THE ROLE OF NEPA IN THE STATES OF WASHINGTON, OREGON, IDAHO, MONTANA AND ALASKA.

OVERSIGHT FIELD HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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OVERSIGHT FIELD HEARING ON THE ROLE OF NEPA IN THE STATES OF WASHINGTON, OREGON, IDAHO, MONTANA AND ALASKA.

Saturday, April 23, 2005
U.S. House of Representatives
NEPA Task Force
Committee on Resources
Spokane, Washington

The Task Force met, pursuant to call, at 10:00 a.m., in the Phase I Building Auditorium at the Washington State University, Riverpoint Campus, 668 North Riverpoint Boulevard, Spokane, Washington, Hon. Cathy McMorris presiding.

Present: Representatives McMorris, Cannon, Gohmert and Inslee.

Miss MCMORRIS. Good morning, everyone. I'd like to begin this hearing by introducing the members of the Boy Scout 171 Troop from Woodbridge Elementary who will present the colors. So, if everyone would please stand.

[Pledge of Allegiance recited.]

Miss MCMORRIS. Thank you very much. Well done.

[Applause.]

Miss MCMORRIS. Well, thank you, everyone, for coming—for giving up your Saturday morning to be here and especially to the other members of the Task Force who are here. I thought I would just start by taking a moment to have—if you would please introduce yourself and share with the audience where you're from. That would be great.

If you would start us off, Mr. Inslee.

Mr. INSLEE. Thank you. Jay Inslee. I represent the First District which is south of Everett. And I'm the number one fan—chairman of the John Stockton fan club in western Washington.

[Applause.]

Mr. CANNON. Of course, I actually represent the John Stockton fan club—in Utah for many years. I represent the central part of Utah. Utah is the seventh most urban state in the union because of the desert—people live in the desert area. So, I represent a quarter of the state—a little over a quarter of the state. Under the county to the west, west desert.

And I want to thank all of you for coming out here and have the green and black stickers on. This is an important process for us. And I don't think anybody here can exceed my—one of my views

as an environmentalist (unintelligible). But I want you to understand that there are better ways of doing things. And hopefully this process will begin to—hello—hopefully this process will begin to discover what those ways are so that we can add to the—a better cost of society with much more efficiency (unintelligible) solving problems. We can do something about it.

The fact is, our biggest problem together is not people building buildings on top of a habitat. It's (unintelligible) species. That's where the bulk of the structure of species is coming from. So, we have huge problems that we deal with and deal with effectively as a society. Or we can ourselves and not progress that's important.

Thank you for being here. We appreciate your participation.

Miss MCMORRIS. One of my fellow brethren who joins us for Texas, Mr. Gohmert.

Mr. GOHMERT. I'm Louie Gohmert. I'm from east Texas. And we do have a lot of trees and natural resources and (unintelligible) Texas. And I'm delighted to be here in Spokane. It's a beautiful area around here. And I hope that what I'm seeing in Washington doesn't play out across the country too far. Some people are so (unintelligible) with such bureaucratic inefficiency that they don't want to see change. And I want to—there's nothing I've ever done in my life that I couldn't review and find some way to do it a little better next time, whether it was a competition I won or whatever.

And so I'm wanting to do things better and improve—now I don't—the empowerment, of course, and the ways of protecting the environment. So, I'm looking forward to the testimony here. I appreciate the wonderful hospitality in this area. We thought we were good about hospitality back home, but this has been great. Thank you.

STATEMENT OF HON. CATHY MCMORRIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Miss MCMORRIS. Well, thank you, everyone, for being here. And I think your attendance, without a doubt, shows the importance of NEPA, the National Environmental Policy Act, and the interest in the work of the Task Force.

I want to thank the Members for their attendance as well as the members of the panels. It is vital to the efforts of the Task Force that the Members hear an array of views and thoughts on NEPA.

