

February 6, 2006

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

The Grand Canyon Trust is a regional, non-profit conservation organization that advocates collaborative, common sense solutions to the significant problems affecting the region's natural resources. Our work is focused in the greater Grand Canyon region of northern Arizona, and in southern Utah.

We offer the following comments on the Draft Recommendations of the Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act.

### **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.*

This recommendation doesn't "enhance" NEPA. Instead it subverts the NEPA process by excluding projects from NEPA, even if they would have significant environmental impacts, as long as the agency avoids committing any "substantial planning, time, resources, or expenditures" to their decisions about the projects. Thus, the "look before you leap" nature of NEPA becomes, "If you promise to leap without looking, then you don't have to look."

Currently, public land agencies are being de-funded so that they cannot put "substantial planning, time, resources or expenditures" into anything.

Then, this recommendation says to the agencies, "If you avoid planning much for a decision that might have severe environmental impacts, you won't have to analyze the impacts." This is not sensible.

For example, under recommendation 1.1, presumably in one day, an agency could publish a notice that they were (1) re-issuing term grazing permits for 50 cattle allotments for a decade without any planning; (2) issue a dozen surface occupancy permits to oil and gas companies without any planning; and (3) designate 200 miles of user-created ORV routes as classified roads without ever looking at the routes. . . No expenditure, no planning ----- and their reward? They won't have to involve the public, consider alternatives, or analyze impacts.

In Utah, the national forests were formed in the wake of unplanned livestock grazing. When the steep slopes, denuded by domestic sheep, were flowing as mud into towns at the foot of the mountains, the townspeople asked for the formation of national forests and substantial planning.

Recommendation 1.1 turns NEPA on its head in order to go back to no planning. It says if an agency refuses to do any "substantial" planning for projects that could cause significant direct, indirect, or cumulative environmental impacts, then they won't have to analyze the impacts! "See no impacts, hear no impacts, tell no impacts."

Additionally, "substantial" is undefined, but this is beside the point, because even if it were defined, Recommendation 1.1 wholly reverses NEPA to reward lack of foresight and planning.

NEPA will not be "enhanced" by changing the definition of "major federal action" from meaning actions with "effects that may be major" (40 CFR 1508.18) to meaning actions, however irreversibly destructive, that are undertaken with no planning, time, or resources committed to decisionmaking.

*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.*

Recommendation 1.2 is unworkable for several reasons:

1. The purpose of an EIS is to foster informed decisionmaking and to thoughtfully consider alternatives. A mandatory timeline would subvert both. What if the Army were given a mandatory timeline to complete design of a military weapon and then construction and deployment of the weapon would have to commence, no matter how dangerously flawed the design? Would this seem wise?

2. Decisions made under an artificial timeline will end up in lengthy litigation. Those who simply want to litigate would have a field day in court with shoddy EISs.
3. An agency under a timeline could delay providing essential information to the public so that the deadline for completion would run out before the public could read, analyze, or rebut that information.

The best way to come to timely, defensible decisions is to engage all interested parties early and often in the planning of an action that may have significant impacts. That requires no legislative changes. It simply requires agencies to stop trying to dictate environmentally or publicly unacceptable projects.

*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.*

The Task Force has not provided evidence that current regulations and CEQ guidance for CEs, EAs, and EISs are ambiguous.

The recommendation to categorically exclude “temporary activities” apart from the environmental impacts they may cause is nonsensical. For example, permitting a one-weekend off-road vehicle event through sensitive wetlands could cause damage that might not be undone for decades, if ever.

Likewise, the “temporary” aerial spraying of a sulfonyl urea herbicide near an agricultural community could cause damage to crops that would not be undone for years.

The “temporary” nature of actions has nothing to do with whether significant harm may occur.

*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).*

40 CFR 1502.9 (c)(1)(i) and (ii) use the word “or” between (i) and (ii). The Task Force renders this “or” to “and” between 1) and 2) in Recommendation 1.4. By using the term “and,” Recommendation 1.4 would allow an agency to avoid supplementation as long as they refuse to make substantial changes in the proposed actions even if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

Recommendation 1.4 eliminates the wording of 1502.9(2), in which an agency may prepare supplements “when the agency determines that the purposes of the Act will be furthered by doing so.”

