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February 1, 2006

VIA E-MAIL, FACSIMILE & U.S. MAIL

NEPA Draft Report Comments
c/o NEPA Task Force
1324 Longworth House Office Building
Washington, DC 20515

Dear Chairwoman McMorris, Ranking Member Udall, and Members of the House NEPA Task Force:

Thank you for the opportunity to comment on the draft recommendations of the Task Force staff. Many of these recommendations will advance the Task Force's stated goal of making the NEPA process more efficient without sacrificing the immensely beneficial environmental protection goals of and performance under the Act. Other recommendations, I submit, need more scrutiny before being advanced in legislative form. Indeed, as I noted in response to questioning at the Task Force hearing, the preponderance of improvements to the NEPA process can be achieved without new legislation (though assisted, constructively, by Congressional prodding). Only certain of the matters relating to judicial review of administrative agency action would require new legislation.

I also appreciate the Task Force's earlier invitation to me to testify before it and have attached a copy (the long version) of my November 17, 2005, testimony. As I said at that time, there are steps that can legitimately be taken to streamline NEPA -- to respond to the grievances of some of those who deal with the NEPA process and to reduce delay in the system -- while at the same time preserving the benefits of a statute which has, on the whole, served the American people immensely well. As I discussed in that testimony, there are numerous constructive and worthwhile measures that can be adopted to make the NEPA process more efficient, but, at the same time, taking care not to: (1) exempt actions from NEPA, (2) eliminate or reduce the requirement to examine alternatives, (3) squeeze the public out of the NEPA process, or (4) curtail judicial review.

That said, and sharing Chairwoman McMorris' stated commitment to making the NEPA process "more timely and more efficient" while not undercutting the environmental and public protections which the law affords, my specific comments on each draft Task Force recommendation follow:

Group 1 -- Addressing Delays in the Process

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

Comment: This is one of those recommendations where "the devil is in the details." The bottom-line question is what actions would be deleted from the present definition of "major federal action." That current definition is both based upon and has assisted in shaping the case law. The current definition reads as follows:¹

\$1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (Sec. 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (Secs. 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no

¹ CEQ's explanation (as part of the administrative history of this section) appears at 43 Fed. Reg. 55989 (Nov. 29, 1978). The Regulations carry forward many of the concepts originally contained in the predecessor guidelines adopted by CEQ during the Nixon Administration.

Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

- Before further defining “major Federal action” and potentially excluding from NEPA actions which are now covered and which have been considered covered for the past 36 years, I think it important to determine just what you want excluded from the present coverage. I am not aware of any need to constrict that basic coverage (while, at the same time I believe strongly, as you know, that the NEPA process can and should be made more efficient and unnecessary delays squeezed out of the process).
- The current Congressional direction for EISs is to prepare them for actions which may “significantly affect” the human environment. That is a better test than actions which require “substantial planning, time, responses, or expenditures.” The latter test measures bureaucratic input. The former

(existing) test measures real-world output -- what the effect is to be analyzed. Significance of impact is the better test.

- You are aware, of course, that “major federal actions” is a portion of the test for requiring Environmental Impact Statements (EISs) under NEPA §102(2)(C), 42 USC §4332(2)(C). However, Environmental Assessments (EAs) are prepared under a far-broader section of NEPA §102(2)(E), 42 USC §4332(2)(E), requiring agencies to “[s]tudy, develop, and describe appropriate alternatives to recommended courses of action which involves unresolved conflicts concerning alternative uses of available resources;”² Then EAs may in turn result in an EIS if they show there may be significant impacts.

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents.

Comments: I strongly support both the intent of this provision and the fact of having time limits on the NEPA process. As you are aware from my testimony, I think mandatory time limits on the NEPA process the single most important potential reform in eliminating delay from the process.

- As you also know from my testimony, I have some concern over a “one size fits all” approach in that NEPA applies to an extraordinary range of actions -- from a TransAlaska Pipeline to a single highway interchange. That is why I proposed multiple (say 3) presumptive time limits such that an appropriate one could be assigned at the beginning of each action. (See attached Testimony at 12-15). That approach appears to me more realistic than the single, uniform approach proposed in the draft recommendation.
- That said, the limits you propose -- 18 months for EISs and 9 months for EAs -- are, in most instances, reasonable ones.
- The language of any legislation should make clear that these are outside limits. In many cases NEPA compliance can take place more expeditiously than the time limits you set would permit.