As one of the first environmental laws passed in this country, NEPA was visionary for its time. It started with the goal of establishing a national environmental policy to guide the action of Federal decisionmakers. Today over 80 Federal agencies have developed their own NEPA guidance, and NEPA has been modeled in over 20 states, including here in Washington.

What started as visionary but overly vague has now grown into 25 pages of regulations, over 1,500 court cases, and several hundred pending lawsuits. Too often instead of progress and results we see delays and conflict. And while there's been little change to NEPA itself, it's been amended only twice, there's been no shortage of activity surrounding the Act.

Litigation began within three years and there have been several legislative streamlining proposals, not to mention the countless articles and discussions. NEPA has also changed. In 1997 under

President Bill Clinton, CEQ, which is the White House's Counsel on Environmental Quality, reviewed NEPA and concluded that NEPA takes too long and costs too much and that documents are too long and too technical for people to use. Indeed by 2000 the average length of an environmental impact statement had grown to 493 pages. Some estimates show that the average cost of an environmental impact statement is between 500,000 and 2 million. And the average EIS takes over two years.

Undoubtedly the NEPA process has increased the Federal government's awareness of environmental consequences. And there have been cost savings, increased public participation and other benefits. This awareness has not necessarily translated, though, into a better NEPA process. It is against this backdrop that the Task Force seeks input to what is working well, what is working poorly, and what can be done to ensure that the original intent of NEPA is fulfilled.

Our new vision for NEPA should be to reform the process in ways that foster a spirit of dialog and collaboration so that stakeholders work together with a common purpose of making projects the very best they can be for our communities and our environment.

Today we will hear from NEPA experts, Federal and state officials and groups that have participated in the NEPA process. The goal is to create a complete and rich record that can guide us as we formulate recommendations.

I do want to mention that one of the integral parts of NEPA is that it calls for public participation and public comment. Even though we only have 13 witnesses here today, we want to hear from everyone. And I encourage you to submit your comments to the Resources Committee so that we can take all comments and recommendations into consideration.

At this time, I would like to acknowledge Mr. Inslee for any opening remarks he might have.

STATEMENT OF HON. JAY INSLEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. INSLEE. Thank you. And I want to thank the Chair (unintelligible) in Congress for the willingness to take on this responsibility. And so thank you very much for your (unintelligible) having you on the Committee already.

I do have some comments I'd like to make. I want to say that, first, I approached this responsibility with a fair amount of humility, which might be (unintelligible) politics I suppose. But I do so because I really feel—for a variety of reasons.

Number one, I really feel that we are walking in the footsteps of giants here. This is something that Henry Jackson created. This is one of his absolute marked achievements in his illustrious career in the State of Washington. And any time you talk about sort of redrafting, rewriting something of—something that has had such a success by such a great (unintelligible) in Washington. You have to approach it with some humility.

Second, flying over this morning, I just got kind of an eyeful of what this is about, which is, you know, the place as you know it the Creator worked on everywhere else. And when he got done

practicing, he made Washington. When you fly from Seattle to Spokane you really get a flavor of that.

Look down (unintelligible) at lake where my dad first took me hiking when I was ten years old. Grand Coulee and Dry Falls and—you know, it's just—it really is an incredible spot we live. And NEPA is important to the preservation of that.

But there's a third issue that I sort of—I think you should have some humility about which isn't the land which is obvious on NEPA. But NEPA is really the—perhaps as or more important it's about people. It's about people's access to the democratic process. And it's the ability of individuals and communities to make sure that their voices are heard when their Federal government is charged with responsibility to protect their land and their water and their air.

And this issue of NEPA is really in my book a perfecting process of our democratic institutions to make sure that agencies listen to people that they're intended to protect. That people do consider alternatives. That people do consider it as any business would to look at alternatives and make investments early so you don't make mistakes late.

These are real fundamental concepts of democracy. And it's just not environmental issues that we are concerned with. It is a democratic principle that agencies work for the people rather than people working for the agencies. And NEPA probably is one of the single most effective tools to date of making sure that people remain ascended in these decisions.