The Task Force has provided no evidence that the existence of 1502.9(2) has resulted in frequent and/or significant “delays in the process.”

Thus, Recommendation 1.4 seems to have no purpose other than to prevent agencies from implementing 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.*

Recommendation 2.1 does not “enhance” public participation, but instead denigrates valid, scientific and/or personal concerns raised by non-local citizens during the course of federal decisionmaking.

- As is well known, “local interests” are often unduly subject to local industries, out-of-town industries employing local residents, or focused expenditures of money by an entity that stands to profit from a particular federal decision.

When a forest is owned equally by all citizens, when a grasslands is owned equally by all citizens, when a local decision has implications for national precedent, when a local loss of a species or resource (e.g., wetlands) incrementally contributes to a national loss of that species or resource, why should local interests be weighted any more heavily than any other entity’s in the nation?

- “Directly affected” is indefensible and not definable.
  - When a resident of Utah learns of a decision to graze cattle heavily in a Sierra Nevada meadow where she has loved to hike during many vacations, does that not “directly affect” that citizen?
  - As noted in 40 CFR 1508.3, “affecting” means “will or may have an effect on.” If a decision is made to incinerate chemical and nerve gas weapons in Utah, and a citizen leaving near Umatilla, Oregon believes that will tilt decisionmaking toward incineration of nerve gas weapons at the Umatilla Army Depot, does that Utah decision not have an “effect” on the Oregon resident? As 40 CFR 1508.8 notes, effects include direct effects and indirect effects. Recommendation 2.1 would privilege direct effects over indirect effects.
  - In our global economy, the U.S. seems to think it should have a say over Europe’s local decision to reject beef laced with hormones or genetically-engineered seeds. Perhaps Recommendation 2.1 should be used as an argument against the WTO?
  - What is the meaning of “federal” if not the purview of a nation’s citizens equally?
- “Weighted more” is not definable. When a biological soils crust expert in Utah learns of an ORV or mining permit that will eliminate a rare, intact patch of biological soil crust in

an erosive landscape, should that concern be denigrated compared to local consensus that “Nobody around here cares about some hard-pan crust”?

- If local participants focus on jobs made from extracting resources from federal lands, and non-local participants focus on cumulative losses of a particular natural resource on the same lands, why should the local participants’ concerns be privileged over non-local participants’ concerns?

*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.*

Recommendation 2.2 proposes to legislatively address an issue best addressed through agency skills and judgment. Collaborative problem solving prior to initiation of an EIS process would allow an agency to reduce much EIS length.

If Recommendation 2.2 implies that the EIS, including appendices, must be limited to 150-300 pages, then many EISs will simply fail to inform the public of the likely impacts of the proposed project and/or fully consider analyze eminently reasonable alternatives. They will be successfully litigated.

If Recommendation 2.2 means only the EIS, but not appendices, will be limited to 150-300 pages, the bulk of essential information will simply be moved to appendices.

### **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.*

- “Political subdivision” is not defined. Is, for instance, the “California Strawberry Commission” of California, a strawberry industry group enacted by enabling state legislation in 1993, a political subdivision that will be able to be a “cooperating agency” alongside EPA for purposes of determining federal decisionmaking regarding use of methyl bromide, a global ozone depleter and farmworker poison? If the California Strawberry Commission would be considered a “political subdivision,” then the inter-agency process of cooperating on developing an EIS will become subject to paralysis through the intervention of hundreds of industry “commissions.”
- The NEPA Task Force has provided no evidence in its report that political subdivisions “are generally ignored in the planning of NEPA.” NEPA is designed to ignore nobody. If agencies are ignoring anybody in the planning of NEPA, those who are ignored have a basis for seeking redress in court.
- Current CEQ regulations already provide for federal, tribal, state, and local government stakeholders as well as full-time government commissions to serve as cooperating agencies. Recommendation 3.1 appears to add nothing to that, while at the same time greatly burdening the lead agency with coordinating numerous government and other stakeholders, each as cooperating agencies. This will not help with timeliness of agency decisionmaking, but it will certainly disadvantage non-governmental entities not considered “political subdivisions.”