² The draft Task Force report suggests that approximately 50,000 EISs are filed each year (at page 11). In fact, fewer than 500 are EISs, and the balance (more than 40,000) are EAs.

- The start and conclusion of the time limits are critical. For EISs I would recommend that the time limit run from publication in the Federal Register of the Notice of Intent to prepare the EIS (40 CFR §§1501.7, 1508.22) and that the limit run until the Record of Decision is signed (40 CFR §1505.2).³ For EAs I would suggest running from the determination to prepare an EA (40 CFR §1501.4(b)) to the signing of the Finding of No Significant Impact (40 CFR §§ 1501.4(e), 1508.13) (assuming that no EIS is to be prepared).
- When there is a time limit followed by a finding that analyses will be “considered complete,” it is essential to build in safeguards to prevent “gaming” the system. Often applicants have information within their knowledge which is essential to an environmental analysis (emissions from a factory, precise route of a pipeline, cooling water consumption of a power plant, etc.). You do not want to construct a system which rewards the applicant for withholding such information, either until the time limit has run or until there is insufficient time for independent analysis of it.
- I must confess that I have considerable qualms about the “considered complete” provision generally. It is an invitation to proceed in the absence of complete environmental scrutiny. Reporting to CEQ or to Congress if a document is tardy would be a less draconian sanction, as Congress provided in the recently-enacted SAFETEA. (See Testimony at 14.)
- As you are undoubtedly aware, CEQ will need additional resources to undertake the new duties you have assigned to it.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA), and Environmental Impact Statements (EIS).

³ This assumes the ability of an agency to complete the NEPA process with a ROD but to reserve the right to finalize the decision based on other non-environmental factors. As NEPA should not delay the process, it also should not force an agency, before that agency is ready, based on other factors, to move ahead with the action.

Comment: This is one of those issues which is unobjectionable in concept but difficult in execution. Of course, the existing CEQ NEPA Regulations strive to do exactly that -- create unambiguous differentiating criteria.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents.

Comment: This recommendation would continue existing law with two provisos:

- The recommendation as worded uses “and” rather than “or” as used at §1502.9(c)(1). Significant changes to the project and significant new information are different concepts. Each should occasion supplemental analysis.
- The recommendation deletes from current law the provision (§1502.9(c)(2)) permissively allowing agencies to prepare supplemental documents to further the purposes of NEPA. That is a worthy purpose which should not be deleted. Since it is permissive, failure to take that action cannot result in a lawsuit. It merely, but wisely, encourages agencies to behave in an environmentally sensitive manner even when not required by law to do so.

Additional recommendations to reduce delay. In my testimony (attached) before the Task Force I made additional recommendations to reduce delay which are not included in the Task Force staff’s draft recommendations but which I again commend to the Task Force for its consideration. These include:

- Concurrent reviews. Congressional direction to agencies to undertake their environmental responsibilities concurrently rather than consecutively. (See Testimony at pages 15-16.)
- Early assurance of legal compliance. Using skilled NEPA legal experts, preferably with litigation experience, to review agency NEPA documents (at least in potentially controversial cases) before they are finalized so to maximize the prospects for “bulletproofing” the documents before they are finalized, both deterring litigation and raising the prospects for success should there be litigation. I further suggested that a means for accomplishing this would be for the Justice Department to be involved

such that the lawyers who will be defending the documents can have a say in shaping the documents they will ultimately be defending. (See Testimony at pages 19-20.)

- Headquarters personnel available to step in to expedite. Such recourse can be exceedingly useful in expediting agency action. (See Testimony at page 21.)
- Priority to NEPA suits. Congressional direction to give priority to NEPA cases, as the California Legislature has done with CEQA cases, will expedite their disposition. (See Testimony at page 26.)

Group 2 -- Enhancing Public Participation

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments.

Comment: I see no problem with a legislative emphasis on governmental responsiveness to local concerns, but to denigrate the comments of others seems unwise.

