



Comments on the NEPA Task Force Draft Report

February 6, 2006

NEPA Task Force
Committee on Resources
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Dear NEPA Task Force:

Nuclear Watch of New Mexico (NukeWatch) is pleased to submit the following comments on the Task Force's recommendations to "improve" the National Environmental Policy Act (NEPA).

Summary

1.2: We oppose the recommendation to create a new definition of "major federal action" based on the belief that CEQ regulations already offer sufficient guidance for federal agencies to decide what constitutes "major" or "significant" federal actions.

1.2: We disagree with this recommendation to add mandatory timelines for the completion of NEPA documents if it is to be legislatively mandated, but do agree that agencies should be strongly encouraged to efficiently complete NEPA documents.

1.3: We disagree with this recommendation to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS) because we believe that sufficient guidance is already given by CEQ regulations.

1.4: We oppose this recommendation to address supplemental NEPA documents because the necessary provisions are already in CEQ regulations.

2.1: We oppose this recommendation to prepare regulations giving weight to local comments. As long as individuals or groups are American citizens or composed of American citizens, there is no such thing as "outside" groups and individuals.

2.2: We oppose the recommendation to mandate EIS page limits. The length of a NEPA document should be completely dependent upon the complexity of the subject. Also, site-wide and programmatic environmental impact statements are by nature lengthy.

3.1: We oppose this recommendation to grant tribal, state and local stakeholders cooperating agency status. Tribes historically have not participated in NEPA processes because in their view their interactions with federal

agencies are taking place on a government-to-government level and not as an agency of the federal government. The proposed introduction of political subdivisions relates to the proposed introduction of economic interests made in Recommendations 4 & 5. We contend that they, if brought in as cooperating agencies, would further weight NEPA processes toward economic interests to the detriment of environmental considerations.

3.2: We disagree with this recommendation to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. As NEPA addresses federal actions we believe that only federal analyses will suffice.

4.1: We assert that there is no need to amend NEPA to address NEPA litigation. Our experience shows that we cannot rely upon the government to police itself in NEPA implementation, and citizen suits are a necessary resort. We staunchly oppose any attempt to limit that right.

4.2: We staunchly oppose this recommendation to add a requirement that agencies “pre clear” projects on the grounds that this could hinder or cut out entirely judicial interpretation and enforcement of NEPA

5.1 and 5.2: We vigorously oppose these recommendations to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are economically and technically feasible and to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project. We strongly believe in principle that the rejection of any alternative should not be preordained, and certainly not legislated as such. We also believe the two Recommendations together would give overwhelming weight to economic interests.

5.3: We support this recommendation to promulgate regulations to make mitigation proposals mandatory as an added CEQ regulation, but not as an amendment to the Act itself.

6.1: We agree with the underlying principles of this recommendation to promulgate regulations to encourage more consultation with stakeholders after the scoping comments are received and before the draft EIS is too far along.

6.2: We have no objection to a consolidated agency record, which as a matter of course should be made public. We oppose the rest of the recommendation to codify CEQ regulation 1501.5 regarding lead agencies because existing statute and CEQ regulations not only already provide for the “horizontal” application of agencies’ authorities, but require it.

7.1: We oppose this recommendation to create a “NEPA Ombudsman” within the Council on Environmental Quality. We believe that public comment and agency response is the core of NEPA processes.

7.2: We oppose this recommendation to control NEPA related costs because we think it could be used to financially strangle NEPA processes.

8.1: We disagree with this recommendation to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts. Although investigating existing environmental conditions is one tool to use in accounting for past actions, it cannot be the only way to legitimately do so.

8.2: We disagree with this recommendation to prepare regulations that would modify the existing language in 40 CFR 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are “reasonably foreseeable.” First of all, NEPA is precisely meant to consider proposed actions before they are predetermined and become “concrete.” We believe that “reasonably foreseeable” is a prudent benchmark

whereby to judge whether or not a possible future action should be analyzed for its potential cumulative impacts.

9.1: Although we think that there could be far better uses for the CEQ's time and resources, we have no particular objections to this recommended study of NEPA's interaction with other Federal environmental laws.

9.2: We do not oppose this recommendation to study current Federal agency NEPA staffing issues. The draft of this report should be available for public comment before the final is submitted.

9.3: We have no opposition in principle to this recommendation to study NEPA's interaction with state "mini-NEPAs" and similar laws, except that when dealing with federal issues the states' processes should conform to federal processes, and not the other way around.

Background

NukeWatch and/or its personnel have had fairly extensive experience with NEPA, albeit solely limited to issues concerning the Department of Energy (DOE). We have participated in some fifteen different NEPA processes, including environmental assessments, environmental impact statements, site-wide environmental impact statements, and programmatic environmental impact statements. We have also been central to three prevailing NEPA or NEPA-related lawsuits.

We believe we are relatively well informed on NEPA issues and strongly support the Act, while not disputing that some improvements or streamlining could be appropriately done around the margins (especially when it doesn't pertain to DOE issues). Having said that, we think there are more urgent national, governmental and legal priorities that the committee should be concerned with, for example reform of congressional lobbying rules and ethics, protection of endangered species and mitigating the encroachment of private and corporate economic interests upon public lands.

We strongly argue that not only has NEPA been good for the environment and the American public, it has produced tangible and direct benefits for the federal government itself. On the latter, we can offer one concrete example that we were directly involved in, and which NEPA Task Force Ranking Minority Member Rep. Tom Udall has referred to in hearing testimony. This concerns a 1999 "Site-Wide Environmental Impact Statement (SWEIS) for Continuing Operations at the Los Alamos National Laboratory (LANL)."

