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February 6, 2006

(Via Email)
NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, DC

To whom it may concern:

Attached are the State of Nevada's comments on the Initial Findings and Draft Recommendations of the Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act dated December 21, 2005.

Thank you for the opportunity to comment on this important issue.

Sincerely,

Robert R. Loux
Executive Director

RRL/cs
Attachment

cc Governor Guinn
Nevada Congressional Delegation
Attorney General George Chanos

STATE OF NEVADA COMMENTS ON THE DECEMBER 21, 2005 INITIAL FINDINGS AND DRAFT RECOMMENDATIONS OF THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON RESOURCES' TASK FORCE ON IMPROVING THE NATIONAL ENVIRONMENTAL POLICY ACT AND TASK FORCE ON UPDATING THE NATIONAL ENVIRONMENTAL POLICY ACT

I. Overview of Nevada's Comments

Of all the states in our nation, Nevada is perhaps the most acutely interested in the National Environmental Policy Act. The federal government owns and controls approximately 83% of all land in Nevada. In many Nevada counties, that percentage is over 90%. Consequently, the lives of all Nevadans are directly influenced by the decisions of federal agencies. Those agencies decide on projects that impact the quality and quantity of Nevada's water resources, the health of Nevada's fish and game, the vitality of Nevada's rangelands, and the beauty and recreational value of Nevada's lands. Most importantly, federal decisions control the risks posed to all Nevadans by the transportation and disposal of nuclear waste.

NEPA provides Nevadans, individually and through their elected governments, with crucial opportunities to influence those federal decisions. NEPA does not compel the federal government to make any particular decisions. But it requires federal agencies to explain what they are doing, and why, and what the consequences will be; it compels those agencies to consider whether their projects really make sense; and it offers Nevadans the opportunity to make their voices heard. If federal decisions are made poorly, or are inadequately explained—if the federal government engages in the kind of "myopic, dishonest, and dumb" decisionmaking discussed by the task force's report—NEPA gives Nevadans the ability to respond. The law, in short, allows Nevadans a greater say over the governance of their state.

For those reasons, Nevada is deeply concerned about the proposed revisions to NEPA. Nevada strongly supports some of the recommendations. In particular, it agrees that local participation should be increased, and that NEPA's provisions for local government involvement should be strengthened. But many of the recommendations would water down NEPA's strengths by requiring lesser EISs and by making NEPA challenges more difficult to bring, even when the federal government is clearly wrong. Moreover, the draft report makes those recommendations despite demonstrating that they are unnecessary; it provides hard facts indicating that excessive NEPA challenges currently are not a problem. Those recommended changes, if made, therefore would unnecessarily harm Nevada's efforts to protect its environment and the safety of its citizens, and Nevada strongly opposes them.

Nevada's specific comments on the task force report are included below. The first section contains Nevada's comments on the report's background discussion. The second section contains Nevada's comments on the draft recommendations.

Nevada appreciates the opportunity to review the draft report, and thanks the task force for considering these comments.

II. Nevada's Comments on the Findings and Discussion

A. NEPA's intent

Nevada agrees that NEPA is an important and valuable law. As a state whose environmental quality is largely dependant upon, and whose natural resources are primarily controlled by, federal decisions, Nevada appreciates the importance of requiring federal agencies to consider the environmental consequences of their decisions. Similarly, Nevada appreciates the importance of providing its citizens, its cities and counties, and the state government itself the opportunity to participate in evaluation of federal projects before those projects proceed. Nevada therefore strongly agrees with Mr. Connaughton's observation that NEPA's "foundational objectives, especially those found in section 101 are as relevant today as when Congress passed it."

B. Reasons for and concerns about modifying NEPA

While Nevada supports many of the specific recommendations of the task force, Nevada agrees that Congress should be cautious about amending NEPA. Nevada disagrees with this section's apparent premise that NEPA has fully accomplished its purpose of educating the federal government about environmental issues, and that no backsliding into the era of "myopic, dishonest and dumb government" is likely or possible.

