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February 6, 2006

The Honorable Cathy McMorris  
Chair, NEPA Task Force  
Committee on Resources  
1324 Longworth House Office Building  
Washington, D.C. 20515

**Re: NEPA Task Force Draft Report**

Dear Representative Morris:

Thank you for your proactive efforts to review and find ways of improving the National Environmental Protection Act (NEPA). On behalf of the Family Farm Alliance (Alliance), I would like to express further appreciation for the opportunity provided by the NEPA Task Force to review the December 21, 2005 initial findings and draft recommendations released by the Task Force.

The Family Farm Alliance is a grassroots organization of family farmers, ranchers, irrigation districts and allied industries in 16 Western states. The Alliance is focused on one mission: To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers.

The Family Farm Alliance believes that without new sources of water, increasing urban and environmental demands will deplete existing agricultural supplies and seriously threaten the future of Western irrigated agriculture. The often slow and cumbersome federal regulatory process is a major obstacle to realization of projects and actions that could enhance Western water supplies. The Family Farm Alliance wants to work with Congress, federal agencies and other interested parties to build a consensus for improving the regulatory process.

The Task Force draft report represents an important step towards addressing a law that has drawn scrutiny from many western water users: the National Environmental Protection Act. As you have likely heard during the course of your field hearings conducted throughout the country last year, NEPA implementation can have a direct bearing on the success or failure of critical water supply enhancement projects.

## **Regulatory Impediments to Progress on Western Water Supply Projects**

Last year, we surveyed irrigators and water managers throughout the West and asked them to identify the regulatory impediments they most frequently encounter as they seek to construct projects that enhance water supplies. NEPA “horror” stories were abundant, and the impediments related to NEPA implementation are listed later in this letter.

### **Alliance Recommendations**

In April 2005, Alliance Chairman of the Board Bill Kennedy testified on behalf of the Alliance before the NEPA Task Force in Spokane, Washington. While Mr. Kennedy’s testimony focused on an unusual NEPA application – a decision by federal agencies not to prepare full NEPA documentation for the Klamath Project in 2001, when irrigation supplies were curtailed – he also provided recommendations to streamline NEPA regulations as they relate to new water supply and conservation projects. These recommendations are outlined below.

### **Assessment of Task Force Report**

We have reviewed the Task Force draft report and are generally in agreement with its findings and recommendations. In assessing the Task Force report, we compared it to the problems identified by the Alliance’s survey and to recommendations presented to the Task Force in Mr. Kennedy’s testimony. Of course, our focus was more specifically directed at how the Task Force recommendations would contribute to a more streamlined regulatory process for water supply enhancement projects. We understand that the Task Force report provides recommendations intended for a much broader application than just water projects.

### **Beneficial NEPA Task Force Recommendations**

The following section shows how NEPA Task Force recommendations address the specific problems identified by the Family Farm Alliance West-wide survey.

**Problem #1: The alternatives proposed for assessment by NEPA regulators are frequently inappropriate, unrealistic, difficult-to-implement, and often in conflict with state law.** The NEPA Task Force offers five recommendations to address this concern:

- Recommendation 1.3. Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS).
- Recommendation 2.1. Direct Council on Environmental Quality (CEQ) to prepare regulations giving weight to localized comments.

- Recommendation 7.1. Amend NEPA to create a “NEPA Ombudsman” within the CEQ. This recommendation would direct the CEQ to create a NEPA Ombudsman with decision making authority to resolve conflicts within the NEPA process.
- Recommendation 7.2. Direct CEQ to control NEPA related costs.
- Recommendation 8.2. Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis.

We are particularly encouraged about Task Force Recommendation 1.3, which would amend NEPA to create unambiguous criteria for the use of CEs, EAs and EISs. As these criteria are clarified, it will force policymakers to also address the confusion that currently exists relative to what exactly constitutes a “significant” impact. The definition of “significant impact to the human environment” needs to be clarified to minimize confusion and varying interpretations between various local and regional federal agency staff. Ultimately, proper implementation of this recommendation has the potential to reduce future litigation costs.

