

January 25, 2006

NEPA Draft Report Comments
C/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, DC 20515

Nepataskforce@mail.house.gov

RE: NEPA Draft Report Initial Findings and Draft Recommendations

To Whom It May Concern:

The Montana Logging Association (MLA) offers the following comments and recommendations on the above referenced report, released December 21, 2005 by the House Resource Committee NEPA Task Force. The MLA represents approximately 600 independent logging contractors, each of which operate a family-owned enterprise that harvests and/or transports timber from forest to mill. In Montana, the vast majority of timberland is owned by government agencies, most notably the U.S. Forest Service; therefore the welfare of the MLA members is directly dependent upon the policies and actions of federal land managers.

As requested, we would like to offer our comments on specific draft recommendations in the report and to make special note that we support all recommendations on which we have not specifically commented. We would also like to note that the Council on Environmental Quality (CEQ) has express authority on a number of these issues to engage rulemaking without amending NEPA itself.

As you know, NEPA is an “umbrella” law, requiring all Federal agencies to give **appropriate** consideration to all potential environmental impacts of proposed actions as part of agency planning and decision-making with both a **substantive** and **procedural** goals and provisions. Section 101 of NEPA lists six key **substantive** goals towards which we have the collective responsibility to work. Section 102 lists nine **procedural** provisions that require all Federal agencies to promote efforts to prevent or eliminate damage to the environment and biosphere. However, to date, case laws interpreting NEPA either ignore the substantive section or consider it to be merely precatory language.

As stated above, the *spirit* of NEPA lies in Section 101 goals, which are:

1. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
2. Assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.
3. Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other desirable and unintended consequences.
4. Preserve important historic, cultural, and natural aspects of our national heritage and maintain, wherever possible, an environment which supports diversity and variety of individual choice.
5. Achieve a balance between population and resource use, which will permit high standards of living and a wide sharing of life's amenities.
6. Enhance the quality of renewable resources and approach the maximum recycling of depletable resources.

To comply with NEPA, Section 102 requires an agency to follow nine procedural steps:

1. Use a **systematic, interdisciplinary approach** to evaluate environmental impacts.
2. Develop methods and procedures that ensure **unquantified environmental amenities and values** are given appropriate consideration, along with economic and technical considerations.
3. Prepare and **environmental impact statement** for action that might have significant impacts.
4. Disclose disagreements regarding impacts.
5. Study, develop, describe, and evaluate **alternatives** for proposed actions that involve unresolved conflicts concerning uses of available resources.
6. Recognize worldwide and long-range environmental problems.
7. Make available to states, counties, municipalities information useful in restoring, maintaining and enhancing the quality of the environment.
8. Initiate and use ecological information in planning and developing resource-oriented projects.
9. Assist the Council on Environmental Quality (CEQ).

Therefore in theory, complying with the procedural requirements of Section 102 fulfills the *spirit* of Section 101. Congress intended that by following these procedural requirements, agencies would avoid unwise decisions. NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action. Making informed decisions that give “appropriate” consideration to the environment and taking excellent actions – these fulfill the *spirit* of NEPA.

Following the *letter* of NEPA is mandatory, where following the *spirit* of NEPA is advisable. However, an agency is not constrained by NEPA from deciding that **other values** outweigh the environmental costs. An agency can complete proposed actions despite environmental costs, as long as it has fully complied with NEPA procedures and requirements and violates no other environmental law. Section 105 of NEPA state that “the goals set forth in this ACT are supplementary to those set forth in existing authorizations of Federal agencies” meaning, that an agency's legal charter (i.e. mission) is paramount to NEPA, but not to other substantive environmental laws.

The Supreme court labels decisions that fail to take environmental data into account “unwise” (Robertson v. Methow Valley Citizens Council, 1989), but in the same case, it reaffirms an agency’s right to make such decisions if needed. “If the adverse environmental effects of the proposed action are adequately identified and evaluated,” says the court; “the agency is not constrained by NEPA from deciding that other values outweigh environmental costs.” Historically, the Court has recognized that agencies have many factors to consider when making a final decision. Economic, operational, and political realities, in addition to the need to meet an agency mandate, sometimes counterbalance the environmental constraints. **NEPA should not regulate agency choices. But it does demand a good faith, hard look at the potential environmental impacts and a full and honest disclosure of impacts to the public.**

Originally, Congress envisioned two “documentation pathways” in determining if NEPA was required prior to project implementation. For each proposed action, agencies would perform a preliminary analysis to see if the action had the potential for “*significant impacts*”. If it did, the agency would write an EIS. If not, no paperwork was required. However, CEQ made two important changes to this process in 1978 when it wrote NEPA regulations governing all federal agencies.

