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MEMORANDUM

To: NEPA Task Force
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From: Karen Budd Falen, Budd Falen Law Offices L.L.C.

Date: February 6, 2006

Re: Comments Regarding Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act, Committee of Resources, United States House of Representatives, *Initial Findings and Draft Recommendations*

The purpose of this memorandum is to provide my comments to the Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act, Committee of Resources, United States House of Representatives, *Initial Findings and Draft Recommendations* dated December 21, 1005 (Initial Findings). Those comments are as follows:

1. I want to congratulate the Task Force on Improving the National Environmental Policy Act and the Task Force on Updating the National Environmental Policy Act (“NEPA Task Force”) on undertaking this monumental review and on its preparation of this report. From my review of the testimony and participation at the Committee hearings, I believe this report fairly characterizes the numerous and diverse comments on the implementation and impact of the National Environmental Policy Act (“NEPA”). You are to be commended for your work.
2. With regard to the Initial Findings, I would make the additional recommendations (my comments are only directed at those recommendations with which I strongly agree or disagree):
 - A. Recommendation 1.1 suggests defining “major federal action.” I strongly support

this recommendation.

- B. Recommendation 1.2 suggests that time frames be added for NEPA compliance. I do not agree with this suggestion. While I agree that it takes far too long to complete a NEPA document, adding statutory time frames only adds an additional, and frankly easy, litigation target (see e.g. litigation regarding statutory time frames to develop critical habitat under the Endangered Species Act). If one of the goals of this Task Force is to limit NEPA litigation, this suggestion will not help and in fact will have the opposite impact.
- C. Recommendation 2.1 directs the Council of Environmental Quality (“CEQ”) to promulgate regulations to give more “weight” to localized comments. I strongly support this recommendation. In addition, more weight should be given to individualized substantive comments, not form letters.
- D. Recommendation 3.1 requires NEPA be amended to require tribal, state and “local stakeholders” be granted cooperating agency status. I support this recommendation if it is changed to mean that “local stakeholders” equates to “local governments.” If not, the term “local stakeholder” must be defined to include only those directly impacted by the NEPA decision.
- E. Recommendation 4.1 would allow a citizen suit provision based upon certain criteria. While I know of no other statute with criteria tied to a citizen suit provision, I believe this idea has a great deal of merit. Additionally, I would recommend that if litigation is filed, a bond must be posted by the Plaintiff/Appellant. If a citizen suit provision is added, I also recommend that attorney fees be awarded as with all other citizen suit provisions of which I am aware.
- F. Recommendation 5.2 requires the inclusion of a “no action alternative.” I support this recommendation. In addition, the “no action alternative” should be specific defined as the “status quo” or current management alternative. Under the current process, some federal agencies define the “no action alternative” as a “no use” alternative and some federal agencies define the “no action alternative” as the current management alternative. The latter is the correct interpretation.
- G. Recommendation 5.3 requires that mitigation be mandatory. I strongly agree with this recommendation.
- H. Recommendations 8.1 and 8.2 deal with the requirements of cumulative impact analyses. Cumulative impacts should be affirmatively defined to include social and economic considerations and impacts.

Again, the Take Force is to be congratulated on this Report. Please let me know if you have further questions or would like clarification on the above analysis.