*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.*

Existing state environmental review processes vary widely across states and thus any sweeping claim that “existing state environmental review processes” would satisfy NEPA processes is

unwarranted. The NEPA Task Force has not defined “functional equivalence,” but if it has any meaning, it would require, for instance:

1. Provision for scoping, draft EIS/EA comments, Final EIS/EA comments, and Records of Decision.
2. Development of a sufficiently broad Purpose, and factually accurate Need
3. 40 CFR 1502.14: The requirement to “rigorously explore and objectively evaluate all reasonable alternatives” including those submitted by citizens.
4. 40 CFR 1502.14: The requirement to identify all methodologies used in the discussions and analyses in EISs, including explicit reference to the scientific and other sources relied upon for conclusions.
5. 40 CFR 1503.4: Response to comments by the means listed in 1503.4
6. Section 1502.16: Discussions of direct, indirect, and cumulative environmental consequences and mitigation.
7. 40 CFR 1502.22: The requirement to obtain missing information relevant to reasonably foreseeable significant adverse impacts essential to a reasoned choice among alternatives.
8. The ability of citizens or organizations to litigate for failure to abide by the regulations.

Basically, a state NEPA will not be “functionally equivalent” to NEPA unless it requires the same level and frequency of public participation, consideration of all reasonable alternatives, requirements for scientific accuracy, and access to litigation provided by NEPA and the Administrative Procedures Act.

For a state NEPA to be the functional equivalent of NEPA, it will need to function essentially the same as NEPA functions and review processes will be no more nor less time-consuming, resource-intensive, or litigation-free than NEPA. Transparency of information, scientific accuracy, considering new alternatives, and genuine public participation aren’t “efficient,” but they are essential means to democratic process and careful stewardship of the environment.

#### 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. If implemented, the citizen suit provision would:*

- *[a] Require appellants to demonstrate that the evaluation was not conducted using the best available information and science.*
- *[b] Clarify that parties must be involved throughout the process in order to have standing in an appeal.*
- *[c] 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 is[sic] sustained.*
- *[d] 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;*
- *[e] 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*

Recommendation 4.1[a] adds nothing that is not provided for by Section 1502.24 (“Methodology and scientific accuracy”). The recommendation appears to imply by its use of the term “best available information and science” that only existing studies or data need be considered. This would negate Section 1502.22 (“Incomplete or unavailable information”), under which agencies must gather information when it is missing, feasible to gather, and essential to reasoned decisionmaking. Recommendation 4.1[a] would give agencies an incentive to avoid gathering on-ground or other relevant information so that adverse impacts need not be revealed.

A recent Final EIS (which has temporarily been withdrawn) would have authorized term grazing permits for 31 sheep allotments on a large plateau in the Manti-La Sal NF. Numerous entities (Tribes, the EPA, numerous conservation organizations, and the Department of Interior) had all requested information on the ecological condition and functioning of springs within the allotments area. The Forest has never surveyed the condition, water flow, or water quality of its springs in this project area, or elsewhere on the Forest. Recommendation 4.1 would allow the Manti-La Sal National Forest to continue its ignorance of conditions at springs (upon which numerous wildlife are dependent) that are being used by domestic sheep.

Recommendation 4.1[b] is not clear. “Involved in the process” is undefined.

Existing procedures require plaintiffs to have exhausted their administrative remedies before participating in litigation, and there are requirements for standing. The Task Force has not identified a problem that it is attempting to “fix” with Recommendation 4.1[b].

One uncompleted EIS for construction of a highway through rare federal wetlands in Oregon is now 21 years old due to repeated fundamental illegalities of the EIS, failure of the lead agencies to complete obviously-essential studies (e.g., how the highway would affect hydrology of the wetlands), constant modifications of the proposed highway to meet standards and cost limits, and opposition from within an intensely-divided community. Recommendation 4.1[b] would effectively preclude all people born within the past 40 years from participating in an appeal of the Final EIS.

Recommendation 4.1[c] ignores the existence of Federal Rule of Civil Procedure Rule 24(a) (intervention as of right) and 24(b) (permissive intervention), which apply equally to businesses, other interest groups, and individuals.