NEPA has created an incentive for the federal government to better understand environmental problems, and to develop internal expertise in analyzing and avoiding such problems. But if NEPA is substantially weakened, those incentives will disappear, and many of those improvements could quickly be lost. The consequence could be an unfortunate reversion to the pre-NEPA decisionmaking style criticized by the task force report.

Additionally, based on Nevada's experience, some branches of the federal government still have not learned NEPA's lessons, and remain entrenched in the pre-NEPA mentality the report decries. In particular, the Department of Energy, which has the capacity to make decisions affecting almost all Nevadans, continues to treat NEPA as an unimportant statute to obeyed minimally if at all, particularly in its Yucca Mountain decisionmaking. As a consequence, DOE remains prone to making environmentally risky and financially costly decisions without giving Nevadans adequate opportunities to participate in the decisionmaking processes.

Nevada therefore opposes any weakening of NEPA that might be perceived as validating past patterns of non-compliance, and that might halt or reverse the ongoing shift toward greater environmental awareness in the federal government.

C. Litigation

In general, Nevada agrees with the factual discussion in this section, which demonstrates that minimal NEPA litigation is occurring, that such litigation rarely leads to injunctions, and that litigation can be avoided if federal agencies proactively involve stakeholders in planning processes. Nevada questions, however, an implicit premise of this section's discussion. The authors appear to assume that even if NEPA's purposes are important, NEPA enforcement is inherently bad, and that the ability of plaintiffs to bring, and win, NEPA cases is a problem to be solved. As the plaintiff in recent NEPA cases, Nevada questions that premise. Properly interpreted and enforced, NEPA serves as an indispensable check against arbitrary and overreaching federal agency actions, while also enhancing open debate and environmental responsibility.

As with any law, some level of NEPA enforcement is desirable, for an unenforced law will be ignored. If the IRS did not enforce the tax code, cheating would be rampant; speeding tickets, though unpleasant, keep our highways safe. With NEPA, too, some enforcement is necessary, for without that enforcement, agencies will have little incentive to spend the time and effort necessary to comply with the law, and NEPA's basic purposes would be thwarted. Because the federal government does not bring NEPA actions, the law can be enforced only if state or local governments, or private parties, bring claims. Those enforcement efforts will, of course, require some time and money, but if the law's purposes are valid—and the task force correctly concludes that NEPA's are—that time and money must be spent.

For that reason, Congress should not assume that the existence of NEPA cases is a problem to be solved. If those cases did not exist, that would be evidence either that there is no NEPA non-compliance—which Nevada knows is not the case—or that NEPA is not being enforced and has no effect. Similarly, if federal agencies claim that they modify projects, or prepare more comprehensive studies, in an effort to avoid litigation, those statements evince that the law is working, not that it is flawed. Congress should not be concerned if private businesses claim that they improve their accounting practices in response to federal legislation, or if the threat of IRS enforcement induces private citizens to pay careful attention to tax returns. Similarly, it should not perceive NEPA's deterrent effect, and the more careful decisionmaking it causes, as a problem to be fixed.

Existing law also already contains extensive safeguards against excessive litigation. NEPA defendants benefit from an arbitrary-and-capricious standard of review, and NEPA plaintiffs must be clearly and plainly right to win a case. If they do prevail, NEPA plaintiffs still have little hope for recovering their full attorney's fees, and thus have strong financial disincentives to bring cases. Those incentives help explain the relatively small amount of NEPA litigation documented by the task force report. Those incentives also explain why NEPA's deterrent effect remains moderate, and belie the

report's conclusory or anecdotal assertions that litigation threats impose unreasonable delays on planning processes.

For those reasons, Nevada does not view NEPA litigation as a problem to be solved by erecting barriers to plaintiffs, and questions the need for the many specific recommendations apparently designed to increase the difficulty of bringing NEPA litigation. Nevada agrees that federal agencies should strive to avoid litigation, and that active stakeholder collaboration and preparation of thorough, high-quality environmental documents can achieve that goal. But NEPA can serve its valuable function only if violations can be challenged, and existing law already creates incentives against meritless NEPA cases. The task force report documents that those incentives are working.