First, CEQ added a third pathway whereby agencies could write an environmental assessment (EA) if they were unsure if a proposed action would have “*significant impacts*”. CEQ also ordered each agency to create a list of actions that normally do not have significant impacts, i.e. categorical exclusions (CEs). The public was given their chance to comment on this list, and it was finalized and approved by CEQ.

Any action that **might** have “*significant impact*” requires an EIS. In 1981, CEQ created the “mitigated EA.” CEQ allowed agencies to write an EA instead of an EIS, if mitigation reduces the impacts below the level of “*significant*”. Usually, monitoring is required to ensure that the mitigation measures are working. Mitigation measures must be **specific, enforceable, and effective** in reducing impacts.

Five types of mitigation measures are defined in the CEQ regulations:

1. Avoid the adverse condition
2. Minimize impacts by limiting degree of magnitude
3. Rectify the impact
4. Reduce or eliminate impact over time
5. Compensate for the impact
- 6.

Mitigating actions can often make an unreasonable alternative reasonable. A reasonable alternative is one in which meets the minimum agency objectives and environmental standards, is technically feasible, economically possible and politically acceptable.

CEQ regulations mandate and the courts expect EISs and Eas to be highly readable, analytic documents. The courts have noted that many agencies’ EISs seem to be more like justifications of an action rather than a detailed disclosure of impacts. Over the years, NEPA has fallen into pitfalls and legal problems when an agency is:

1. Unclear in their purpose and need
2. Alternatives do not accomplish objectives

3. There are unquantified impacts
4. There is little evidence of a site-specific analysis
5. Agencies use unnecessary jargon and esoteric technical language
6. There is little or no discussion of cumulative impacts and/or connected actions
7. Agencies use unqualified analysts
8. There is inadequate public involvement

Having stated the above, we fully recognize that NEPA has undergone such a mutation process over the past thirty years that agencies can neither fulfill the “*spirit*” nor execute the “*letter*” of the law. We therefore, support the Committee’s efforts to take a comprehensive look at ways to modernize and improve this decades old environmental Act. To assist in the effort, we offer the following comments and suggestions to your draft interim report.

Recommendation 1.1

We support this recommendation and believe that this is one of the most important recommendations by the task force. As currently implemented federal agencies with high political controversy treat almost all actions as “major federal actions.” We strongly discourage the use of vague terms to define “major federal action” in the statute, which would invite further litigation to clarify the terms such as the word “substantial”. There should be a concrete way to determine what is and what is not a “major federal action.” We are particularly concerned with an expansive definition of major federal action that includes ongoing projects where requiring a halt to projects for further NEPA analysis is extremely costly and disruptive. We prefer to have a “major federal action” limited to new projects. If ongoing projects are included, then concrete limits should be placed on the obligation to perform NEPA analysis for those projects.

Recommendation 1.2

We support this recommendation and believe that agencies, in an attempt to “bullet proof” their NEPA analysis, have allowed analysis creep to drive the completion of NEPA documents and drag the environmental analysis phase of a projects years beyond what the original framers of NEPA intended or specified in statute.

Recommendation 1.3

We support this recommendation, particularly statutory recognition of the categorical exclusion provision. Since CEQ’s adoption, over twenty years ago, to exempt certain types of projects from notice, comment and appeal have failed recently in the courts – the only recourse is to codify this provision in statute. We also recommend that any amendment specifically limit the scope of an EA as already specified in CEQ regulations.

Recommendation 1.4

We have significant reservations about simply adding the CEQ regulations on supplemental NEPA documents into the statute. In this modern day, there must be explicit limits on when supplemental environmental analysis is required or in the words

of the Supreme Court it will “render agency decision-making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.” Marsh v Oregon Natural Resource Council, 490 U.S. 360, 392 (1989). The CEQ regulation has poorly defined limits on supplemental analysis and it should not be added to the statute in its present form.

Recommendation 2.1

While we support this recommendation in concept, we believe that the regulations should be amended to give weight to substantive comments, and like the Task Force, discourage mass mailing and campaign responses to NEPA documents and federal proposals for action. It would also be helpful for Congress to emphasize that the purpose of NEPA is to inform agency decision-makers, and the public, of the environmental consequences of their proposed actions.