The Task Force cites (Report, p., 12) the statement by “one witness” that the Ninth Circuit has “repeatedly held that industry parties cannot intervene as a right in NEPA cases, asserting that the government is the only proper defendant.” The Task Force concludes, “This is one example of an interested party not being able to participate in NEPA litigation.” The Task Force seems not to have looked into the facts that (a) the Ninth Circuit has also said that public interest groups cannot intervene as a right in NEPA cases; and (b) that both private industry and public interest groups can intervene via permissive intervention, given some requirements of relevance applicable equally to both types of non-governmental entities.

Requiring all businesses and individuals that are affected by a settlement to be present at settlement discussions is not feasible. Recommendation 4.1[c] refers to inclusion of “the business and individuals that are ‘affected’ by a settlement.” If by “affected,” the NEPA Task Force is referring to affecting profits of a business, then it must equally refer to humans whose health is affected, or public lands users whose wildlife viewing or fishing are affected, or anyone whose quality of environment is affected. The point is that Recommendation 4.1(c) cannot simply privilege affected businesses over other affected parties.

Recommendation 4.1[d] proposes to alter established agency and court procedures regarding standing for the nation’s citizens to challenge agency decisions in court.

The term “directly impacted” cannot meaningfully be limited to impacts on private profits, given that impacts can also include loss of a view; the enjoyment of amphibians or salamanders; ability to teach one’s children about hunting or wild places; health; silence; a wetlands one has visited over the years; a biodiverse environment; healthy fisheries; or other aspects of the environment. Section 102 [42 USC § 4332 (B)] of the National Environmental Policy Act calls for establishment of NEPA procedures “which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations” [emphasis added]. Thus, any recommendation that

would privilege impacts to private profits over impacts to the environmental “amenities and values” fails our National Environmental Policy Act.

Recommendation 4.1[e] An arbitrary time limit for filing challenges would allow an agency to balk at providing information relevant to litigation until an effective challenge cannot be filed.

An arbitrary time limit for filing challenges would lead to excessive filing of challenges, including those occasioned by an agency failing to provide the public with the information necessary to file an effective challenge

*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.*

It is unclear why the NEPA Task Force believes that NEPA must be amended to require what is already offered by CEQ to the limits of its resources, i.e., advice to agencies regarding NEPA procedures in light of court rulings and NEPA requirements.

If the NEPA Task Force believes that agencies are not being able to access the information they need from CEQ, why is it not recommending a larger CEQ budget? Is the NEPA Task Force aware of any agency requests for advice on NEPA procedures that have gone unanswered by CEQ? And if such examples can be found, is the NEPA Task Force under the impression that CEQ was unwilling to provide such advice, or simply incapable, given the small CEQ staff and budget?

As is the case with so many other words being used by the NEPA Task Force in its recommendations, “pre-clear” is not defined.

If the NEPA Task Force is requiring that all agency (1) project analyses or procedures under NEPA or (2) determinations of projects as warranting a CE, EA, or EIS be reviewed for sufficiency, then the Task Force should calculate what CEQ budget and staffing would be required; what time that would add to an agency’s NEPA process; and what procedures would be needed to “pre-clear” projects that have been amended following CEQ indications that the projects do not meet standards.

The NEPA Task Force is not indicating what need is not currently being met by CEQ.

### 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 5.1 would require anyone who wants to propose an alternative to fund feasibility and engineering “studies.” This immediately privileges wealthy individuals, businesses, or other organizations that have the money to contract for “hired-gun” feasibility and engineering studies. Even if the NEPA Task Force was recommending the funding of environmental impacts studies, rather than or in addition to “feasibility and engineering studies,” this would privilege those who have the money to hire someone to do studies supporting their alternative.
- The NEPA Task Force has not provided evidence that Recommendation 5.1 addresses any documented problem. Has the NEPA Task Force documented that excessive numbers of alternatives are being proposed? That plaintiffs have succeeded in forcing agencies to analyze infeasible or unreasonable alternatives?
- By human nature, agency people often do not want to consider alternatives to their habitual ways of managing natural resources, or their usual approaches to building highways or ports or destroying chemical weapons or whatever their “specialty” is. But that’s why NEPA is such a profoundly essential law: It requires agencies to publicly analyze “all reasonable alternatives” to see if they might be able to better take the environment into account. When some members of the public, be they businesses, non-profit entities, communities, or individual citizens provide a reasonable and perhaps more environmentally sound alternative for undertaking public lands management, energy conservation or production, transportation, communications, health delivery, or other federally-funded or federally-managed activity, such alternatives simply become part of the universe of “reasonable alternatives” the agency is charged with analyzing under Section 1504.14.