In the draft LANL SWEIS the Department of Energy completely omitted consideration of wildfire as a serious risk to the Lab. Due to our comments and others the DOE included a detailed wildfire analysis in the final SWEIS. Moreover, DOE began implementing some wildfire mitigation measures that soon proved to be invaluable. As the Committee Members likely know, in April 2000 an extremely serious wildfire broke out after a proscribed burn went out of control in Bandelier National Park, ultimately burning some 48,000 acres. Both the Lab and the Los Alamos town site were evacuated for a week. What is remarkable is that the Cerro Grande Fire closely followed the NEPA analysis in the final SWEIS.

A senior Lab official told NukeWatch that during the height of the emergency LANL personnel would read that analysis as a game plan for how the fire would next behave. Most important were the fire mitigation measures implemented near Technical Area 54, which stores radioactive transuranic wastes (primarily plutonium-contaminated) in fabric air buildings. The fire ultimately stopped just some few

hundred yards from TA-54. Had there not been some prior fire prevention measures the results could have been catastrophic.

We submit that the above is concrete demonstration of the value of NEPA in general and public comment in particular. It is unlikely that DOE would have conducted a wildfire analysis in the 1999 final LANL SWEIS without public comment. In the heat of an extraordinary site-wide emergency, the Lab tangibly benefited from its existence. Keeping in mind this example of tangible benefit to the federal government arising from the NEPA process, we respectfully urge the Committee Members to support and help preserve the National Environmental Policy Act.

In the broadest context possible, we are alarmed by what is arguably a coordinated assault on the nation's environmental laws, for example, in addition to NEPA, the Endangered Species Act and proposed amendments to the Clean Air Act. Further, the present Administration, in our view, is not making a serious effort to address the threat of global warming, which could have severe impacts on our grandchildren and ongoing generations. Mounting evidence of the ongoing deterioration of the global environment argues for strengthening environmental laws rather than diminishing them. Thus, we hope that the Task Force's efforts are aimed toward marginal improvements rather than undermining the original purposes of NEPA, which Congress eloquently stated in 1970 as:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the nation...

Detailed Comments on the Task Force's Recommendations

Group 1 - Addressing Delays in the process

Recommendation 1.1: Amend NEPA to define "major federal action." NEPA would be enhanced 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.

The use of the word "substantial" is, of course, subjective. We think it inevitable that federal agencies will always have to use a certain amount of subjectivity in deciding if an action is "major." However, we believe that existing Council on Environmental Quality (CEQ) regulations already offer sufficient guidance to enable federal agencies to make their decision. Under 40 CFR § 1508.18, "Major Federal Action," we find that the word "Major" reinforces but does not have a meaning independent of 'significantly' (Sec. 1508.27)." In turn, 40 CFR § 1508.27, states that the "Significantly, as used in NEPA requires consideration of both context and intensity." Context means that the significance of an action must be analyzed in several contexts and states that significance varies with the setting of the proposed action.

40 CFR § 1508.27 continues on to state that "Intensity" refers to the severity of impact, and in paraphrase the following should be considered: the possible beneficial and adverse impacts; impacts on public health or safety; proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas; the controversy of the project; the degree of uncertain, unique or unknown risks; precedence; relationship to other actions and cumulative impacts; effects on significant scientific, cultural, or historical resources; effects on endangered or threatened species or habitat; and whether an action might be in violation of Federal, State, or local environmental laws or requirements.

All of the above, we believe, would take care of a proverbial example that we heard at a NEPA Task Force hearing in Albuquerque where a witness complained that just to move a fence on Bureau of Land Management land would require an EIS. We just don't believe that to be true, barring other factors unknown to us, under existing CEQ regulations. Therefore, we oppose the recommendation based on the belief that CEQ regulations already offer sufficient guidance for federal agencies to decide what constitutes "major" or "significant" federal actions.

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents. A provision would be added to NEPA that would limit to 18 months the time for completing an Environmental Impact Statement (EIS). The time to complete an EA will be capped at 9 months. Analyses not concluded by these timeframes will be considered completed. There will obviously be situations where the timeframes cannot be met, but those should be the exception and not the rule. Before the time expires, an agency would have to receive a written determination from CEQ that the timeframes will not be met. In this determination, CEQ may extend the time to complete the documents, but not longer than 6 and 3 months respectively.

We disagree with this recommendation if it is to be legislatively mandated, but do agree that agencies should be strongly encouraged to efficiently complete NEPA documents. Our fear is that federal agencies, for example DOE (which is somewhat notorious for its various NEPA delays), could possibly abuse a legislated mandate by intentionally dragging its heels and then claiming that analysis was complete because the deadline has expired.

Further, how long an analysis takes is in large part a function of resources, which could be constrained by insufficiently agency-requested or congressionally appropriated funding. Moreover, large EISs, such as the LANL Site-Wide Environmental Impact Statement and programmatic EISs, should be allowed to take as long as they need.