Recommendation 3.2

We strongly support this recommendation. Duplication of analysis and coordination requirements is a waste of time and scarce public financial resources, and this recommendation would help eliminate duplication of efforts. The statute should explicitly provide that a biological opinion prepared pursuant to Section 7 of the Endangered Species Act is the functional equivalent of NEPA requirements. NEPA regulations already recognize the Clear Air and Water Acts, Resource Conservation and Recovery Act, National Historical Preservation Act, **Endangered Species Act**, Marine Mammal Protection Act, Safe Drinking Water Act, Toxic Substance Control Act, Federal Insecticide, Fungicide and Rodenticide Act, Coastal Zone Management Act, EO 12898: Environmental Justice Act, and the Pollution Prevention Act.

Recommendation 4.1

We support these proposals for clarifying judicial review. We recommend that in addition, such a provision make clear that having an economic interest in the proposed action does not disqualify an entity from standing to challenge the quality of the NEPA analysis or from intervening to defend the analysis. The burden of proof must be placed on the plaintiff to show by clear and convincing evidence that the agency decision was not based on the best available science and that the missing information was actually essential to a reasoned choice among alternatives. Judicial interpretation of NEPA has a far greater impact than just the case at hand. NEPA cases epitomize the axiom of “bad facts made bad law.” One NEPA decision binds federal agencies throughout the country.

Recommendation 4.2

We support the need for timely dissemination of court decisions and their applicability to federal planning and documentation. However, we do not support this recommendation. Rather, we recommend that CEQ be directed to conduct a rulemaking every three years to address NEPA interpretations by the federal courts of appeals.

Recommendation 5.2

We support the specific recommendation and believe it is a concept that Congress should clarify or else the courts will. While CEQ regulations directing analysis of impacts

resulting from inaction would be helpful, statutory language would establish the concept once and for all.

Recommendation 5.3

We think that this recommendation is unclear. As stated earlier, mitigation measures must follow CEQ's five types of mitigation actions already defined in regulation.

Recommendation 6.1

We strongly support agency consultation with stakeholders. However, we believe that NEPA is first and foremost a public disclosure law as opposed to a public participation law. Many current laws already require various forms of public participation in agency planning and decision-making and NEPA should not be duplicative of these laws or impose additional requirements on agencies.

Recommendation 7.1

We do not support this recommendation. EPA already reviews agency EISs and is limited to assessing the adequacy of the analysis. A CEQ role would add confusion and create additional layers of review and bureaucracy, and may well result yet more pressure on the agency to make a particular decision.

Recommendation 8.1

The treatment of the effects of past actions is a prime example of the confusion created by a single judicial decision, no matter how many lawsuits are filed. Federal agencies have generally treated the effects of past actions as part of the existing condition analysis. *The Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005), the U.S. Court of Appeals for the Ninth Circuit invalidated this approach and ruled that past action must be included in the cumulative impact analysis. This recommendation would return analysis of past actions to the proper place in the EIS. We recommend that the Task Force restate the recommendation to avoid any confusion of your intent: “Recommendation 8.1: Amend NEPA to clarify that agencies evaluate the effect of past actions in the assessment of existing environmental conditions.” At some point an agency must freeze the analysis process. Unless the process is frozen, writers of an EIS or EA will forever be chasing a moving target.

Recommendation 8.2

We strongly support any steps by Congress to either address the treatment of cumulative impacts in statutory language or in directives to CEQ for rulemaking. The issue of cumulative impact analysis is one where the federal courts have been particularly active. Since the courts are not bound by any requirement for consistency, federal agencies are faced with ever-expanding directives for conducting cumulative effect analysis. We appreciate efforts by CEQ to address this concern by the recent development of the Cumulative Effects Guidance Letter – which subsequently has been upheld in federal court. However, without cogent rules explaining geographic and temporal scope of the analysis, courts will be free to demand whatever scope the particular judge feels comfortable with.

Recommendation 9.1, 9.2, 9.3

We support these recommendations. These studies are essential and the information should not be only available to Congress, but to the public as well.

Finally, we recommend Congress should strike the language regarding major federal actions significantly affecting the quality of the human environment from Sec. 102(2)(C) and simply add this language to Sec. 102(2). Thus, 102(2) would be revised to read “(2) all agencies of the federal government shall for every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.”

Thank you for the opportunity to comment on this important report and we look forward to working with both Congress and the Administration on modernizing and improving NEPA as the framework for the many challenges ahead. If you have questions or comments, please feel free to contact me at: julia@logging.org or 406-251-1415/406-253-4485.

Sincerely,

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