**Problem #2: Federal regulators take a long time making decisions on projects, and at times they seem unable to even make decisions.** The NEPA Task Force report identifies three recommendations to address this concern:

- Recommendation 2.2. A provision would be added to NEPA to codify the concept that an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects.
- Recommendation 7.1. Amend NEPA to create a “NEPA Ombudsman” within the Council on Environmental Quality (see above).
- Recommendation 7.2. Direct CEQ to control NEPA related costs (see above).

**Problem #3: USFWS and NOAA Fisheries are not compelled to consult with other agencies in a timely fashion, and frequently do not begin work on ESA biological opinions until after the NEPA process has been completed.** The Task Force report includes two similar recommendations:

- Recommendation 6.2. In order to reap the maximum benefit of lead agencies, their authorities should be applied “horizontally” to cover all cases. Additional concepts would be added such as charging the lead agency with the responsibility to develop a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions.
- Recommendation 9.1. CEQ study of NEPA’s interaction with other Federal environmental laws. Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that:

a) Evaluates how and whether NEPA and the body of environmental laws passed since its enactment interacts; and b) determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication.

The following section compares NEPA Task Force recommendations with the recommendations proposed by the Family Farm Alliance.

**Alliance Recommendation #1: Anything that can be done to streamline the overall permitting process (NEPA, ESA, Clean Water Act, etc.) should be encouraged.** Related Task Force recommendations include:

- Recommendation 1.2. Amend NEPA to add mandatory timelines for the completion of NEPA documents.
- Recommendation 1.3. Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS) – (see above).
- Recommendation 1.4. Amend NEPA to address supplemental NEPA documents (see above).
- Recommendation 4.2. Amend NEPA to add a requirement that agencies “pre clear” projects. CEQ would become a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. (The Family Farm Alliance notes that this is the basic function of the Categorical Exclusion that is almost never used because of the test of “significant impact”.)
- Recommendation 9.1. CEQ study of NEPA’s interaction with other Federal environmental laws (see above).
- Recommendation 9.3. CEQ study of NEPA’s interaction with state “mini-NEPAs” and similar laws.

**Alliance Recommendation #2: Agency work on biological opinions should be required to keep pace with development of NEPA compliance documents.** The NEPA Task Force report, as previously noted above, recommends a CEQ study of NEPA’s interaction with other Federal environmental laws.

**Alliance Recommendation #3: The state’s legislative and planning process should be considered in establishing purpose and need for construction of dam and reservoir projects.** While not specifically addressing new storage projects, Task Force

Recommendation 3.2 directs CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements.

**Alliance Recommendation #4: Develop a reasonable range of alternatives to facilitate project planning and the NEPA process.** NEPA documents should only pertain to the proposed action and only address issues raised in public scoping that are directly tied to the proposed action. A common ploy of certain activist groups is to throw a “laundry list” of issues and concerns at a federal agency, knowing full well it will distract, confuse, and lengthen the process, thereby creating a document with potential loop holes that might later be appealed. We believe alternatives should be limited to the proposed action being analyzed. The number of alternatives should be constrained only to the range of activities and associated impacts of the proposed action.

NEPA Task Force Recommendation 5.1 would amend NEPA to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are economically and technically feasible.

**Alliance Recommendation #5: Encourage cooperative efforts to move projects through the NEPA and permitting processes.** The Task Force report has two recommendations that promote increased cooperation in NEPA implementation:

- Recommendation 3.1. Amend NEPA to grant tribal, state and local stakeholders cooperating agency status. The definition would include the term “political subdivisions” to capture the large number of political subdivisions that provide vital services to the public but are generally ignored in the planning for NEPA.
- Recommendation 6.1. Direct CEQ to promulgate regulations to encourage more consultation with stakeholders.