- What may appear “local” may have implications of concern to Americans across the land. For instance, a proposal to dam the Colorado River in the Grand Canyon would certainly be of interest to citizens from Washington State to Virginia as well as to those whose homes border the National Park. Similarly there is no reason why New Yorkers’ views on the future of the Statue of Liberty or District Columbians’ opinions on the Washington Monument should merit greater attention than those of our fellow citizens in other states.
- Bear in mind that a seemingly national organization may have local roots. The Sierra Club, for instance, with members who live near a project in Oregon, may speak fully as much for the values of local inhabitants as does another organization with a purely local membership.
- The worth of comments -- at least as to the adequacy of environmental analyses under NEPA -- depends more on the content and usefulness of the comment than on the residence of the commenter.

- Keep in mind that the courts are accustomed to winnowing out officious intermeddlers by the use of standing to decide who gets to pursue a NEPA claim in court, but once the standing threshold is met, the excellence of the comments should influence the agency's response to the comment more than the address of the commenter.

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

Comment: I have no issue with this recommendation. It would reinforce the need to make NEPA documents more user-friendly for both agency decisionmakers and the general public. As CEQ pointed out in adopting its Regulations in the 1970s, judicial opinions deal with the most complex of issues in well under 150 pages. There is no reason why EISs cannot do the same.

- Of course, while the EIS and EA should be crisp and readable, any backup technical studies (typically the appendices) must continue to made available to the public and agencies so that those who want to analyze underlying data are able to do so.

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.

Comment: I think this suggestion has merit, with one caveat.

- You entitle state, local, and tribal stakeholders to cooperating agency status "barring clear and convincing evidence that the request should be denied." The nub is the criteria for such denial. I personally favor an increased state/local/tribal role, but sometimes there are national interests which should prevail. Suppose, for instance, that a national decision was made that the country needed greater supplies of natural gas, beyond the capacity of North American gas fields to produce. LNG would be an obvious alternate source. Suppose also that the three contiguous Pacific states each resolved as a matter of political judgment to do everything in their power to prevent the siting of an LNG facility along their coasts. The people of the inland states would have been denied access to LNG from the Pacific. If the Commerce Clause of the Constitution is to mean

anything, certain states should not be able to bar other states' access to such a natural gas supply. I might add that I personally favor a significant state role in siting,⁴ but I would be leery about making a jurisdiction a "cooperating agency" when its avowed purpose is not to cooperate but to undermine.

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

Comment: The worth of this proposal also depends on how it is drafted. The proposal would restrict the authority to rely on state processes to those instances where "state environmental review are functionally equivalent to NEPA requirements"

- As a generality this proposal can be made to work in a limited number of states. The state process, to be "functionally equivalent" to NEPA would have to include the basics of NEPA -- scoping, preparation of an Environmental Impact Statement (or Report), opportunity for public comment on Draft EIS (or EIR), rating of the EIS (or EIR) by EPA under §309 of the Clean Air Act, Final EIS (or EIR) which responds to the comments, opportunity to comment on the FEIS (or FEIR), a Record of Decision, and opportunity for judicial review, preferably in Federal Court.⁵ I believe -- at maximum -- the states which might qualify for "functional equivalent" status would, at present, be limited to Hawaii, Washington, California, Montana, Minnesota, Wisconsin, New York, and Massachusetts. Any broader inclusion would not be "functionally equivalent" and would weaken NEPA.
- I personally believe that greater protection, not to speak of greater national consistency, would be furthered by persuading states to adopt NEPA documents as their own (with review in Federal Court) than by federal agencies adopting state "little NEPA" documents prepared by disparate

⁴ In the particular example I could see the Federal government insisting that a state furnish an LNG facility, but then leave it to the state to decide where.

⁵ Note this precedent afforded by NEPA §102(2)(D), 42 USC §4322(2)(D) whereby state transportation agencies prepare the EIS or EA (under Federal law, however) with some degree of Federal oversight.

agencies under disparate laws. And, as stated above, I strongly believe that documents and processes from states without effective “little NEPAs” should not and cannot be deemed “functionally equivalent” to NEPA and cannot substitute for NEPA.

Group 4 -- Addressing Litigation Issues.

Recommendation 4.1: Amend NEPA to create a citizen suit provision.

Comment: There is a quite highly developed and relatively settled body of law governing citizen suits and NEPA. I am not sure what a new provision would add to it.