And I want to say a couple things. NEPA has processes that cause great angst, anxiety and concern. It is an issue that involves people who want to move quicker than the NEPA process allows in time. It creates a lot of frustration.

But I think it's important just to know some of the successes.

You look at Hanford where because of the NEPA process, we avoided about a $500 million bad decision that the Department of Energy wanted to make. And when citizens finally had their input, it saved the Federal government $500 million.

You look at the North-South highway where we had some improvements made. There were communities locally concerned was—were taken into consideration. And look at the Hauser situation, when we're told there was no NEPA compliance when we had this fueling station went in. Now we have a potential contamination of the Spokane aquifer. This is a local issue in Spokane County. And that's why I'm very appreciative (unintelligible). There are people concerned about this. I see about, oh, 120 people wearing stickers saying "I support NEPA." And I think that reflects a broad concern.

Two other points I want to make. When we consider NEPA, I think it's important in our discussions that we consider it in coordination with the other parts of our environmental protection scaffolding that protects our clean air and clean water. And I don't think we can consider it alone. And I have to say that I approach this with some caution. Because right now the Federal government has had significant rollbacks in a whole host of environmental protections for its citizens.

We've seen rollbacks in protection against arsenic in our water. We've seen rollbacks in protection of mercury in our air. We've seen a failure to fund Superfund site activity. We've seen rollbacks on a whole host of issues. We've seen a failure to deal with global warming issues.

And I think that when we have that sort of host of reductions of environmental protection going on in our Federal government, NEPA is more important than ever. And I think NEPA is—probably is more important now than perhaps it has ever been.

One other point I'd like to make is I hope that in our discussions we look for ways and I think we'll find principle ways to improve and help agencies in their executive performances of statutes. Statute is one thing; agency performance is another. And I'm going to be very interested in what our witnesses talk about how to help the agencies perform their duties better to give them the resources. And I have tell you I'm very concerned about the budget cuts in the forest service and the national parks right now making it more difficult for them to comply with their environmental responsibilities.

But I think we also need to look at ways to strengthen NEPA to fulfill its obligation of citizen input environmental protection. For instance, I think we need to look at can we make NEPA better, look at the cumulative impacts of individual decisions.

We passed an energy bill in the House the other day that has some cumulative impacts, for instance, on global warming. Does NEPA do a good enough job to consider those cumulative impacts? I think there's that kind of issue.

Are we doing a good enough job helping agencies become educated about NEPA compliance? You know, a lot of these lawsuits when the courts decide there was lack of NEPA compliance, it's not the statute's fault. It's the agency's fault for not complying. People get mad at NEPA. Perhaps there should be some angst at agencies on occasion. Can we help them more.

And third the budgetary issue.

So, those are kind of the things I'm interested in. I want to thank my friends from other states and look forward to working with you. Thank you.

[Applause.]

Miss MCMORRIS. Thank you. At this time, we're going to hear from our first panel. And I will ask that all of the Task Force members' statements be included for the record.

On the first panel, we have six people.

To give us a bit of history and context is Thomas Jensen. He is an attorney with Sonnenschein, Nath & Rosenthal, LLP, and Chairman of the National Environmental Conflict Resolution Advisory Committee.

Second to talk about NEPA and its impact on infrastructure is Doug MacDonald. He's the Secretary of Washington State's Department of Transportation.

To give the panel light on NEPA's role in hydroelectric project relicensing is Bob Geddes. He's the General Manager of Pend Oreille Public Utility District.

To provide the perspective of a Federal agency line manager is Abigail Kimbell. She's a Regional Forester, Region 1, of the U.S. Forest Service who joins us from Montana.

To give us some insight into the state mini NEPA is Michael Kakuk, an attorney from Helena, Montana. And he worked on MEPA, which was the Montana Environmental Policy Act.

And then finally is John Roskelley, who is former Spokane County Commissioner and member of the Eastern Washington Growth Management Hearings Board, who will share with us the importance of public participation.

