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February 6, 2006

The Honorable Cathy McMorris  
1708 Longworth House Office Building  
Washington, DC 20515-4705

Dear Representative McMorris and members of the Task Force:

The Society of American Foresters (SAF) strongly supports the principles and purposes of the National Environmental Policy Act of 1969 (NEPA). At its heart, NEPA is designed to help improve decisions, providing a framework for consideration of the environmental implications of a project. Additionally, NEPA provides a mechanism for public awareness and involvement in federal decisions. We are pleased to offer comments on the *House Resources Committee Task Force Report on Improving and updating the National Environmental Policy Act, initial findings and draft recommendations*. We offer these comments as an organization of professional forest managers, researchers, and educators with extensive experience in NEPA implementation as it relates to federal forestland management and other federal actions affecting forests.

NEPA is a valuable tool for making decisions but it has also become wrought with controversy and mired in bureaucratic processes. It has served to improve agency decisions but has also halted or delayed many worthwhile projects. In some cases, the inherent vagueness of NEPA processes has led to excessive analysis that does not always lead to more informed and better decisions. The goal should be adequate, accurate analysis that enlightens decisions while involving the public and interested stakeholders in the decision-making process.

SAF believes that there are improvements that can be made in NEPA to better enable agency decision-making while at the same time, ensuring that the environmental, economic, and community needs are considered. However, we also believe that NEPA issues are just one part of a larger problem that the federal land management agencies face, specifically the US Forest Service and the Bureau of Land Management (BLM). Both the Forest Service and the BLM lack current clearly understood and accepted missions or purposes. They are currently operating under statutes that were formulated more than 25 years ago. These statutes do not take into consideration the current framework for federal land management that includes numerous federal environmental laws, court decisions, executive orders, regulations, and evolving public values. While we applaud efforts to improve the NEPA process, without clear direction from Congress as to the purposes of the federal forests, we fear that timely decision-making processes that are critical to sustainable forest management and protection of the nation's natural resources will continue to be mired in conflict. Congressionally established goals and priorities should be clear, should fully consider local and regional needs, and should enable timely decision-making by federal land managers.

With this in mind we offer comments on recommendations put forth in the Task Force Report. Lack of comment on a specific recommendation or issue does not indicate support or opposition.

### **Group 1 – Addressing Delays in the Process.**

NEPA has been identified in many cases to slow down agency decision making. A slow decision making process is not always bad if it helps to improve the decision. However some decisions need to be made in a timely manner to protect public health, safety, and the nation's natural resources. Additionally, federal land management agencies, because of the controversy that sometimes accompanies their decisions and actions, often overcompensate with excessive analysis and lengthy process in hopes that this will relieve controversy and reduce administrative appeals or litigation. While thorough analysis is important, there comes a point when land managers must be able to implement a final decision on the ground or risk damage to natural resources. Providing clear parameters for NEPA analysis can improve the decision-making process and guide the agencies toward more effective use of limited resources.

**Recommendation 1.1: Amend NEPA to define “major federal action.”** The phrase “major federal action significantly affecting the quality of the human environment” has varying interpretations. This phrase has been interpreted to relate to the size, scope, or the impact of the project. Because this is the trigger for determining whether and what level of environmental analysis is needed for a proposed action, it is critical that clear standards be defined which incorporate risk analysis of the various categories of action. Because of the current lack of clear standards, the agencies tend to err on the side of caution and excessive analysis, rather than tailoring the extent of analysis to the expected environmental impact of the project.

SAF supports further clarification of this phrase. This clarification should address the entire phrase--“major federal action *significantly affecting the quality of the human environment.*” This will ensure the definition takes into account the extent of the action as well as the impact on the environment. We also recommend broadening the definition of “major federal action” beyond those projects that involve substantial planning, time, resources, and expenditures to also include those projects that will have a significant impact on the environment. All of these factors should be taken into account when determining the level of environmental analysis necessary.

**Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents.** This recommendation would establish mandatory deadlines for completion of EIS's (18 months) and EAs (9 months). These deadlines could be extended when warranted by the Council on Environmental Quality (CEQ). SAF supports the establishment of deadlines for completing NEPA documents with some flexibility for extraordinary circumstances. Deadlines can be particularly helpful where there is an urgent threat or issue such as a wildfire threat or insect outbreak.

The recommendation also stipulates that analysis not completed by the deadline would be considered complete. We oppose this idea because it could lead to incomplete analysis and faulty decisions. Also, it is unclear how this would work in relation to the right to appeal and litigate under NEPA. If the analysis is deemed complete by law, then this would limit litigation and appeal on the basis of sufficiency of the analysis.

**Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EAs), and Environmental Impact Statements (EIS’).** Creation of criteria for the various levels of analysis would be helpful for providing general agency direction, although it could be problematic to specifically define this in legislation. Currently, individual agencies make this determination, with some direction from CEQ; however there is limited legal backing for agencies to do this. We recommend Congress provide some broad criteria and grant specific legislative authority to the agencies, with oversight from CEQ, to establish their own criteria and categories of action, based on their experience.

**Recommendation 1.4: Amend NEPA to address supplemental NEPA documents.** SAF supports this recommendation to codify 40 CFR 1502.9(c)(1)(i) and (ii). However, this would not clarify the threshold points for “significant” and “substantial” in these regulations. We urge further clarification on this issue.

### **Group 2 – Enhancing Public Participation**

Effective public participation in federal forest management decisions is critical to making informed decisions and building trust among the various stakeholders. However, as a result of working under multiple statutes, the federal land management agencies are often faced with overlapping mandates for public participation and collaboration. Additionally, there is little direction as to the goals and desired outcomes of these various forms of public participation, creating frustration for the agencies and the public.

**Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments.** SAF strongly believes that in order for forests to be sustainable over the long-term, we must balance the ecological, environmental, and community concerns and values associated with forests. SAF supports this recommendation because it would direct the agencies to address the local community needs first, a key component in sustainable forest management, while still taking into consideration the issues and concerns of those outside the community or those not directly affected by the action. These regulations should not limit comment and involvement from outside groups and if issues are raised, they should be given due consideration.

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

Cooperation among all levels of government is critical to ensuring that sound decisions are made. Improvements can be made in federal land management to allow for more landscape level approaches to forest management across ownerships. Because of the intermixed ownership of many forested landscapes, this is critical to ensuring long-term health and sustainability of forest resources.

**Recommendation 3.1: Amend NEPA to grant tribal, state and local stakeholders cooperating agency status.** SAF strongly supports clear granting of cooperating agency status to other government agencies. We are concerned with the word “stakeholders” in this recommendation and urge clarification that this status will only be granted to other governmental bodies.

**Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements.** This recommendation needs further clarification. NEPA governs “federal actions” and it is unclear whether this recommendation would allow state equivalents of NEPA to govern “federal actions” or whether this would only apply in those cases where state equivalents and NEPA both apply.

#### **Group 4 – Addressing Litigation Issues**

Litigation, in some cases, has caused delay of critical federal actions. The fear of litigation can also add to the excessive analysis problems as the agencies attempt to “bullet proof” documentation because of fear of a court challenge.

We would like to bring to your attention some research which could prove helpful in discussions regarding Forest Service NEPA litigation. Researchers at the State University of New York, College of Environmental Science and Forestry recently completed an examination of Forest Service land management cases commenced from January 1, 1989 to December 31, 2002. This research shows that 68.6% of Forest Service land management cases commenced during this fourteen year period included a NEPA claim, which demonstrates the prevalence of Forest Service NEPA litigation. Interestingly, in the NEPA cases decided by a federal judge or panel of judges (i.e., cases not withdrawn or settled), the judge(s) decided the Forest Service had done *everything* correctly in 71.2% of cases. This demonstrates that in the vast majority of cases, which we believe represent the most litigious administration of NEPA, federal judges ruled that the Forest Service correctly complied with all its NEPA requirements.

**Recommendation 4.1: Amend NEPA to create a citizen suit provision.** This recommendation would stipulate specific criteria for citizen suits, which currently does not exist in NEPA. SAF supports the idea of limiting standing only to those who have participated in the process, as a means to encourage greater involvement in the pre-decisional phase of NEPA analysis and attempt to resolve issues so that administrative appeals and litigation are not necessary. We also support the criterion that requires appellants, if they are suing on the basis of insufficient scientific data and information, to demonstrate this insufficiency.

**Recommendation 4.2: Amend NEPA to add a requirement that agencies “pre clear” projects.** We urge clarification of the term “pre clear” in this recommendation. We do not think it’s an effective or valid activity for CEQ to review and approve specific agency projects. However, if the intent of this recommendation is to establish CEQ as a clearinghouse of NEPA litigation cases and a source of guidance for agencies who need to interpret cases and determine relevance to their activities, we support this idea. This will help to ensure consistency in implementing court and administrative decisions across agencies. This could also help agencies learn from each other and prevent future litigation. We recommend including a provision in this recommendation that CEQ issue guidance after such decisions and then work with the agencies to amend any regulations promptly, providing clear and consistent direction to the field.