D. Federal, tribal, state and local entities and the NEPA process

Nevada agrees that increased coordination among federal agencies, and between federal agencies and state agencies, would increase the efficiency and quality of the NEPA process. In particular, Nevada urges correction of what appears to be an inherent anti-federalism bias in the current NEPA regulations. While lead agencies must include, as cooperating agencies, other federal agencies with jurisdiction by law or special expertise over the project at issue, they have discretion to deny states' requests for cooperating agency status. Such denials may occur even if the state has relatively more expertise, and more of a stake in the decision, than a federal agency required by law to be a cooperating agency.

This disparity has undesirable practical effects. It devalues state expertise, forcing states to participate as commentors rather than as cooperating agencies. It undermines the perceived legitimacy of the process by excluding governments with strong interests at stake. And it promotes inefficiency by separating federal and state decisionmaking. Nevada therefore supports recommendations designed to integrate state and federal decisionmaking processes and to make states partners in federal NEPA review.

E. NEPA and other substantive laws

Nevada agrees that studying NEPA's overlap with other environmental laws is a worthwhile endeavor, and that increasing efficiency through application of the functional equivalence doctrine may be appropriate.

F. Delays to the NEPA process

Nevada agrees that NEPA processes have increased in duration, and that those delays impose costs. However, Nevada cautions against adopting several of the fixes proposed by the task force's discussion.

The best way for the federal government to minimize NEPA-associated delays is to involve affected communities in the NEPA process as early and as effectively as

possible, to address community concerns in a pro-active fashion, and to prepare a thorough impact report that does not hide a project's environmental effects. Many NEPA delays result when federal agencies attempt to cut corners in their analysis, conceal project effects, or, as the task force noted, alienate local stakeholders by refusing to involve them in the process. None of the solutions suggested by the task force's discussion, however, would create greater incentives for avoiding those mistakes.

While Nevada also agrees that EISs have grown longer, it cautions against blanket fixes that impose shorter page limits. In Nevada's experience, many of the projects proposed by the federal government require long EISs because they are complex projects with numerous environmental effects. In addition, the increased length of EISs may be largely due to our increased understanding of the complexity and extent of environmental impacts.

G. NEPA compliance costs

Nevada agrees that NEPA compliance is costly, but notes that the task force also should consider the important benefits of NEPA compliance. While costs may not be "negligible in light of the need for 'sound agency decisions,'" as some commentors have stated, the benefit of such decisions—and of NEPA's creation of a culture of environmental awareness and open, publicly responsive decisionmaking within the federal bureaucracy—should be considered in evaluating whether NEPA's costs are worthwhile. To provide a concrete example, while preparing proper NEPA documentation for a nuclear waste storage project certainly would not be cheap, the social, financial, and safety costs of making a poor project decision are astronomical. Quantifying the benefits of NEPA-induced improvements in decisionmaking would be extraordinarily difficult, but even a slight improvement in project decisions would probably represent on enormous return on the federal government's NEPA investment.

H. Public participation

Nevada generally agrees with this discussion about the importance of public participation.

I. Federal Agency Resources

Nevada agrees that the quality of federal NEPA staff is an important concern, and supports evaluations of ways to provide federal agencies with the resources to more expeditiously comply with NEPA.

III. Nevada's Comments on the Draft Recommendations

A. Group 1

1.1 Nevada does not support recommendation 1.1, which would amend NEPA to define major federal actions as "new or continuing projects that would require substantial

planning, time, resources, or expenditures." The word "substantial" is vague, and agencies are likely to have widely varying interpretations of what constitutes a "substantial" effort. Additionally, this change would apparently replace NEPA's current applicability to actions with potential *environmental* impacts, which is consistent with the statute's core purpose of *environmental* protection, with a standard disconnected from that basic purpose.

1.2 Nevada has no position on recommendation 1.2.

1.3 Nevada does not support recommendation 1.3, which would require categorical exclusions for "temporary activities *or* other activities where the environmental impacts are clearly minimal" (emphasis added). That phrasing is vague, and could be read to suggest that a temporary activity, whether or not its impacts are clearly minimal, would be subject to a categorical activity, which would allow categorical exclusions to apply to temporary activities with major effects.

