believe this statute is extremely important in helping to ensure a safe, healthy environment for all Americans, and in allowing the public to participate in the development of projects taking place on Federal land and/or financed with Federal money.

Thus we are very concerned with some of the "Initial Findings and Recommendations" of the NEPA Task Force contained its Report of December 21, 2005. Pages numbers in the text below refer to this Report.

No statute is perfect, and we do not maintain that NEPA cannot be improved or that it should never be changed. However, based on scant evidence consisting of scattered examples of purported problems, the Report is much too eager to conclude that NEPA needs significant change. For example, the Report discusses delays in projects being implemented because of the time it takes to prepare NEPA documents. Page 18 et seq. Many projects proposed on Federal land, including large timber sales covering thousands of acres, and proposals for natural gas drilling, are increasingly complex, and, because of increased population, have a much larger chance of adversely affecting the human environment than similar proposals done 35 years ago, in the infancy of NEPA, would have had. The increased length of NEPA documents for such projects indicates that the statute is working as intended, as the complex interactions between projects and the human environment are being addressed, as agencies would not prepare long documents if they did not need to..

It may be considered unfortunate that the need to prepare longer and more complex NEPA documentation for proposed projects means that implementation of those projects is delayed. However, it is much better to delay implementation of projects in order to assess the likely impacts and then take the time to design projects to prevent or mitigate these impacts, rather than to quickly begin implementing big projects and having to

address potentially serious impacts after they have occurred and are thus more difficult to mitigate.

In our experience, delays in completing NEPA documents occur because of the lack of agency resources. Steady reductions in the money appropriated to agencies over the last 15 years make it impossible to timely fill various positions to replace retirees and people who have moved on to jobs elsewhere. The result is often that for months at a time, a field office of a Federal agency lacks both people trained in NEPA compliance and one or more specialists to competently evaluate impacts from one or more projects for which NEPA documents are being prepared.

The Task Force Report does address this problem, but hints that more resources might not solve it, at least in part because agency resources are being shifted away from management to “litigation support”. Page 24. We disagree. Litigation over NEPA documents occurs on only 0.2 percent of all environmental impact statements filed each year. Page 11. Thus this “resource shifting” (id.) simply could not account for delays in more than a very small percentage of the cases. The perception that agency personnel are spending more time on litigation support may stem from the fact that the agencies are so short staffed that the remaining employees have to do the work of other staff positions that no longer exist or are not filled

The surest way to decrease any unjustified delays in completing NEPA documentation would be to ensure that agencies are fully staffed with people competent to do the necessary work. Then even if there was resource shifting toward litigation support, agencies would be much better equipped to handle it and still finish other NEPA work in a timely manner.

## COMMENTS ON SPECIFIC RECOMMENDATIONS

Below we comment on some of the recommendations made in the Task Force Report. It should not be assumed that we necessarily accept or approve of those recommendations we chose not to comment on.

1.1 – Amend NEPA with a new definition of “major federal action”. Major federal actions would only be those “that would require substantial planning, time, resources or expenditures”. This ignores the most important criteria for determining whether a proposed Federal action is major, thus requiring preparation of an EIS: whether it has a significant effect on the quality of the human environment. NEPA section 102, 42 USC 4332. This recommendation is inappropriate and must not be adopted.

1.2 - Amend NEPA to impose mandatory time limits for NEPA document completion. EISs would have to be completed within 18 months and environmental assessments within 9 months, with extensions of six and three months, respectively, allowable by the Council on Environmental Quality (hereafter “CEQ”). Particularly chilling is the

recommendation that “analyses not concluded by these timeframes would be considered complete”. This would, at best, prevent even those agencies who are diligent about fulfilling their responsibilities under NEPA from adequately analyzing the impacts of very complex projects. At worst, it would encourage agencies to delay preparation of environmental documents and then not be able to complete them, even if they later desired to do so, because of the inflexible deadlines. As discussed above, agencies are critically short-staffed these days, thus meeting these deadlines would be impossible in many cases.

This recommendation is absolutely unacceptable and must never be adopted.