Yet another concern is that the time for the public to comment could be shortened if mandated timelines were imposed. Finally, we believe that the burden is on the federal agencies to efficiently complete NEPA documents because the public is always granted a fixed deadline (sometimes incrementally extended) to submit comments. In other words, it's the federal agencies, and not the public, that is responsible for delays in completing NEPA processes, and citizen litigation is not to blame here given that litigation can only occur after a formal federal decision is made. So again, yes we feel that more efficient completion by the federal agencies should be strongly encouraged, but not mandated.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS). In order to encourage the appropriate use of CEs and EAs the statute would be amended to provide a clear differentiation between the requirements for EA's and EIS's. For example, in order to promote the use of the correct process, NEPA will be amended to state that temporary activities or other activities where the environmental impacts are clearly minimal are to be evaluated under a CE unless the agency has compelling evidence to utilize another process.

We disagree with this recommendation because we believe that sufficient guidance is already given by CEQ regulations (see our previous comments for Recommendation 1.1). This is not to say that we are categorically opposed to the use of Categorical Exclusions "where the environmental impacts are clearly minimal," although "minimal" can be a highly subjective word. Care needs to be taken in deciding the appropriate level of NEPA review for "temporary" activities. Even temporary activities can have

long lasting impacts. Further, some temporary activities could presage a “commitment of irretrievable resources” to more permanent projects, and therefore amount to predetermination.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents. A provision would be added to NEPA to codify criteria for the use of supplemental NEPA documentation. This provision would limit the supplemental documentation unless there is a showing that: 1) an agency has made substantial changes in the proposed actions that are relevant to environmental concerns; and 2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. This language is taken from 40 CFR 1502.9(c)(1)(i) and (ii).

As this recommendation explicitly acknowledges, language already exists in CEQ regulations addressing supplemental NEPA documents. 40 CFR 1502.9(c)(1) states that agencies shall prepare supplemental NEPA documents when the conditions quoted above exist. 40 CFR 1502.9(c)(2) states that agencies “may” prepare them, meaning at agency discretion, to further the purposes of NEPA. We do not know about all federal agencies, but at least in the case of DOE we have never known the Department to discretionarily prepare a supplemental NEPA document without substantial changes to proposed actions or significant new environmental circumstances or concerns. We are willing to bet that this is the rule for all federal agencies. In short, we oppose this recommendation because the necessary provisions are already in CEQ regulations and therefore there is no need to legislatively amend NEPA.

Group 2 - Enhancing Public Participation

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments. When evaluating the environmental impacts of a particular major federal action, the issues and concerns raised by local interests should be weighted more than comments from outside groups and individuals who are not directly affected by that proposal.

NEPA clearly concerns federal actions. A Webster Dictionary definition of “federal” is “designating, of, or having to do with the central government of the United States.” Therefore, as long as individuals or groups are American citizens or composed of American citizens, there is no such thing as “outside” groups and individuals. Therefore, we oppose this recommendation.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. 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.

First we note that DOE projects required to undergo NEPA review tend to be complex by their inherent nature. Moreover, some have potentially severe occupational and public risks, one example being the Dual Axis Radiographic Hydrodynamic Testing Facility (DARHT) at LANL. This facility x-rays the implosion process of surrogate plutonium pits (the core component of nuclear weapons) during dynamic explosive tests. The Lab was going to construct the facility on the basis of a categorical exclusion until enjoined by our citizen suit from doing so until an environmental impact statement was completed. The EIS process resulted in important mitigation measures, such as a pledge in the Record of Decision by DOE to phase in steel vessel containment of explosive experiments involving plutonium.

The final August 1995 DARHT EIS (DOE/EIS-0228) consisted of approximately 800 pages.¹ Upon its completion, DOE asked the federal court to lift the injunction against its construction, which the judge so ordered. However, in his Order the judge noted

In this instance [i.e., DARHT's operation], some environmental damage is certain and the risks are substantial... There are also some signs of hasty preparation [of the EIS]... It is of course easier to enforce the letter of the law of NEPA than to instill its spirit. I have expressed concern in the past over DOE's good faith in connection with their NEPA obligations. Defendants began construction on DARHT before performing an EIS and then refused to halt construction even when they themselves decided an EIS was necessary. It took a court order to compel Defendants to comply with NEPA, as it apparently took to compel Defendants to do the SS&M PEIS.^{2 3}

Our point here is that it took 800 pages or so for the judge to find that DOE's EIS was adequate enough to lift the injunction against DARHT construction. Even then, the judge noted

The DARHT FEIS [Final EIS] has its limitations. First, it relies on three-year old data in its assessment of the current state of the environment to be affected. See Chapter 4 (1992 data used to assess existing ground and surface water contamination, airborne pollutants, radiological factors and weather). However, the 1996 draft SS&M PEIS contains a much more thorough analysis of LANL and surrounding environs and I am satisfied that the affected environment has therefore been sufficiently analyzed, described and considered by DOE.⁴

This may imply that the DARHT EIS was not long enough, but in fact had to rely upon a completely separate document. We use this point to argue that the length of a NEPA document should be completely dependent upon the complexity of the subject. We are not interested in volumes for their own sake. What we are interested in is complete discussion and analysis of the subject at hand and its risks, whatever the number of pages necessary to do so.

It should also be noted that the DARHT FEIS had a classified annex of an undeclared number of pages. Should, despite our argument, a page limitation be codified for environmental impact statements, we would further argue that classified annexes, which the public never gets to see and may not even know how many pages they may contain, should not be included within that limitation. Moreover, we note that out of the approximate 800 pages in the DARHT FEIS, some 350 were taken up by submitted written public comments and the DOE's response. An arbitrary limit to an EIS' numbers of pages would effectively limit the publication of public comment and agency response, two items that we think lie at the heart of NEPA. We therefore argue that if there is a page limitation the number of pages devoted to public comment and agency response should be exempt from it.