- With respect to the “best available information and science,” the current state of the law is that, absent an unreasoned scientific analysis, the courts defer to the agency’s scientific expert when there is a conflict of opinion. This is well-settled law, from the Supreme Court on down. To provide for “best available” science will repudiate the law on scientific deference and substitute a standard which invites judges to search for what is “best” and displace the agencies as the arbiters of scientific accuracy. That in turn will make for more litigation. I do not think it a good idea.
- If not carefully drafted, this provision could also adversely impact §1502.22, as amended during the Reagan Administration, which recognizes that in some occasions it is necessary to develop information which is not currently “available.”
- With respect to involvement at the administrative level as a condition of judicial relief, I do not think there is a problem with the existing state of the law. The Supreme Court, most recently (2005) in Public Citizen, has stated that issues, as a general rule, may not be raised in court if they were not raised administratively, but the Court also left an out for issues that should have been obvious to the agency. It is worth considering how such a proposal would affect litigations in different situations:
 - > For instance, if a sophisticated national environmental organization capably staffed with lawyers and scientists, is to make an argument in court, there is much to be said for imposing -- or more accurately, since it is current law, retaining -- an obligation to

present the issue to the administrative agency as a condition of later judicial review (which is typically confined to the administrative record).

- > But there are also situations when, for instance, bulldozers unexpectedly appear, pursuant to Federal agency authorization, and start clearing a forest in a neighborhood. The neighbors have never heard anything like this was going to happen. I would not want to preclude them from going to court to try to persuade a judge to do something (assuming an apparent violation of NEPA). To insist on their having participated in an administrative proceeding they did not know existed would be unjust.
- With respect to intervention by those directly affected by NEPA litigation, as I noted in my testimony, I think that a good idea. It has always seemed to me fundamentally unfair for NEPA litigation to proceed between, for instance, a citizens' group and a government agency which involves, for instance, a permit or other authorization for use, but the would-be permittee (a business, a state or local government, an Indian Tribe) is not permitted to intervene. The fiction is that the agency adequately represents the interests of the permittee in that both are defending the NEPA process. In fact those interest can diverge, sometimes due to an applicant's sense of urgency which is not shared by the agency. I believe that under NEPA affected or interested people should have their day in court, whether they are plaintiffs or intervening defendants. Once the latter are parties, they will be able to participate in any settlement discussions. Some courts do use the rationale that an "economic" interest does not support intervention as a matter of right. I think that wrong in that the proponent of a project has fully as much interest in the outcome of litigation affecting the future of the project as does any other party.
- With respect to the guidelines on standing, I had thought (with the exception of the issue discussed in the previous bullet) this was pretty well settled through a third of a century of case law, roughly along the lines suggested in the proposal. I do not see the need for such guidelines, which could have the perverse result of eliciting new litigation to interpret the guidelines.

- I support the proposal to establish a 180 days statute of limitations. The period is short enough to move the NEPA proceedings to a close, but long enough to allow potential plaintiffs to get their acts together.

Recommendation 4.2: Amend NEPA to add a requirement that agencies “pre clear” projects.

Comment: This appears to contain two distinct proposals:

- The first would make CEQ a clearinghouse for monitoring court decisions. That would be useful, but must include corresponding augmentation of CEQ’s resources.
- The scope of second proposal is unclear. If CEQ is to analyze and advise concerning every judicial or administrative decision regarding NEPA, the job would be immense. If, however, as I assume is to be the case, CEQ is to use its judgment as to which are the important cases meriting analysis and advice, such direction would be useful. CEQ has in the past given such advice in three ways: (1) by issuing Memoranda to Heads of Agencies analyzing important NEPA cases (which was done particularly in the Nixon and Ford Administrations); (2) by issuing case-specific analyses, often at the behest of the Justice Department in connection with pending litigation; and (3) by commenting on all Justice Department NEPA pleadings before they were filed so as to ensure CEQ’s expertise is brought to bear (as was done during the Carter Administration [see attached Testimony at page 20, note 27]).

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.