Under Recommendation 5.1, an agency confronted with a truly reasonable alternative from the public could eliminate the alternative by forcing the proponent to provide the funding to prove that it must be analyzed. This is facially inappropriate.

- Recommendation 5.1 requires economic and feasibility analyses prior to the very NEPA process that would analyze economic and technical feasibility. This inappropriately transfers the duties of NEPA analysis to non-agency participants.

*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 [sic] an extensive discussion of the “no action alternative” as opposed [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.*

- Recommendation 5.2 suggests that NEPA be “amended” to require that the no-action alternative be “extensively discussed.” However, 40 CFR § 1502.14 already requires “consideration of the environmental impact of not taking an action” because it is one of the alternatives that must be “rigorously explored and objectively evaluated”.
- Recommendation 5.2 also suggests amending NEPA to require the agency to reject “no action” if its impacts “would outweigh the impacts of executing the project or decision.”

This recommendation is confusing, because it apparently says an agency would be required to reject the no-action alternative if its impacts “would outweigh the impacts of executing the...decision. “ What this means is not clear.

As well, this recommendation is unclear because there is no objective measure of whether the impacts of one alternative “outweigh” the impacts of another alternative. For instance, how does one “weigh” extirpation of a non-charismatic native species from a national forest due to an action alternative (e.g., a mining permit) against a claimed potential 1% loss of estimated quarterly profits (i.e., an economic impact) to an international mining company due to no action?

There would be no feasible way for a court to apply this “balancing test” in an objective manner.

The NEPA Task Force is not being forthcoming about the problem Recommendation 5.2 is supposedly addressing; or the desired outcome. Nor is the Task Force describing a mechanism by which an agency would be found guilty of not having legally “balanced” a complex of environmental, social, economic, and cultural “impacts.”

*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.*

Recommendation 5.3 that mitigation measures be mandatory is good. The recommendation, as worded, however, is nonsensical, saying that agencies would need to include a binding commitment to proceed with proposed mitigation unless it formally commits to mitigation implementation.

Recommendation 5.3, however, doesn't seem to require that the mitigation be monitored for its effectiveness, but only that mitigation proposed as part of the project be undertaken. Monitoring the efficacy of the mitigation is as essential as undertaking the mitigation. Most "restoration" projects, for example, are never studied for whether they actually restored what they were expected to restore. The recent *Science* article on post-fire logging of the Biscuit Fire in southern Oregon is a case in point<sup>1</sup>. What an agency might claim to be "mitigation" may in fact cause harm rather than providing mitigation.

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<sup>1</sup> Donato, DC, JB Fontaine, JL Campbell, WD Robinson, JB Kauffman, and BE Law. 2006. Post-wildfire logging hinders regeneration and increases fire risk. *Science* 311:352.

## 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.*

- It is not clear why the NEPA Task Force is proposing “regulations” to “encourage more consultation with stakeholders.” The CEQ as well as NEPA regulations already encourage early and frequent communication with stakeholders.
- Many public agencies do not have the budget to get out on the ground to monitor the impacts of what they’re doing, or to get “valid data” or “acquire new information.” Why is the NEPA Task Force not recommending larger budgets for these agencies?

Grand Canyon Trust has proposed to help survey five of 31 sheep allotments for impacts on aspen regeneration, springs, and boreal toad in Manti-La Sal National Forest. The Forest indicates that it doesn’t have the funding to survey these on even three of the 31 allotments. The difficulty here is not unwillingness on the part of stakeholders to have a “constructive dialogue” or to validate data or acquire new information. The major problem appears to be lack of Forest budget.

- It is not clear what the NEPA Task Force means by “consult in a formal sense with interested parties throughout the NEPA process” (emphasis added). In many projects there are numerous “interested parties.” In fact, for some projects, e.g., an aerial spraying, or a mining operation upstream of a community, there are thousands of “interested parties.”