We have purposively used the DARHT EIS as an example to argue against page limitation because of the complexity of the facility, its potentially severe risks and DOE's egregious NEPA behavior leading to a citizen's suit that enjoined facility construction until an EIS was completed. This leads us to discuss site-wide and programmatic environmental impact statements (SWEISs and PEISs respectively), which the Task Force's recommendations failed to even mention. The 1996 Stockpile Stewardship and Management PEIS that analyzed post-Cold War reconfiguration of the nuclear weapons complex has already been mentioned (it too had to be compelled by citizen litigation). The scope of the PEIS' analysis contained nine different and complex sites across the country, and one very large and complex specific facility called the National Ignition Facility (which given its subsequent cost overruns and delays was arguably not analyzed well enough). We estimate the number of the PEIS' pages at 2,000 (again including public comment and agency response), and argue that that is what was necessary for proper analysis. In short, we strongly assert that programmatic analyses that not only consider a number of sites but also different functional program elements should not be subject to page limitations.

We believe the same to be true for site-wide EISs as well. A case in point is the 1999 LANL SWEIS, which we estimate to be approximately 2,000 pages as well (750 of which was public comment and

agency response). The SWEIS not only had to embrace the Lab's complexity, but also analyze two complex and controversial proposals, the enhancement of plutonium pit manufacturing and expanded radioactive waste burial. Again, we argue that the large number of pages was necessary to get the NEPA job done, and Site-Wide Environmental Impact Statements should not be subject to page limitations. We can offer a number of other examples, such as past site-wide environmental impact statements for the Lawrence Livermore and Sandia National Laboratories and one in process for the Y-12 Plant in Tennessee (which historically has 2 million pounds of mercury unaccounted for, presumed to have been released to the environment).

Group 3 – Better Involvement for State, Local and Tribal Stakeholders

Recommendation 3.1: Amend NEPA to grant tribal, state and local stakeholders cooperating agency status. NEPA would be enhanced to require that any tribal, state, local, or other political subdivision that requests cooperating agency status will have that request granted, barring clear and convincing evidence that the request should be denied. Such status would neither enlarge nor diminish the decision making authority for either federal or non-federal entities. 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.

We oppose this recommendation. First of all, although we most certainly do not speak for tribes, we do believe in their sovereignty. To our understanding, tribes historically have not participated in NEPA processes because in their view their interactions with federal agencies are taking place on a government-to-government level and certainly not as an agency of the federal government. Thus, they could not have cooperating agency status.

Second, we suspect that the proposed introduction of political subdivisions is related to the proposed introduction of economic interests made in Recommendations 4 & 5. Generally, local and state political subdivisions are hungry for any infusions of federal cash. Thus, we contend that they, if brought in as cooperating agencies, would further weight NEPA processes toward economic interests to the detriment of environmental considerations.

We believe that we have an excellent case-in-point here in northern New Mexico. Since having been taught by citizen actions to be compliant in at least preparing required environmental reviews LANL has been continuously issuing NEPA documents for its numerous proposed projects. It is fair to say that Los Alamos County is a "one company town" given the overwhelmingly economic presence of the Lab. It is also fair to say that the Los Alamos County Commission is by reflex vigorously supportive of the Lab.⁵ We submit that the "political subdivision" Los Alamos County would hardly be an objective party as a cooperating agency and would likely adversely skew Lab-related NEPA processes. Finally, as a matter of principle, since NEPA addresses federal actions, we believe that cooperating agencies should be limited to federal agencies.

In fact, we recommend that there should be stronger provisions to encourage, even require, other federal agencies to be active cooperating agencies when it is clear that they are directly involved in the lead agency's proposal. Again, we offer a case-in-point. The National Nuclear Security Administration (NNSA), DOE's semi-autonomous nuclear weapons agency and LANL's "landlord," has begun a renewed NEPA process for operations of an advanced biolab that will handle bioweapons "select agents" such as anthrax, plague and Q fever. As this future work is to be primarily for the Department of Homeland Security (DHS) NNSA has "invited" DHS to be a cooperating agency. We believe that DHS should be required to be an active cooperating agency. Further, NNSA has consistently made the claim that the biolab will comply with (but not be regulated by) Centers for Disease Control and

Prevention (CDC) regulations. NNSA further asserts that CDC will conduct periodic inspections of the biolab. Accordingly, we believe that CDC should be required to be an active cooperating agency as well. As a background matter, we are not aware of a LANL-related NEPA case in which a federal agency has been invited to be a cooperating agency and then actively participated as such.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. CEQ would be directed to prepare regulations that would, in cases where state environmental reviews are functionally equivalent to NEPA requirements, allow these requirements to satisfy commensurate NEPA requirements.

We disagree with this recommendation. A positive effect of NEPA is that EISs offer, or should offer, updated and independent environmental reviews for the area impacted. To use an existing state environmental review instead of doing a new additional federal review removes one of the crosschecks and would severely weaken the validity of the EIS. The age of an environmental review is one of the key factors affecting its legitimacy. New computer models and data are introduced on a regular basis. A new project should have a new environmental review. Further, as NEPA addresses federal actions we believe that only federal analysis will suffice. Using LANL as an example, we also question whether there would be much, if hardly any at all, overlap between state and Lab-based federal reviews to begin with.