1.4 Nevada supports recommendation 1.4, which would codify the principles of the NEPA guidelines and caselaw.

B. Group 2

2.1 Nevada supports the goal underlying recommendation 2.1, but believes the recommendation, as written, does not propose a practicable change to NEPA. Federal agencies always should give careful consideration to local comments, and Nevada supports federal efforts to take local concerns into account. However, there is no mechanism in NEPA for giving "weight" to particular comments, and the recommendation provides no clarity about how federal agencies would go about giving greater weight to local comments. The recommendation, as written, therefore would impose an ambiguous mandate on federal agencies.

2.2 Nevada does not support recommendation 2.2. While shorter documents obviously are desirable, strict imposition of the page limits in 40 C.F.R. section 1502.7 would sometimes lead to cursory and overly general impact statements, particularly for projects with multiple and complex environmental effects. Such short limits could limit the ability of agencies to present the reasoning and data supporting their conclusions, and might leave room only for conclusions. A better way to increase public participation would be to require that agencies include a concise and clear executive summary in environmental impact reports.

C. Group 3

3.1 Nevada strongly supports recommendation 3.1. Local agencies typically are directly affected by decisions subject to NEPA, and also often have greater knowledge of the resources affected by a project than federal lead agencies. Because of their strong interest and expertise, they should have the opportunity to participate as cooperating agencies. Indeed, there is little reason, other than an improper bias toward federal

authority, to extend mandatory cooperating agency status to other federal agencies, as NEPA currently does, but to deny state, local, and tribal agencies the opportunity to assume such status unless they obtain the acquiescence of the federal lead agency.

3.2 Nevada supports recommendation 3.2, which would promote efficiency and cooperation between the states and the federal government.

D. Group 4

4.1 Nevada strongly opposes recommendation 4.1. In general, Nevada believes that the Administrative Procedure Act's judicial review provisions already provide a basically adequate vehicle for judicial review of NEPA actions, and that the arbitrary and capricious standard of review set forth by the APA provides the federal government with more than ample protection against improper litigation. A citizen suit provision therefore is unnecessary. Additionally:

- Nevada opposes a requirement that NEPA challengers demonstrate that a NEPA review "was not conducted using the best available information and science." This provision would accomplish nothing, for NEPA challengers already must overcome a deferential standard of review if they wish to challenge an agency's reliance on science. Additionally, creating a blanket requirement for this showing would be pointless in the many cases in which a NEPA challenger questions an aspect of the lead agency's compliance—its exclusion of alternatives, for example, or its selection of an analytical baseline—that has little to do with its selection of scientific information.

- Nevada opposes a requirement that NEPA challengers "must be involved throughout the process in order to have standing in an appeal." This provision is unnecessary, for existing NEPA caselaw already adequately requires that challengers participate in administrative processes and prohibits arguments in court from exceeding arguments made in the administrative process. Those requirements already protect agencies from litigation surprises, and if the panel wishes to codify an exhaustion requirement, it should simply codify the principles of existing NEPA caselaw.

  Instead of providing protection, this provision would thwart public participation by freezing affected people or local governments out of the NEPA process. Taken literally, the requirement that participants be involved "throughout the process" would suggest that participants would need to participate even in scoping meetings in order to be able to litigate. But often, and through no fault of their own, people do not learn of a proposed project until the process is already underway. A rancher, for example, may not learn of a proposed federal railway across his land until after a draft EIS is published. But if that project will affect him, and if the government agency proposing the project has not complied with NEPA, that rancher should not be denied standing to protect himself in court.

- Nevada opposes a prohibition on NEPA settlements that would "forbid or severely limit activities for businesses that were not part of the initial lawsuit." This recommendation, if adopted, would make NEPA litigation substantially more expensive, for it would effectively remove the federal government's ability to settle NEPA cases, even if the lead agency, or the Department of Justice, determines the cases have merit. That expense would extend not only to the federal government, but also to states and private businesses interested in timely completion of NEPA litigation.

- Nevada opposes establishing further guidelines on "who has standing to challenge an agency decision." Existing federal caselaw already provides rigorous guidelines, and ensures that plaintiffs have a real stake in the suits they bring. New rules would only encourage the federal government's already-excessive practice of utilizing technical, jurisdictional defenses to derail NEPA challenges.