*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.*

- The NEPA Task Force has not indicated what problem it is supposedly addressing with Recommendation 6.2. Regulation 1501.5 is already “codified” in the sense that the NEPA regulations are legally enforceable.
- The following sentence in Recommendation 6.2 is unclear: “In order to reap the maximum benefit of lead agencies, their authorities should be applied ‘horizontally’ to cover all cases.” We do not understand what this means. Presumably the NEPA Task Force is not proposing that the lead agency preempt cooperating agency responsibilities or legal obligations. What this means is not clear.
- The NEPA Task Force appears to be recommending that NEPA be “amended” to address a problem that is far better approached through early inter-agency cooperation so that a NEPA document adequately addresses the responsibilities of cooperating agencies. In Eugene, Oregon, for instance, a 21-year old FHWA/Oregon Department of Transportation proposal to construct a four-lane highway in BLM wetlands has not considered least damaging practicable alternatives (e.g., alternatives that would avoid wetlands destruction). Thus, FHWA has been putting Army Corps of Engineers in the position of calling for development and analysis of reasonable alternatives, although FHWA has been asked to do this for 20 years by community residents.

It is curious that the NEPA Task Force is proposing legislative fixes for a problem that is best solved by agencies following CEQ advice regarding early coordination and consultation with other government agencies.

**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 offset[sic] the pressures put on agencies by stakeholders and allow the agency to focus on consideration of environment [sic] impacts of the proposed*

- What is meant by a NEPA ombudsperson “with decision making authority” is unclear. It would seem that the best role CEQ can play is the role it does play to the extent its budget and staff size allow: CEQ provides practical and legal advice, training, and answers regarding NEPA questions to agencies as well as stakeholders. CEQ thus currently plays the informal, but exquisitely important role of “ombudsperson.” What kinds of “decision-making authority” the NEPA Task Force is contemplating is unclear.
- The meaning of the phrase “to resolve conflicts within the NEPA process” is not clear. Recommendation 7.1 refers to the need to “offset the pressures put on agencies by stakeholders and allow the agency to focus on consideration of environment [sic] impacts of the proposed action.” It is not clear what if any “decision-making power” would appropriately be vested in the CEQ to “resolve conflicts” an agency has with stakeholders.
- Remarkably, Recommendation 7.1 is the first (and only) NEPA Task Force recommendation in which the word “environment” appears.

*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.*

- “Cost ceilings” are not practical when agencies propose to impose projects that are environmentally, scientifically, legally, and/or socially indefensible. Such NEPA processes drag on and are expensive.
- It is not feasible for NEPA to recommend Congressionally-mandated “cost ceiling policies” given that projects have vastly different complexities and uncertainties, scientists or the public often bring information or concerns the agency had never before acknowledged, or the agency sometimes is taking the time to actually and seriously reconsider its own proposals.

- While CEQ could be directed to provide cost-cutting advice, it is not reasonable to charge CEQ with making recommendations for legislative “cost ceiling policies” if in fact CEQ understands that non-legislative approaches to cost-cutting will be more effective.

**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.*

- Recommendation 8.1 would violate 40 CFR § 1502.14 (“Methodology and scientific accuracy “), because it would declare “an agency’s assessment of existing environmental conditions,” no matter how incomplete or inaccurate, as “the methodology to account for past actions.” Agencies often assess existing environmental conditions with scientifically unsound methods. For instance,
  - Agencies rarely use minimally-impacted reference systems (e.g., livestock-free, ORV-free, water diversion-free, natural fire regime sites) to compare with impacted systems and thus underestimate the degree of alteration or degradation that resides within “existing environmental conditions.”
  - The agencies rarely have “existing conditions data” on more than a tiny fraction of the wildlife and plant species within their project or jurisdictional boundaries.
  - Different “past actions” variously impact different resources. The agencies rarely have data on more than a fraction of the different “resources” within their agency jurisdiction.
  - “Existing environmental conditions” can vary widely year to year solely through climatic influences. These are difficult to separate from conditions due to past activities unless there are numerous sites with data gathered from numerous years.
  - An “assessment” is not a “methodology.” An assessor uses methods to assess conditions, and those methods may or may not accurately assess those conditions. For Recommendation 8.1 to declare a poorly-done assessment as a legitimate method to account for past actions is not appropriate.
  - “Existing environmental conditions” may be due to current, ongoing activities as much or more than to “past actions.” Western U.S. land management agencies, for instance, consistently blame current degraded upland conditions on livestock “overgrazing” in the early 1900s. Much of the current conditions, however, are simply due to current grazing.