Comment: The current requirement is to examine all “reasonable” alternatives (40 CFR §1502.14), which is usually taken to mean that they must be economically and technically feasible. So -- I am not sure what is proposed to be added. Two factors should be borne in mind:

- First, it is the agency's responsibility to implement NEPA, including devising and analyzing alternatives -- not the public's. That responsibility should remain squarely with the agency. Of course, members of the public (or State or local government or Indian Tribes or other Federal agencies) may propose additional alternatives, but the basic responsibility should remain that of the agency(ies) preparing the NEPA document.
- Second, the question comes up -- feasible for whom, particularly when project applicants are involved? Again, the ultimate NEPA responsibility to determine feasibility must lie with the agency. Let me suggest several concrete examples:
 - > A would-be shopping center developer owns land which is substantially wetlands and proposes to build on those lands. The particular developer does not own "upland" sites, although they do exist. The developer can say it is not feasible for him to build other than on his own site, because he does not own upland sites. Under the Clean Water Act's §404 a wetland site may not be used if an upland site is available. The agency must be able to look at what is feasible from the point of view of constructability, not just the one applicant's economic situation. In the same example another developer announces a plan to build a shopping center on a nearby upland site, and the market will only support one shopping center. Surely the upland site is an appropriate alternative to the first developer's wetland site, even if not feasible for that first developer. The second developer, who plays by the rules and avoids wetland sites, should be rewarded. NEPA should be examining the environmental impacts of the upland alternative site even if not feasible for the first developer.
 - > A related example from real life illustrates one of NEPA's great success stories -- and also illustrates the importance of examining an alternative which may not be feasible for a particular developer but which is feasible in a larger sense. In the mid 1970s Congress decided it was in the national interest to secure the transport of North Slope Alaska natural gas to the lower 48 states. Two separate applicants submitted proposals. The first was for a natural gas pipeline which would parallel the existing TAPs oil pipeline

and deliver gas to Valdez, where it would be liquefied and sent as LNG to west coast ports. The second proposal involved transport exclusively by pipeline across the Arctic Wildlife Refuge and, using an untried technology, following Canada's MacKenzie River and across into the U.S. Midwest. Initially, because of jurisdictional reasons the Interior Department prepared an EIS on the former proposal and FERC did so on the latter proposal (sufficient direction having not been given from the highest levels of government). The two documents were then combined. Many perceived environmental problems with the first proposal including the effect on caribou of having to cross the paths of two pipelines, the safety of LNG tankers, (particularly near Valdez), and the questions relating to the discharge ports on the West Coast of the lower 48 states. Others perceived environmental problems with crossing the Arctic National Wildlife Refuge and with the untried technology proposed to be used to transport natural gas by pipeline across permafrost. Congress did not know which to endorse, but wanted something to happen quickly. It then took jurisdiction away from the courts and gave that authority to CEQ, directing to hold hearings, review the EIS, and make recommendations to the President for transmittal to Congress under a fast-track procedure. Despite the wishes of both applicants, CEQ found the environmentally preferable alternative to be a third alternative -- a conventional natural gas pipeline to follow the existing, already disturbed route of the ALCAN highway from Alaska to the lower 48. The alternative was also found to be feasible. A new consortium was formed and a new application submitted by the new developer to follow that environmentally preferable route. The President and Congress then approved that route.⁶ This was an example of NEPA at its best. You do not want to stop the Federal decisionmakers from considering -- and perhaps adopting - - an alternative which is not preferred by (or perhaps feasible for) the original applicant.

⁶ For reasons of economics the project was not built in the 1970s, but its viability is again on the table in the new century.

Recommendation 5.2: Amend NEPA to clarify that the alternatives analysis must include consideration of the environmental impact of not taking an action on any proposed project.

Comment: Despite the first sentence of the analysis, this is what happens under existing law (40 CFR §1502.14(d).) EISs regularly consider the “no action alternative” and give it substantially the same treatment (see §1502.14(b)) as other alternatives. I am not sure I understand what is meant by the second sentence of the description, but, when warranted, an agency’s ability to conclude that, after environmental scrutiny, an action should not go forward should not be circumscribed.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory.