#### **Group 5- Clarifying Alternatives Analysis**

While NEPA doesn’t require examination of a specific number of alternatives to the proposed action, EIS’s have evolved over time to include more alternatives, generally to avoid potential claims that they have not fully considered all possible options. Alternative analysis is helpful in

improving both agency and public understanding of the action, but each alternative adds time and cost to the analysis required before a project can proceed. In recognition of this problem, *The Healthy Forests Restoration Act* (P.L. 108-148) defined the number of alternatives to be analyzed for projects designed to reduce wildfire risk and insect and disease infestations. We strongly encourage an in-depth analysis of the effects of this change, in terms of time and costs, as well as on the ground results.

**Recommendation 5.1: Amend NEPA to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are economically and technically feasible.** We strongly support this recommendation as a means to reduce excessive analysis and at the same time set parameters for the alternatives to be analyzed. However, we recommend adding socially feasible and environmentally sustainable to the criteria.

**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.** We strongly recommend mandating environmental analysis of the “no action” alternative in NEPA documentation. However, the report recommends that the agency reject the alternative if the impacts of no action outweigh the impacts of action. We oppose this language, as it would be a strong departure from current statute and the procedural nature of NEPA. Currently, no direction is given as to how an agency is to make a decision. Individual agency missions, statutes, and mandates govern this. We urge you to not confuse NEPA with these other statutes and mandates and to remove this component of recommendation 5.2.

**Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory.** SAF supports inclusions of mitigation measures in agency decisions. However, we are concerned that mandatory mitigation measures could expose the agency to unwanted litigation if these measures need to be changed in the event of resource constraints or new information. We urge flexibility in these regulations to adjust mitigation measures where necessary. With regards to the Report’s recommendations, the exceptions outlined in the report should be reexamined. Number 2 of these exceptions appears to create a large loop-hole and if the agency is meeting numbers 1 and 3, mandating mitigation should not be a problem.

#### **Group 6 – Better Federal Agency Coordination**

**Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders.** SAF strongly supports increasing efforts to collaborate with interested stakeholders throughout the NEPA process. These regulations should be constructed in a manner that encourages productive dialogue and meaningful participation. This collaboration/consultation should occur early and throughout the process.

#### **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.** It is unclear from this recommendation what this individual would be responsible for. This individual should not be involved in agency project-level decision-making but could help resolve conflicts or inconsistencies among agency NEPA processes.

**Recommendation 7.2: Direct CEQ to control NEPA related costs.** While it is certainly important to control NEPA costs, we urge strong collaboration with the individual agencies in assessing costs and crafting cost-containing policies.

**Group 8 – Clarify meaning of “cumulative impacts.”**

Cumulative effects analysis is often the most problematic aspect of NEPA. This analysis is critical to understanding the impacts of actions in both a spatial and temporal context. It is difficult to determine where to draw the line on cumulative effects and often it is not possible to precisely predict the long-term impacts of management actions in forests, given the presence of other natural factors and the dynamic nature of forests. This does not mean that agencies shouldn't move forward if there is not complete certainty of a proposed action's impacts. The concept of cumulative effects analysis in NEPA should allow for some acceptance of risk and uncertainty. Cumulative effects analysis should also recognize that agencies should be using, as a means of best management practice, a model of monitoring and adaptive management where impacts of actions are continuously examined and adjustments are made to mitigate unforeseen negative impacts. While this model should not be a part of NEPA, it should be part of standard operating in federal agencies.

**Recommendation 8.1: Amend NEPA to clarify how agencies evaluate the effects of past action for assessing cumulative impacts.** This recommendation is not clear, if the intent is to make clear that an agency's current assessment of conditions is sufficient and past actions need not be analyzed, this should be clarified.

**Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis.** We support this clarification; the agencies should not have to guess what actions could possibly take place. Instead, the agencies should only be required to examine what is “reasonably possible” and then be able to move forward with a certain amount of risk and uncertainty. Again, agencies should have monitoring and adaptive management measures in place to respond and correct unforeseen consequences of actions.

**Group 9 - Studies**

**Recommendation 9.1: CEQ Study of NEPA's interaction with other Federal environmental laws.** We very strongly support this recommendation. As mentioned above the federal land management agencies suffer from overlapping and sometimes contradicting mandates. A CEQ study of this problem could point to solutions. We urge consideration of ideas in the SAF Task Force Report, *Forest of Discord: Options for Governing Our National Forests and Federal Public Lands* and will gladly provide copies upon request.

**Recommendation 9.2: CEQ Study of current federal agency NEPA staffing issues.** We strongly support this evaluation. NEPA staffing is a significant problem in federal land management agencies and often compounds delay and costs of projects.

**Recommendation 9.3: CEQ Study of NEPA's interaction with state “mini-NEPAs” and similar laws.** We strongly support such a study and urge you to consider examining state laws

governing forest practices as well, some of which have public involvement and environmental analysis requirements and could overlap with similar NEPA requirements.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Marvin D. Brown". The signature is written in a cursive style with a large, prominent initial "M".

Marvin D. Brown  
President