The assessment of cumulative impacts associated with a given project must involve an assessment of the interaction of past, current, and future reasonably foreseeable activities within the project area.

*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.”*

- Recommendation 8.2, like Recommendation 8.1, would prescribe a scientifically indefensible method of estimating cumulative impacts. By focusing only on “impacts of concrete proposed actions” (whatever they are), the Recommendation requires agencies to keep their heads in the sand. For instance, upcoming Forest plans under the 2005 regulations will indicate activities that will likely take place during the coming decade in order to achieve each Forest’s Desired Conditions. However, none of these activities will be “concrete proposed actions.” They will be, in the words of the U.S. Forest Service, merely “aspirational.” Recommendation 8.2 would require agencies to ignore all those likely actions and pretend only that the handful of actions that are definitely planned and proposed will happen. This is like requiring planning to be based only on those hurricanes that are currently sighted as heading toward shore.

### **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*

NEPA is a unique law in its triple-bottom requirements that (1) agencies analyze reasonable alternatives to proposed decisions and projects that might have significant impacts on the nation’s environment using (2) science and transparent sources for their analyses and conclusions while (3) meaningfully and creatively engaging the public and government agencies in all steps of this process.

While it might be interesting for CEQ to lay out the way NEPA interacts with and complements other laws, the issue of “duplication” will likely turn out to be a non-issue.

It seems, however, that a much more useful charge to CEQ would be to prepare a report on those processes that have resulted in lead agencies successfully focusing up front on the issues that matter to all cooperating government agencies and public stakeholders, so that the NEPA process has proceeded more smoothly and final decisions have been widely accepted.

*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.*

The study proposed in Recommendation 9.2 would be useful. However, the key finding would almost certainly be that agencies are being starved budget-wise such that the under-funded NEPA staff in the agency are having to coordinate the development of documents for projects that lack sufficient on-ground data to justify conclusions; have been undertaken without up-front collaboration with interested local and national stakeholders; lack a hard look at reasonable alternatives; and/or are serving agency habits and established political alliances more than the National Environmental Policy Act.

*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; [sic] and*
- b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication.*

State “SEPA’s” vary greatly in the degree to which they mirror NEPA’s triple bottom requirements of alternatives, science, and public participation. State and local “mini-NEPAs” are often used for state and/or local project decisionmaking. Decisionmaking about federal management or projects does not appropriately devolve to states, particularly in the realm of environmental matters. Environmental impacts rarely stop at a state’s borders, particularly in terms of cumulative impacts (e.g., the nationwide cumulative loss of wetlands, one by one).

The study proposed by the NEPA Task Force could be useful, particularly for identifying the ways in which various state “mini-NEPAs” lack essential elements of NEPA.

### **Conclusion**

In sum, the Grand Canyon Trust does not find the NEPA Task Force to have provided a compelling case for any legislative “amendments” to NEPA. One possible exception may be Recommendation 5.3 to require that mitigation be implemented. However, monitoring of the outcomes of “mitigation” would likewise need to be funded, or “mitigation” could mean “damage.”

With the exception of Recommendation 5.3, the Task Force recommendations appear to attempt to “fix” non-problems with NEPA by inappropriately diminishing a number of positive elements of current NEPA practice:

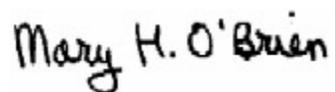
- non-business public participation
- non-local public participation
- the time and money agencies can use to coordinate with government agencies, re-think their proposals, consider public input, or provide quality analyses
- the use of appropriate scientific methods
- the consideration of reasonable alternatives
- the consideration of reasonably foreseeable future impacts.

Such recommendations do not “improve” NEPA.

As a final editorial comment, the NEPA Task Force could well learn about clarity of words and unambiguous meanings by re-reading the CEQ regulations. They, unlike the Task Force

recommendations, are transparent as to motive (i.e., fulfilling the intent of the National Environmental Policy Act), and are understandable.

Respectfully,

A handwritten signature in black ink that reads "Mary H. O'Brien". The signature is written in a cursive, slightly slanted style.

Bill Hedden  
Executive Director  
Grand Canyon Trust

Mary O'Brien  
Utah Program  
Grand Canyon Trust