Comment: This is an excellent proposal. In short, if crafted correctly, it would follow the lead of some of the State “little NEPAs” (including Chairman Pombo’s State of California) and put teeth into NEPA. In short, if a significant adverse environmental impact is identified, it must be mitigated, absent some sort of overriding consideration. (See pages 23-24 of my attached testimony to the Task Force of November 17, 2005.) This is the one proposal in the entire package which, if well crafted, will constitute a significant enticement to those to whom environmental protection is a high priority. (See language from California’s CEQA, noted at page 24 of my testimony, footnote 29.) Of course, many responsible agencies do this anyway, believing it their responsibility to avoid or mitigate the adverse environmental impacts which they through the NEPA process have identified. Somewhat paradoxically enforceable mitigation is often required for EAs under present law but not for EISs. That is because, if an EA reveals significant impacts, an EIS must be prepared. But, the courts have held that if the impacts are then mitigated below the level of significance -- a so-called “mitigated FONSI” [Finding of No Significant Impact] -- then an EIS need not be prepared. The way then to avoid an EIS is enforceably to mitigate adverse impacts below the Congressionally set threshold of significance such that the longer document need not be prepared. The result is that under existing law EAs may be required to incorporate mitigation but EISs are not so required. That means mitigation can be required for what are typically smaller projects (initially meriting EAs) but not for typically larger ones (initially meriting EISs).

Requiring enforceable mitigation of significant adverse impacts would further NEPA's goals.

Group 6 -- Better Federal Agency Coordination

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders.

Comment: This is a worthwhile recommendation.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies.

Comment: This also appears worthwhile.

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.

Comment: This appears a worthwhile proposal (and presupposes appropriate additional resources being made available to CEQ).

Recommendation 7.2: Direct CEQ to control NEPA related costs.

Comment: This is clearly a worthwhile proposal.

Group 8 -- Clarify Meaning of Cumulative Impacts

Recommendation 8.1: Amend NEPA to clarify low agencies would evaluate the effect of past actions in assessing cumulative impacts.

Comment: What is important is that in assessing impacts for past, present, and "reasonably foreseeable" actions (taken from the definitions of cumulative impacts in 40 CFR §1508.7), that each of those impacts be considered. With respect to past actions it is methodologically appropriate either to include them within the analysis of existing conditions or to single them out for analysis along with present and future impacts. I am aware that at least one court went

overboard in demanding a retrospective analysis of past impacts. That holding can be addressed, while leaving flexibility to the NEPA document preparer, by specifically allowing either of the methodologies I suggested above.

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.

Comment: While the non-specific directive set out in the underlined statement above is unobjectionable, the proposal to substitute “concrete proposed actions” for “reasonably foreseeable” future actions is a bad idea, and I urge you to retract it.

- Let’s take a typical occasion for a cumulative impacts analysis. Three developers, all known for constructing recreational home developments, each buy one-third of a newly developing valley, which at present has no access. The proposal is to construct an access highway (which involves a Federal action -- either Federal funds in building the road or it is being built over Federal lands). Two of the three developers have formulated “concrete proposed actions” each involving 500 homes and a projected 2000 daily trips associated with those homes (i.e., concrete proposals for 1000 homes and 4000 daily vehicular trips). The Federal agency responsible for the highway is charged with sizing and routing the highway based on the number of projected daily trips with their attendant air quality and noise impacts. The third developer has not yet formulated a “concrete proposed action,” but everybody familiar with the situation knows and reasonably expects that the third developer will at some point formulate a proposal of roughly the same size as the other two. In other words, a total of 1500 homes generating 6000 daily vehicular trips is reasonable foreseeable. Under the staff proposal the NEPA document, confined to “concrete” proposals, will analyze 4000 vehicular trips -- and will get it wrong -- it will use the wrong number. Under current law it would look at what is “reasonably foreseeable” -- all three developers’ actions -- and will analyze 6000 trips. That will get it right.
- The test of “reasonably foreseeable” allows for flexibility and the exercise of judgment by those responsible, which is a good thing.

- I respectfully submit that this recommendation is just plain wrong.

Group 9 - Studies

Recommendation 9.1: CEQ study of NEPA's interaction with other Federal environmental laws.

Comment: This appears to be a worthy recommendation (again assuming adequate resources for CEQ).

Recommendation 9.2: CEQ study of current NEPA staffing issues.

Comment: This too is a worthy recommendation (yet again assuming adequate resources for CEQ).

Recommendation 9.3: CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws.

Comment: Yet again this is a worthy recommendation (and again assuming adequate resources for CEQ).

Thank you again for extending me the opportunity to comment on your evolving recommendations.

Yours truly,

Nicholas C. Yost

NCY:kjs

Attachment (testimony before Task Force)