### **Other Positive Task Force Recommendations**

We were pleased to see that the Task Force proposed several other recommendations that addressed concerns not identified by our membership. We support the following recommendations and believe they will provide beneficial results if implemented:

- Recommendation 4.1. Amend NEPA to create a citizen suit provision. This provision would clarify the standards and procedures for judicial review of NEPA actions.
- Recommendation 5.2. Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project.

- Recommendation 9.2. Within 1 year of the publication of The Task Force final recommendations, CEQ will be directed to conduct a study and report to the Committee on Resources that details the amount and experience of NEPA staff at key Federal agencies.

### **Concerns with NEPA Task Force Recommendations**

We are, for the most part, in full agreement with the Task Force recommendations. However, we do have a few concerns.

First, Recommendation 1.1 would enhance NEPA to create a new definition of “major federal action” that would only include new and continuing projects that would require substantial planning, time, resources, or expenditures. We have concerns that NEPA should apply to “continuing” projects. The current application of NEPA generally does not pertain to ongoing actions, such as the operation of a reservoir from year to year under the normal range of operating parameters.

Second, the footnote on page 22 under the “Public Participation” section of the draft report contains an error. “Bureau of Land Management” should be changed to “Bureau of Reclamation”. Also, additional explanation of the government’s decision not to proceed with a full-blown EIS for the Klamath Project in 2001 – as noted briefly in the footnote - might be justified. The ultimate NEPA lesson learned from the 2001 Klamath water crisis is that NEPA should apply to and precede a regulatory action that disrupts communities of humans and wildlife.

The Klamath example demonstrates that NEPA –like so many federal laws and regulations – can be applied to any situation in a manner that is largely dependent on the demeanor of the agency staff that has jurisdiction in the manner. A consistent problem noted by several Western water users who have worked in NEPA processes are decisions made by the lead agency staff, who, due to perceived bias or lack of ability to adequately administer NEPA, routinely and habitually instigate “pre-decisional” actions. For example, during the scoping phase of a recent coal bed methane project in Wyoming, local project proponents voiced their expectations that a comprehensive water management plan would be analyzed and included in the NEPA documentation. Instead, the lead federal agency - with no public disclosure or participation by cooperating agencies - internally decided on one course of action and required the methane production companies to re-inject all the co-produced water. This pre-decisional action by the federal agency was seen by local irrigators as a gross violation of NEPA.

### **Additional Issues Not Addressed by NEPA Task Force**

As outlined earlier, the Alliance offered eight recommendations to the Task Force at its Spokane hearing last April. The above summary demonstrates that, clearly, many of our

concerns are positively addressed in the Task Force draft report. However, a few were not, which might be expected, given that the Task Force is looking at more general, “big picture” fixes to NEPA. We reiterate here our water supply-specific recommendations, which we feel are not fully addressed in the draft report.

- **“Purpose and need” requirements related to potential benefits or uses of future water supplies are dismissed by agency regulators in NEPA.** Planning opportunities and purposes for which a project may be permitted are restricted, which narrows the planning horizon, and makes it impossible to plan for projects with long-term benefits.
- **NEPA analyses should require that value be assigned to continued agricultural production in a project area.**
- **Impacts of drought and continuing water demands must be assessed and built into the NEPA process.**

We understand that these water-specific recommendations may be too narrowly focused for the purposes of your report. Nevertheless, they do represent measures intended to address the concerns identified by Western irrigators and rural water managers.

### **Conclusion**

Thank you for this opportunity to provide input on this matter, which is very important to the family farmers and ranchers of our membership. We are hopeful that a concerted good-faith effort to address the problems identified by the Task Force will result in a streamlined regulatory process that will be efficient, fair and effective. We look forward to working with you toward that goal.

If you have any questions about this letter, I encourage you or your staff to contact me at (541)-850-9007.

Sincerely,



Dan Keppen  
Executive Director