1.3 - Amend NEPA to create “unambiguous” criteria for when to use categorical exclusions, EAs, and EISs. NEPA’s implementing regulations already provide clear guidance to agencies for determining when each type of document is needed. See 40 CFR 1501.4(a) and (b) and 1507.3. While they require some judgment on the part of the agencies, they could not be made “unambiguous” because they could not be written to cover every possible type of situation.

The recommendation contains a presumption that “temporary” activities will generally be exempted from review in an EA or EIS. Depending on how “temporary” is defined, that could mean that NEPA documentation for activities lasting only a short time but still possibly having considerable impacts would not have to be prepared. This would encourage agencies to avoid consideration of impacts for such projects, and might lead to the occurrence of unacceptable impacts.

This recommendation is at best unnecessary, and at worst, positively harmful toward protecting the environment. It must not be adopted.

1.4 - Amend NEPA to address supplemental documents by putting the language from the CEQ Regulations at 40 CFR 1502.9(c)(1) into the statute. This is unnecessary and would make it more difficult to change the criteria for when to prepare supplements, if such a change is later desired, because it is much more difficult to get Congress to change a law than it is to amend regulations. It should not be adopted.

2.1 - Direct CEQ to prepare regulations giving more weight to local comments. Federal lands and resources belong to all Americans, not just to those in the area where they happen to be sited. Agencies should, and often do, give considerable weight to local concerns, but this cannot, as a matter of fairness and law, be at the expense of national concerns. An example of a clash between local and national interests would be local desire to allow resource extraction that would severely and adversely impact an area containing nationally unique ecology or high quality habitat for one or more endangered species. Under the proposal here, local concerns would outweigh the larger level ones.

Another problem would be in determining what was truly a “local” interest. Would it be limited to people who resided in the area of a proposed project? What about people who lived there a few months of the year, such as people with vacation homes? Or people who reside out-of-state, but hunt or fish in the same spot every year? Why should input from these legitimate interests be downplayed?

This recommendation is inappropriate, unfair to sectors of the affected public, and unworkable. It must not be adopted.

2.2 - Amend NEPA to add page limits for EISs. Under this recommendation, EISs would generally be limited to 150 pages, and a maximum of 300 pages. Doing so would prevent agencies from adequately identifying, analyzing, and proposing to mitigate, possibly severe impacts that can arise from very large projects. That would clearly contradict the intent of NEPA. This recommendation is egregious and must never be adopted.

4.1 - Amend NEPA to add a citizen suit provision<sup>1</sup> that would limit lawsuits. This would require a litigant to prove that the best available science and information was not used. Such information could be used, but the agency could still, for political or other reasons, reach unjustifiable conclusions about impacts or fail to follow a reasonable procedure for public involvement. Lawsuits should be allowed under such cases.

This recommendation would also prohibit any Federal agency, or the Department of Justice acting on its behalf, from entering into a settlement of a NEPA lawsuit which would severely limit the activities of businesses that were not part of the lawsuit. This would too severely restrict potential lawsuit settlements, allowing cases to proceed that could have otherwise been settled, thus increasing the burden on the Federal courts, which already have difficulty ruling on civil cases in a timely manner. Such settlements that involve some limitation of a business’ activities may be necessary to ensure compliance with laws and to ensure a healthy environment.

This recommendation is clearly aimed at preventing people from using the courts to protect their communities. It must not be adopted.

5.1 - Amend NEPA to require consideration of only those alternatives that are economically and technically feasible, i. e., supported by engineering and feasibility studies. This would discourage the public from suggesting alternatives, as it will generally be beyond their capability to perform such studies. Federal agencies should be encouraged to analyze a wide range of alternatives so that all possible options for protecting the environment during implementation of a project or activity are considered.

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<sup>1</sup> “Citizen suit” is a significant misnomer here. Such provisions in other laws, such as the Clean Water Act, provide a mechanism for litigation by members of the public against agencies who may not be complying with respective laws. The recommendation here would severely limit such action under NEPA.