- Nevada neither supports nor opposes creation of a statute of limitations. Nevada cautions, however, that if a statute of limitations is created, it should include some form of "discovery rule" to protect potential plaintiffs in situations where federal agencies make decisions without publicizing those decisions in records of decision. Otherwise, agencies might be able to immunize NEPA violations from suit by making decisions but keeping those decisions concealed from the public until after the statute of limitations passes.

4.2. Because the recommendation is vague, Nevada neither supports nor opposes recommendation 4.2. The recommendation appears to discuss something other than "pre clear[ing]" projects, and does not explain what it means to "pre clear" a project.

E. Group 5

5.1 Nevada opposes recommendation 5.1. This provision would create a catch-22 by effectively requiring lead agencies to determine that alternatives are feasible *before* analyzing them. But the lead agencies are unlikely to be able to determine the feasibility of alternatives without analyzing them. One purpose of a NEPA analysis is to discover whether alternatives are technically, socio-economically, and environmentally feasible. This recommendation, if adopted, would thwart that core purpose.

In addition, Nevada is concerned that recommendation 5.1, if adopted, could be used by federal agencies to avoid considering alternatives with major environmental advantages if those alternatives are even slightly more financially costly. An agency might site a federal facility in an environmentally sensitive location, for example, without even considering other environmentally preferable locations, on the grounds that no one had shown the financial feasibility of those options. Such exclusion of environmentally preferable alternatives would defeat NEPA's core purpose of informing decisionmakers and the public, depriving those decisonmakers and the public of information necessary to even consider whether environmental benefits would make increased costs worthwhile.

5.2 Nevada supports this recommendation in part, and opposes the last sentence of the recommendation. Nevada agrees that detailed analysis of a no-action alternative is a crucial part of a NEPA analysis, for that analysis allows the lead agency and the public to discern whether or not the project makes sense. But a requirement that agencies *must* adopt projects if the impacts of not acting outweigh the impacts of action would unreasonably remove agencies' discretion to decide, based on a range of factors, whether to proceed.

5.3 Nevada supports recommendation 5.3. If federal agencies propose mitigation as a way to minimize a project's environmental effects, those proposals should not be hollow; the mitigation proposal should be a binding and enforceable commitment. Absent such commitment, mitigation proposals could amount to bait-and-switch tactics.

F. Group 6

6.1 Nevada supports recommendation 6.1. All Nevadans are stakeholders affected by federal decisions, and increased opportunities to participate in NEPA review of those decisions will increase the extent to which NEPA's protections extend to all Nevadans, thus increasing the legitimacy and value of NEPA processes.

6.2 Nevada supports recommendation 6.2

G. Group 7

7.1 Nevada has no position on recommendation 7.1.

7.2 Nevada opposes recommendation 7.2. While Nevada agrees that NEPA costs are a problem, that problem arises largely from insufficient initial investments by federal agencies. Too often, federal agencies minimize public dialogue, cut corners on EISs, and opt for EAs where EISs should be prepared, all in an effort to avoid costs and to minimize disclosure of potentially controversial impacts. Those efforts often backfire; they increase frustration with the NEPA process, promote conflict, and also decrease the agencies' chances of prevailing in litigation. Ultimately, cutting corners can lead to prolonged environmental reviews, increased litigation, and higher costs.

While the purpose of this amendment appears salutary, it is likely to exacerbate the problems described above. Increased cost constraints will increase agency incentives to cut corners on environmental review, leading to public frustration, more inadequate NEPA documents, and ultimately, more costs.

H. Group 8

8.1 Nevada does not have a position on recommendation 8.1. However, Nevada cautions that any revision should ensure that the effects of all related past, present, and future projects, and of other past, present, and future projects that could contribute to cumulative impacts, should be considered in an EA or EIS.

8.2 Nevada supports recommendation 8.2, which is consistent with existing caselaw.

I. Group 9

9.1 Nevada supports recommendation 9.1

9.2 Nevada supports recommendation 9.2.

9.3 Nevada supports recommendation 9.3.