Moreover, we find the recommendation's language "in cases where state environmental reviews are functionally equivalent to NEPA requirements" to be misleading. The Task Force reported

To address the effects and conflicts between redundant process some comments suggested that NEPA be amended to recognize the "functional equivalence doctrine." This doctrine was first espoused in *Environmental Defense Fund v. EPA* 489 F.2d 1247, 1257. Put simply, the functional equivalence doctrine exempts federal agencies from complying with NEPA requirements provided the agencies utilize other "substantive and procedural standards [that] ensure full and adequate consideration of environmental issues."⁶

Clearly that discussion is limited to just federal agencies. By the inherent natures of the different levels of government, federal and state, we maintain that there can be little, if any, meaningful functional equivalence between them. However, with respect to NEPA preparation, we are not opposed to functional equivalence between federal agencies. By all means, when appropriate, relevant and not outdated, and in order to conserve taxpayer monies, the prior work of one agency should be incorporated into the work of another agency. However, we do mean incorporated by text into the body of the lead agency's present work so that it is readily available, logically and thematically fitting, and is cited as not original.

Group 4 - Addressing Litigation Issues

Recommendation 4.1: Amend NEPA to create a citizen suit provision. In order to address the multitude of issues associated NEPA litigation in an orderly manner the statute would be amended to create a citizen suit provision. This provision would clarify the standards and procedures for judicial review of NEPA actions. (Continued below.)

We strongly oppose this recommendation. The Task Force itself reports

The statistics reveal that there is relatively little in the way of NEPA lawsuits as a percentage of the total number [of? (sic)] EISs filed each year. The Task Force was presented with [the? (sic)] following statistics regarding NEPA litigation:

In summary, with respect to NEPA actions and NEPA litigation, taking the average number of NEPA documents filed annually and 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 the 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.”

It was further noted by a number of environmental commentators that of the approximately 50,000 environmental impact statement (EIS) filed each year only .02% resulted in litigation.⁷

We completely concur with the sentiments expressed above, and ask where’s the need, where’s the beef? Conversely, given the statistics, we assert that there is no need to amend NEPA to address NEPA litigation. There is, however, an ongoing need to compel federal agencies to perform adequate NEPA documents, or in some cases to compel them to do it at all, which citizens (including us) have consistently done under the existing legal structure (which the Task Force’s recommendations would, in effect, impede).

The Task Force further reports

Many commentators, especially those that participate in the NEPA process as applicants, suggested that the number of suits has little meaning when examined against the actual impact of these suits. In other words, the impact of litigation is significant if a lawsuit impacts numerous federal decisions or actions in several states. It was suggested to the Task Force that whether there is one case or 100 cases, the result is that agencies are becoming more cautious – but not necessarily more deliberative - in issuing NEPA documents. For those waiting for a government decision, there is a “ripple effect” of lost economic opportunities. Moreover, a number of witnesses expressed the thought that the “threat” of litigation has had a profound effect on the manner in which Federal agencies move through the NEPA process.⁸

We fervently hope that the “threat” of litigation “has had a profound effect on the manner in which Federal agencies move through the NEPA process,” and staunchly argue that is a good thing. As evidence we summarize our litigation-related NEPA experience with DOE:

- The one and only SWEIS that LANL had completed prior to 1999 was in 1979. Despite the DOE NEPA requirement that its complex sites perform new Site-Wide Environmental Impact Statements every 10 years, the Lab continued to “tier” off the old SWEIS for its project-specific NEPA processes until 1998. Moreover, the Lab agreed to complete a new SWEIS only after we found explicit acknowledgement by LANL personnel that the old SWEIS was outdated and obsolete through a Freedom of Information Act request and threatened litigation.
- The fact that LANL was going to construct and operate a facility that would conduct explosive experiments involving radioactive materials (the Dual Axis Radiographic Hydrodynamic Testing Facility) without an EIS has already been discussed. Also repeated here is that as a result of the NEPA process important mitigation measures are supposed to be implemented (it’s not clear that they actually have been) concerning containment of explosive-driven plutonium and other radioactive and hazardous materials.

- As a result of pre-litigation negotiations with DOE over DARHT the Department finally conceded to complete the previously mentioned Stockpile Stewardship and Management PEIS. However, as background, a 1990 court federal order already required DOE to do so, but which it chose to ignore. It was the “threat” of citizen litigation that finally compelled DOE to complete what a federal court had already ordered.
- The 1990 federal court order also required DOE to complete PEISs on its national radioactive and hazardous waste management and environmental restoration (cleanup) activities. In 1996 NukeWatch personnel participated in a coalition of 39 citizen organizations in a lawsuit to enforce that order. DOE did finally prepare a Waste Management PEIS, which was of dubious quality.⁹ DOE chose to never complete an Environmental Restoration PEIS, but instead engaged in hardball negotiations that finally led to a \$6.25 million settlement that funded citizen studies of DOE Environmental Management programs. To this day, DOE has not completed a study of its national cleanup program, estimated to cost between \$200 – 300 billion and believed to be the largest cleanup program in history. Nor have standardized national cleanup standards and practices been considered and analyzed, much less implemented, we believe at great cost to the taxpayer and the environment.
- In 2002 DOE completed a lesser environmental assessment (instead of a more complete EIS) and issued a Finding of No Significant Impact for operations at an advanced biological laboratory that would be the first of its kind in its nuclear weapons complex. This facility will handle bioweapons “select agents” such as anthrax, plaque and Q fever. Among other deficiencies, the environmental assessment argued categorically that any breach to containment could only result in no public risk because the outside environment (wind, aridity, UV, etc.) would kill the pathogens. That may be true in most cases, but certainly not categorically all (e.g., anthrax spores, certain forms of tuberculosis, etc.). Additionally, the environmental assessment failed to address potential security threats to the biolab, which could endanger public safety, even as the Lab was suffering through repeated security scandals and the nation was still reeling from the October 2001 anthrax attacks (in which an internal rogue U.S. scientist was thought to be the “main person of interest”). Accordingly, we sued under NEPA. Subsequently, DOE decided to withdraw the Finding of No Significant Impact and start all over again with a more comprehensive environmental impact statement.