How could agencies know what alternatives were feasible unless they were studied? This recommendation would preclude analysis of possibly feasible alternatives. Note that alternatives are considered to be the “heart of the environmental impact statement. 40 CFR 1502.14. This recommendation would take this fundamental principle of NEPA and stand it on its head.

One of the criteria for this evaluation would be “socioeconomic consequences (e. g., loss of jobs and overall impact on a community)”. This implies that alternatives that might have adverse socioeconomic impacts would not be considered implementable, even if they had overwhelmingly positive environmental impacts.

This recommendation is inappropriate and contrary to the intent of NEPA. It must not be adopted.

6.1 - Direct CEQ to prepare regulations encouraging more consultation with stakeholders. It is always desirable for Federal agencies to encourage public participation. Such communication can only lead to better implementation of NEPA and better projects. Thus this recommendation is commendable.

7.1 - Amend NEPA to create a “NEPA ombudsman” within CEQ. This would be done in part to “resolve conflicts within the NEPA process”. CEQ already exists to do exactly that, thus the recommendation is unnecessary. Further justification for this proposal is nefarious: “offset the pressures put on agencies by stakeholders”. That sounds like a call for agencies to ignore the public. It thus contradicts recommendation 6.1.

Thus this proposal is both unnecessary and contrary to the intent of NEPA, and must not be adopted.

7.2 - Direct CEQ to control NEPA-related costs. It might be appropriate to examine ways to improve efficiencies in the implementation of NEPA, if that can be accomplished without diluting the comprehensiveness of NEPA analysis. However, this recommendation speaks of “bringing recommendations to Congress for cost ceiling policies”. Like hard limits on the length of NEPA documents (recommendation 2.2), this is inappropriate because it would unduly restrict NEPA analysis, i. e., discourage full disclosure of impacts. This recommendation should be dropped or substantially rewritten to emphasize achievement of efficiency while still meeting NEPA’s requirement for a hard look at the impacts of proposals.

8.1 - Amend NEPA to address how agencies evaluate the effect of past actions for assessing cumulative impacts. This provision would lock in an agency’s assessment of current conditions “as [its] methodology to account for past actions”. This assumes that every agency analysis of current conditions uses the best possible methodology. That is

simply not true. This provision would reduce the quality of NEPA analysis and discourage, if not prevent, agencies from improving it. It must not be adopted.

8.2 - Direct CEQ to prepare regulations to clarify what type of future actions must be considered for possible cumulative impacts. Analysis would focus on “concrete proposed actions” rather than requiring analysis of those that are “reasonably foreseeable”, per the current CEQ Regulations. This would restrict NEPA analysis of possible cumulative impacts by encouraging or requiring agencies to ignore the possible impacts of future projects that were likely to occur but were not “concrete”, which we assume means *assured* in this context. That would be contrary to the intent of NEPA to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man”. (NEPA section 2, 42 USC 4321). It must not be adopted.

9.2 – CEQ study of Federal agency NEPA staffing issues. Since Federal agencies have seen their budgets cut drastically over the last 15 years, it may be appropriate for CEQ to study the issue of staffing for timely NEPA compliance, especially “measures necessary to recruit and train experienced staff”. However, what is most needed is an increase in appropriations for agencies who prepare NEPA documents.

## CONCLUSION

We do not agree that the recommendations constitute “modest improvements and modifications to” NEPA and its regulations (page 30). Rather, they represent a wholesale weakening of NEPA’s requirements to identify and disclose impacts on the human environment and encourage public involvement in doing so. If there is a case to be made for improving NEPA by amending the statute and/or revising its implementing regulations, it is certainly not found in the Task Force Report. If anything, the Report demonstrates that continued full consideration of reasonable alternatives, full disclosure of possible impacts, and full public participation in the design of projects under NEPA are all needed more than ever.

Though there are a few positive recommendations in the Task Force Report, most of the recommendations must be rejected. If the Task Force is serious about improving NEPA, we recommend it start over with an unbiased look at one of the most important environmental statutes ever enacted. And most importantly, it should also do whatever it can to ensure that Federal agencies have sufficient resources to fully carry out their NEPA responsibilities.

Sincerely,

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