Miss MCMORRIS. So, I thank you all for joining us today. And I might just mention that this is a regional hearing. This is—we've asked for a broad base of folks from around this region being Washington, Oregon, Idaho, Montana and Alaska.

It's the policy of the Resources Committee to swear in witnesses. So, for those of you who are going to participate right now in the panel, I will ask you to stand and raise your right hand.

[Witnesses sworn.]

Miss MCMORRIS. Let the record reflect that the witnesses answered in affirmative.

Before we get started, I wanted to point out that there are lights at the front of the table to control the time here. Each witness has five minutes. When the light turns yellow, you will have one minute. And when it turns red, please wrap up. Your full testimony will appear in the record. Keeping the statements to five minutes will allow more time for questions.

So, with no further ado, Mr. Jensen, would you please begin.

STATEMENT OF THOMAS JENSEN, ESQ., ATTORNEY, SONNENSCHEIN, NATH & ROSENTHAL LLP, CHAIRMAN, NATIONAL ENVIRONMENTAL CONFLICT RESOLUTION ADVISORY COMMITTEE, U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION

Mr. JENSEN. Madam Chairman and members of the Task Force, thank you for allowing me to appear today. As the first speaker, I think it would be helpful if I provide some context for the rest of the hearing and the rest of your work.

I'll offer context in three different perspectives. The first is Spokane itself. As Congressman Inslee pointed out, we're in the home state of NEPA's father, Henry Jackson. I think equally important, though, Spokane is a growing town with a changing economy, surrounded by public lands that are used and valued by all sorts of different interests in different ways.

We are downstream from the nation's largest Superfund site. We're next to two states with very different environmental rules and cultures and competing economies. We're downwind from Hanford. We're connected to a federally managed, federally owned high power system that other states would love to get hands on. And we're on a river with more demand than supply. It's a good place to think about NEPA.

The second context I would offer is this. There's lots of discussion about NEPA's purpose. And I think it's easy to get lost in the weeds. The place to start is to remember Winston Churchill's quip

about democracy which is that it's the worst form of government except for all the others we've tried.

The problem that NEPA set out to solve—I'll put it in very colloquial terms—myopic, dishonest, dumb government. It's NEPA was about government. People link NEPA because of the chronology to other environmental laws like the Clean Air Act, the Clean Water Act, and the Endangered Species Act.

But I think it is probably more useful to think of NEPA as being akin to the Freedom of Information Act, the Government Performance Results Act, the Information Quality Act, even the Debt Collection Payment Act that requires government to pay interest on its debts when it's late paying them.

If you trust government to always do the right thing for you, for your community, for your business, your family or the environment, you probably don't care about NEPA or any of those other laws. If you don't trust government, utterly, on those grounds, then NEPA is pretty relevant to think about.

I think the last piece of context here is that as you look at—as you hear other witnesses, as you look at the law and look at the history, maintain a distinction in your mind between symptoms and causes. You'll hear a lot about the symptoms, and they're very real: Delay, litigation, uncertainty, dumb paperwork. I assume those boxes behind you are evidence. Interagency confusion. Non-Federal employees being frozen out of the process. The selective nonuse of NEPA by green agencies when they're doing something good for the environment. Those are important symptoms. We live and breathe them. They're out there. But the causes are different, and they're more important in the long-run. What I'll—and I'll talk mostly about them. And my comments come from spending the last two-and-a-half years chairing a Federal Advisory Committee, very verse, bipartisan, Federal advisory committee to the U.S. Institute for Environmental Conflict Resolution looking at NEPA, looking at environmental conflicts. How to resolve them. How to turn down the heat nationwide.

NEPA's problem is in its implementation and not the law itself. NEPA implementation should rely on three components, three factors.

The first is National Environmental Policy. It's Section 101 of the statute. It's the policy. The second leg is environmental analysis, which is in Section 102. And the third leg is public engagement.

NEPA usually stands on just one of those legs, the second one, analysis. EIS's and EA's of paper. An analysis is often too kind a word for what really is just compiling information.