The point of our recitation of our NEPA litigation experience is that the federal government, in our belief, obviously needs to be often compelled to do the right thing under NEPA. Further, our experience shows that we cannot rely upon the government to police itself in NEPA implementation, and citizen suits are a necessary resort. We staunchly oppose any attempt to limit that right.

If implemented, the citizen suit provision would:

- Require appellants to demonstrate that the evaluation was not conducted using the best available information and science.

We oppose this recommendation. In effect, it imposes the burden upon plaintiffs of proving the existence of a negative, whether some information or scientific method is subjectively the “best” or not. It is an unfair burden on plaintiffs to have to argue against agencies that are supplied with public monies whether this or that scientific method is better than another. To the contrary, we believe that NEPA should be strengthened by requiring the federal agency to use the best, un-politicized science available. What should be avoided, and perhaps the Task Force would be sympathetic to this, is endless battles of experts.

Having said that, the use of the word “appellants” above is puzzling to us. According to Black’s Law Dictionary, an appellant is one who is a party “who takes an appeal from one court or jurisdiction to another.” The word “appellants” implies that plaintiffs have filed a suit, lost and are appealing. As a clarifying question, is the Task Force’s recommendation confined to appeals (which we would continue to oppose), or is it meant to apply to all plaintiffs filing NEPA cases?

- Clarify that parties must be involved throughout the process in order to have standing in an appeal.

We do not oppose this recommendation in substance, but note that existing law, interpretation and practice already provide for it. We therefore oppose it as any justification for the need to legislatively amend NEPA.

- *Prohibit a federal agency – or the Department of Justice acting on its behalf – to enter into lawsuit settlement agreements that forbid or severely limit activities for businesses that were not part of the initial lawsuit. Additionally, any lawsuit settlement discussions involving NEPA review between a plaintiff and defendant federal agency should include the business and individuals that are affected by the settlement [that? (sic)] is sustained.*

We staunchly oppose this recommendation, even though it presumably would not pertain to DOE NEPA-related issues.¹⁰ *First of all, this recommendation seemingly conflicts with the one below, in which the Task Force recommends clarification of who has standing. The Task Force can’t have it both ways: either a party has standing by virtue of participating in the NEPA process from the beginning or not. Moreover, through this recommendation the task Force seems to want to give preferential, perhaps even decisive, weight to business interests, which we believe would be antithetical to the heart of the purpose of NEPA as it stands.*

Again, in 1970 Congress enunciated the purposes of NEPA as

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the nation...

We certainly understand that nature must be productive for mankind, and in fact naturally rely upon that upon for own personal and families’ sustenance. However, to give the preponderance of weight to business interests, which we believe this recommendation would do, would, in our view, completely invert the purposes of NEPA. We ask whether this is the Task Force’s true intent?

This recommendation would also play havoc with any prospects for successful negotiations that attempt to avoid litigation, when contradictorily the Task Force professes that one of its main aims is to discourage litigation to begin with. In effect, this recommendation would allow for any business interest to enter into negotiations at any time, or to block any negotiations all together. Given what we believe to be the increasingly dire straits of the environment that humankind collectively relies upon, we staunchly oppose any movement toward giving the preponderance of weight to business interests that by their inherent nature act upon their interests of short term profits rather than the long-range sustainability that will continuously nurture us all.

- *Establish clear guidelines on who has standing to challenge an agency decision. These guidelines should take into account factors such as the challenger’s relationship to the proposed federal action,*

the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge;

We agree that the challenger has to have been engaged in the NEPA process prior to filing a challenge. However, existing law, interpretation or practice already requires that, and hence NEPA does not need amendment to reflect it. The same is true of other standing issues. But reading in between the lines, the above recommendation seems designed to more narrowly restrict standing, which we staunchly oppose, again asserting that standing is already restricted by existing law, interpretation or practice. We therefore oppose this recommendation as any justification for the need to legislatively amend NEPA.

- *Establish a reasonable time period for filing the challenge. Challenges should be allowed to be filed within 180 days of notice of a final decision on the federal action;*

We do not oppose this recommendation in substance. However, we doubt that this needs to be legislatively amended. While we don't know for certain, we believe that all NEPA actions are filed within 180 days of a final federal decision. Should we be wrong, in order to justify amendment, we think it incumbent upon the Task Force to list the number of NEPA actions initiated after 180 days. Otherwise, we oppose this recommendation as any justification for the need to legislatively amend NEPA.

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. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ should be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability.

Without further clarification, we are at a bit of a loss in understanding the language of this recommendation. What, and perhaps more importantly when, is “pre-clear” supposed to affect the NEPA process? There are very clear and explicit NEPA statutes that require major federal actions to undergo “a hard look” without predetermination or prejudicial actions. Is “pre-clear” supposed to kick in at the beginning of the NEPA process, which may well be tantamount to a pre-determination? If so, how would “pre-clear” differ from the agencies’ stated “preferred alternative,” which is already required by NEPA? Or is “pre-clear” to be applied to an agency decision when confronted by a legal challenge? If so, what is meant by the mandate that the CEQ must “advise[e] appropriate federal agencies of its applicability”? Is it the intent of the Task Force to interpret judicial decisions, their provisions and applicability, perhaps offering an interpretation and implementation that the courts may not agree with? Barring further clarification, we staunchly oppose this recommendation that could hinder or cut out entirely judicial interpretation and enforcement of NEPA.

Group 5- Clarifying Alternatives Analysis

Recommendation 5.1: Amend NEPA to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are economically and technically feasible. A provision would be created to state that alternatives would not have to be considered unless it was supported by feasibility and engineering studies, and be capable of being implemented after taking into account: a) cost, b) existing technologies, and (c) socioeconomic consequences (e.g., loss of jobs and overall impact on a community).

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. A provision would be created that require an extensive discussion of the “no action alternative” as opposed [to? (sic)] the

current directive in 40 CFR 1502.14 which suggests this alternative merely be included in the list of alternatives. An agency would be required to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision.

We vigorously oppose the above two recommendations, which we believe are designed to act in concert with one another. First, we strongly believe in principle that the rejection of any alternative should not be preordained, and certainly not legislated as such. This would eviscerate the NEPA requirement to take a “hard look” at all reasonably foreseeable alternatives, including doing nothing. Second, the two Recommendations together would give overwhelming weight to economic interests. If implemented, those interests can then easily argue that if such and such a proposal does not go forth, no matter what its environmental risks and demerits may be, then jobs are lost and therefore no action must be automatically rejected. This would turn NEPA on its head and the Act would simply become a vehicle for justification of “jobs, jobs, jobs” arguments. Therefore, again we vigorously oppose this recommendation.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory. CEQ would be directed to craft regulations that require agencies to include with any mitigation proposal a binding commitment to proceed with the mitigation. This guarantee would not be required if (1) the mitigation is made an integral part of the proposed action, (2) it is described in sufficient detail to permit reasonable assessment of future effectiveness, and (3) the agency formally commits to its implementation in the Record of Decision, and has dedicated sufficient resources to implement the mitigation. Where a private applicant is involved, the mitigation requirement should be made a legally enforceable condition of the license or permit.

We support this recommendation as an added CEQ regulation, but not as an amendment to the Act itself.

Group 6 – Better Federal Agency Coordination

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders. As pointed out in testimony, the existence of a constructive dialogue among the stakeholders in the NEPA process and ensuring the validity of data or to acquire new information is crucial to an improved NEPA process. To that end, CEQ will draft regulations that require agencies to periodically consult in a formal sense with interested parties throughout the NEPA process.

We agree with the underlying principles of this recommendation. We feel that a good time to consult with the public and interested parties would be after the scoping comments are received and before the draft EIS is too far along. If the outline of the draft was offered for public review, interested parties could comment at that point if they thought all issues were included.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies. In regulation, the lead agency is given certain authorities. Legislation such as SAFE TEA-LU and the Energy Policy Act of 2005 have spoken to the need for lead agencies in specific instances such as transportation construction or natural gas pipelines. In order to reap the maximum benefit of lead agencies, their authorities should be applied “horizontally” to cover all cases. To accomplish this, appropriate elements of 40 CFR 1501.5 would be codified in statute. 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. This codification would have to ensure consistency with lead agency provisions in other laws.

We have no objection to a consolidated agency record, which as a matter of course should be made public. We oppose the rest of the recommendation because existing statute and CEQ regulations not only already provide for the “horizontal” application of agencies’ authorities, but require it. Under CEQ regulation, 40 CFR § 1508.25, “Scope,” it is already mandated that

... agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

1. Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
 - (i) Automatically trigger other actions which may require environmental impact statements.
 - (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
 - (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.
2. Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
3. Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

Thus, agencies not only already have plenty of authority to “horizontally” cover of cases, but also are required to do so when they are interconnected.

Group 7 - Additional Authority for the Council on Environmental Quality

Recommendation 7.1: Amend NEPA to create a “NEPA Ombudsman” within the Council on Environmental Quality. This recommendation would direct the Council on Environmental Quality to create a NEPA Ombudsman with decision making authority to resolve conflicts within the NEPA process. The purpose of this position would be to provide [sic] offset the pressures put on agencies by stakeholders and allow the agency to focus on consideration of environment impacts of the proposed action.

We oppose this recommendation. Within the context of NEPA processes, we don’t understand what the task Force means by “offset the pressures put on agencies by stakeholders and allow the agency to focus on consideration of environment impacts of the proposed action.” What pressures can stakeholders put on the agencies other than to formally comment on draft NEPA documents, to which the agencies are then required to respond to? We hardly think that is “conflict,” but instead believe that public comment and agency response is the core of NEPA processes. Further, we fear that the position of a NEPA Ombudsman could be politicized and prejudice NEPA processes and resulting federal decisions.

Recommendation 7.2: Direct CEQ to control NEPA related costs. In this provision CEQ would be charged with the obligation of assessing NEPA costs and bringing recommendations to Congress for some cost ceiling policies.

We oppose this recommendation not in principle, but because we think it could be used to financially strangle NEPA processes. Our concerns could be met contingent upon what specific cost ceilings are, and with recognition of the expense of large environmental impact statements and site-wide and programmatic environmental impact statements. We are also very dubious that there can legitimately be “one-size-fits-all” cost ceilings for the various categories of NEPA processes.