The National Environmental Policy, Section 101, is a remarkable text. It expressly integrates environmental quality with the quality of our country's economy and culture. It comes as close to anything I know of to framing a set of environmental, economic and social goals that most Americans could agree on. It's common language which is the thing that we most need if we're going to understand each other and get along.

NEPA is about improving governments. The management of decisions affecting the human environment. And the term human environment is key. It's in the statute. It doesn't just mean what's out there. It means natural places and built places. It means cities and

salmon. It means wilderness and neighborhoods, families and frogs, health and wealth, clean air and safe streets. America as a whole. I think the meaning has been lost over time, but it's there. It's in the law.

The courts decided that Section 101, the purpose, was not enforceable. It was too broad. It was too aspirational. And as soon as the agency saw that the courts wouldn't enforce it, they abandoned it or they paid lip service to it at best. The fact that the courts have declined to enforce the laws policy does not mean that the Federal government should not attempt to achieve it.

The first recommendation of the Task Force is that we need to bring Section 101 back into the central place that NEPA's framers intended. And we need that common language.

The second missing piece is public engagement.

Engagement is something entirely different and a lot more meaningful and productive than just giving people a chance to comment on a draft EIS. The advisory committee members believe very strongly that there are well-developed, disciplined practices and principles for engaging effective interest in agency decisionmaking that will reduce the number of conflicts, resolve conflicts and, as I said earlier, turn the heat down. Solve problems.

Not every issue is resolvable. And some things will have to get resolved in the courts or in the political process. But we can do a lot better than we are doing now. That's the problem with NEPA. We need to fix those parts.

Without Section 101, without robust principle public engagement, NEPA is employed as a compliance exercise rather than a thoughtful, strategic, conclusive planning opportunity. It's a missed opportunity for agencies, project proponents and the affected public. It doesn't solve the myopic, dishonest, dumb government problem which NEPA was aimed at.

We have to stop confusing process with the purpose of a law. We have to put more emphasis on people, our people, than on paper. We need to link the policy of the law to reliable, useful, honest analysis and the respectful engagement of all affected parties. That's the way we get decisions in a timely way that earn support, face fewer challenges and survive the challenges that do arise.

I think NEPA done right is capable of working effectively and efficiently with the cities and the families and the species who are downwind, downstream or just outside the attention span of comprehension or understanding of Federal agencies.

Thank you very much.

[The prepared statement of Mr. Jensen follows:]

Statement of Thomas C. Jensen, Esq., Sonnenschein, Nath & Rosenthal LLP, and Chairman, National Environmental Conflict Resolution Advisory Committee, U.S. Institute for Environmental Conflict Resolution

Madame Chairwoman and Members of the Task Force, thank you for inviting me to participate in today's field hearing. It is an honor to be present and to have an opportunity to discuss ways to improve the National Environmental Policy Act.

The Task Force asked that my testimony focus on differences between the intent of the framers of NEPA and the manner in which the law is implemented today. The perspective I bring to this task is shaped by three major influences.

First, I have worked as an attorney on NEPA-related matters for 22 years, and am familiar with the way the law has been applied in numerous and diverse contexts, including, among other things, cross-border electric power lines, federal water

contracts, federal dam operations, pipelines, hydropower licensing, military base realignment, fish and wildlife restoration, and radioactive waste.

Second, I have served for most of the last decade as a trustee of the University of Wyoming's Institute for Environment and Natural Resources, along with each sitting and several former Wyoming governors, Senator Craig Thomas, and former Senator Al Simpson, leadership of the state legislature, and representatives of virtually every agricultural, energy, and environmental constituency in the state. The University's Institute sponsored an extended analysis of ways to improve NEPA implementation, involving, among others, former Resources Committee staff counsel.

Third, over the past two-and-a-half years I have had the privilege of serving as chair of a very diverse, bipartisan federal advisory committee, formally known as the National Environmental Conflict Resolution Advisory Committee or NECRAC, focused on ways to prevent and resolve environmental conflicts and measures to improve implementation of NEPA so as to fulfill its policy goals. The Advisory Committee's work offers ideas that respond directly to this Task Force's mandate and I will describe the Advisory Committee's work and findings later in my testimony. My testimony today is given on behalf of the Advisory Committee, though at certain points, I will offer my individual opinion.

To begin, let me note how fitting it is to hold this first NEPA Task Force hearing here in Spokane. In many respects, the State of Washington, not the District of Columbia, is NEPA's home. Henry M. Jackson, who first served six terms in the House of Representatives, then Chaired the Senate Committee on Energy and Natural Resources from 1963 to 1980, is widely recognized as the central figure in NEPA's creation. Many other people were involved, including his senior committee staff, Bill Van Ness and Dan Dreyfus, and his advisor, Dr. Lynton Caldwell, but Senator Jackson shepherded NEPA from introduction to enactment.

Washington's former senator, who played a leading role promoting development of western natural resources through support for multiple use of public lands, reclamation farming, and hydropower development, is the father of America's environmental policy. He knew what he, his constituents, and the country were dealing with. Here, from a statement he made in 1969, is how Senator Jackson explained to his colleagues in Congress the problem he was trying to solve:

> Over the years, in small but steady and growing increments, we in America have been making very important decisions concerning the management of our environment. Unfortunately, these haven't always been very wise decisions. Throughout much of our history, the goal of managing the environment for the benefit of all citizens has often been overshadowed and obscured by the pursuit of narrower and more immediate economic goals.
>
> It is only in the past few years that the dangers of this form of muddling through events and establishing policy by inaction and default have been very widely perceived. Today, with the benefit of hindsight, it is easy to see that in America we have too often reacted only to crisis situations. We always seem to be calculating the short-term consequences of environmental mismanagement, but seldom the long-term consequences or the alternatives open to future action.
>
> [T]he present problem is not simply the lack of a policy. It also involves the need to rationalize and coordinate existing policies and to provide a means by which they may be continuously reviewed to determine whether they meet the national goal of a quality life in a quality environment for all Americans. Declaration of a national environmental policy could, however, provide a new organizing concept by which governmental functions could be weighed and evaluated in the light of better perceived and better understood national needs and goals.
>
> The introduction of these bills is a manifestation of public and Congressional concern which is widely felt and widely expressed. The concern is that we may be giving insufficient public attention to one of the most serious threats to the future well-being of our Nation and our civilization-the mismanagement and degradation of our physical environment.[1]

The public perception of impending environmental crisis was probably more acute and widespread in 1969 than it is today, when many environmental problems tend to be harder to see. A declining species or gradual change in ocean or atmospheric chemistry is not as apparent to the average person as a belching smokestack or burning river. I have heard NEPA criticized as being out of date. Written for a different, simpler era. It may be fair to say that the law was written in a simpler era, at least to the extent that the polarities of good and bad, dirty and clean, were in

[1] Hearing before the Committee on Interior and Insular Affairs, April 16, 1969, Introduction of S. 1075, S. 237 and S. 1752 91st Cong. first session.

sharper contrast. But it badly shortchanges Senator Jackson and NEPA itself to say that the law was written for a simpler era and, as such, is not a good fit for today. I ask you to listen to what Senator Jackson said in 1969, explaining why his proposed legislation included an overarching statement of national environmental policy:

> As a nation, we have failed to design and implement a national environmental policy which would enable us to weigh alternatives, and to anticipate the undesirable side effects which often result from our ongoing policies, programs and actions.
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> A statement of environmental policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations. It serves a constitutional function in that people may refer to it for guidance in making decisions where environmental values are found to be in conflict with other values.[2]

An expression of national goals and aspirations. Guidance in making decisions where values may be in conflict. A constitutional function. These attributes of the law do not go stale with time.