Group 8 - Clarify meaning of “cumulative impacts”

Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts. A provision would be added to NEPA that would establish that an agency’s assessment of existing environmental conditions will serve as the methodology to account for past actions.

We disagree with this recommendation. Although investigating existing environmental conditions is one tool to use in accounting for past actions, it cannot be the only way to legitimately do so. For example, how could past radiological doses be understood from current environmental conditions when radionuclides decay and facility operations might have changed? How could the risks of past radiological and/or hazardous releases be understood from existing environmental conditions, when releases become environmentally diluted over time or perhaps there may have been remedial cleanup actions? It just makes no sense to us that current environmental conditions would be the sole basis for the accounting of past actions.

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. CEQ would be instructed to prepare regulations that would modify the existing language in 40 CFR 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are “reasonably foreseeable.”

We disagree with this recommendation. First of all, NEPA is precisely meant to consider proposed actions before they are predetermined and become “concrete.” We believe that “reasonably foreseeable” is a prudent benchmark whereby to judge whether or not a possible future action should be analyzed for its potential cumulative impacts. However, we are not advocating that mere conjectural predictions should be allowed, but that a solid definition of “reasonably foreseeable” should be adhered to. Black’s Law Dictionary defines “reasonable” as “fair, proper, just, moderate, suitable under the circumstances.” It defines “foreseeability” as “that which is objectively reasonable to expect, not merely what might conceivably occur.” Put together, that works for us, and accordingly we see no need to amend NEPA.

Group 9 - Studies

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

Although we think that there could be far better uses for the CEQ's time and resources, we have no particular objections to this recommended report. This report should also look for gaps in the environmental evaluation process that no law covers and report on those gaps. The draft of this report should, of course, be available for public comment before the final is submitted. It should also take into account NEPA's uniqueness in allowing for public comment and participation, which intrinsically makes the Act largely non-redundant to other laws.

Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues. Within 1 year of the publication of The Task Force final recommendations, the CEQ (with necessary assistance and support from the Office of Management and Budget) will be directed to conduct a study and report to the House Committee on Resources that details the amount and experience of NEPA staff at key Federal agencies. The study will also recommend measures necessary to recruit and retain experienced staff.

We do not oppose this recommendation. The draft of this report should, of course, be available for public comment before the final is submitted.

Recommendation 9.3: CEQ study of NEPA's interaction with state "mini-NEPAs" and similar 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 at a minimum:

- a. Evaluates how and whether NEPA and the body of state mini-NEPAs and similar environmental laws passed since NEPA's 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*

We have no opposition in principle to this recommendation, except that the federal NEPA processes should have primacy in federal issues over state "mini-NEPAs." In other words, when dealing with federal issues the states' processes should conform to federal processes, and not the other way around. The extent to which redundancy can then be weeded out of the state processes would be good. This report should also look for gaps in the environmental evaluation process covered by no law and report on those gaps. The draft of this report should, of course, be made available for public comment before the final is submitted, which should also be made public.

Conclusion

After carefully reviewing the testimony and comments, it is clear that NEPA is a valid and functional law in many respects. However, there are elements of NEPA that are causing enough uncertainty to warrant modest improvements and modifications to both the statute and its regulations. To do nothing would be a disservice to all stakeholders who participate in the NEPA process.

We disagree that the statute, the National Environmental Policy Act itself, needs any amendment, and in fact think it a dangerous course to follow. As we have argued in these comments, NEPA has been good for the American public and environment and has brought tangible benefit to the federal government itself. We are especially concerned over the recommendations' apparent attempts to give more weight to economic interests, which all too often act diametrically to the environmental interests that NEPA serves to protect. We do concede that in some limited cases "modest improvements and modifications" could be appropriately made to Council

on Environmental Quality implementing regulations that would not cause undue harm to the Act's original congressional intent to

encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the nation...

These comments respectfully submitted,

Jay Coghlan
Executive Director

Scott Kovac
Program Director

(Footnotes)

¹ All total page numbers cited in these comments are approximate because the referenced DOE NEPA documents have page numbers divided into executive summaries, chapters, appendices, public comments and DOE's response to them, and sometimes volumes.

² Memorandum Opinion and Order, Los Alamos Study Group v DOE, No. 94-1306-M, April 16, 1996, pp. 4, 7, & 8.

³ SS&M PEIS is the Stockpile Stewardship and Management Programmatic EIS, the final of which DOE completed in September 1996. The SS&M PEIS considered the post-Cold War reconfiguration of the nuclear weapons complex, for which DARHT was one new facility.

⁴ Memorandum Opinion and Order, Los Alamos Study Group v DOE, No. 94-1306-M, April 16, 1996, pp. 6 & 7.

⁵ In contrast, there is one interesting current case in which Los Alamos County opposes added security checkpoints that it contends will harm tourism and other County economic interests.

⁶ NEPA Task Force Initial Findings and Recommendations, December 21, 2005, p. 16.

⁷ NEPA Task Force Initial Findings and Recommendations, December 21, 2005, p. 11.

⁸ Ibid, pp. 11 – 12.

⁹ On the day that DOE released the WM PEIS the related headline story of USA Today was "The \$39 Million Lemon" which cited the documents demerits, inconsistent data and the preparing contractor's conflicts of interest.

¹⁰ Although at least theoretically it could allow for DOE's federal contractors to weigh in, whom we submit would have a vested conflict-of-interests in NEPA outcomes.