The National Environmental Policy Act combines philosophy, policy and process. NEPA is best known for its process: it is the law that requires federal agencies to conduct environmental reviews and prepare environmental impact statements, a procedure that has been copied by many states and by nations around the world.

NEPA is less well recognized for the truly remarkable and far-sighted philosophy at its core, which is stated in NEPA Section 101. The statute defines a National Environmental Policy for the United States. How many Americans know that our country has a national environmental policy and that it has been the law of the land for three decades? Even NEPA practitioners who know that the policy exists often have trouble recalling its terms. [The text of Section 101 is reproduced in Appendix 1].

NEPA Section 101 declares that it is and shall be the continuing policy of the federal government to create and to maintain conditions under which man and nature can exist in productive harmony. The federal government is to use all practical means to improve and coordinate federal plans, functions, programs and resources to achieve a wide range of social, cultural, economic, and environmental values. And NEPA is clear in stating that each American has a responsibility to contribute to the preservation and enhancement of the environment. The nation's environmental policy is written in expansive, hopeful terms that virtually all American would accept.

NEPA's purpose usually has been characterized as "better incorporation of environmental values in federal agency decision-making." This is true, but it is only partly descriptive of NEPA and it does not do justice to the vision of the drafters of the law. They had something more encompassing in mind. Agency decision-making was to change to incorporate environmental values not for their own sake, but because doing so would improve our nation's governance. And improved governance would (to paraphrase the law) function in a manner calculated to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

In other words, people—families, businesses and communities—have been part of NEPA from the very beginning, and not as subordinates to environmental values, but as the beneficiaries of them and participants in their realization. The drafters of NEPA set a policy for the United States that expressly integrates environmental quality with the quality of our country's economy and culture. Section 101 articulates a national policy for the environment that is an elegant and compelling philosophy of balance, innovation, and personal responsibility. It comes as close as anything I know of to framing a set of environmental, economic, and social goals that most Americans could agree upon. It holds the potential to bring common purpose to our fellow citizens' dealings with each other and their government over natural resource and environmental issues.

My advice to the Task Force can be summarized this way: NEPA was written to deal with the problem of uninformed, indifferent, or careless government action harming the human environment. It is an excellent statute. NEPA is inspired, forward looking, valuable, and entirely suitable as written to our country's contem-

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[2] Hearing before the Committee on Interior and Insular Affairs, April 16, 1969, Introduction of S. 1075, S. 237 and S. 1752 91st Cong. first session., Appendix 2.

porary needs. The risk of poorly informed government action is a non-partisan, 50-state, enduring problem, and NEPA is a vital tool in limiting that risk.

I am well aware that not everyone sees the statute in a favorable light. We need to acknowledge that some of the criticism of NEPA is motivated by dissatisfaction with the degree to which environmental concerns limit economic development choices. Some interests simply believe that the law is too protective of environmental values, while others believe that it does too little.

We must understand and respect those perspectives; people have different values and different interests. Yet when I hear NEPA criticized that way, three things come to mind.

I remember the two most heated, personal denunciations of the law I have ever heard, both of which happened to come from Wyoming ranchers. Real ranchers. Hard core private property advocates.

The first rancher attacked NEPA because the federal government was not doing enough to prevent recreational ORV users from tearing through his grazing allotment. They should be doing an EIS on those people and stopping them from destroying my pastures and ripping up the creeks! The second rancher was outraged and nearly desperate because saline groundwater pumped from a federally permitted coalbed methane well was flowing across his land, eroding pastures, and killing off the only trees for miles around. How can the feds let them do that to us? They should have done an EIS and stopped it! Third, without naming names, I will say that anyone who practices in the NEPA area knows of many, many instances where NEPA has been successfully invoked, in litigation or otherwise, by economic development interests against their private sector competitors.

The real problem with NEPA is not that it is too green or not green enough. Most of the criticism of NEPA, whether the critic recognizes it or not, is rooted in the way the law is implemented, not in the fact that the law seeks protect the quality of the human environment. The problem is that parties with different values compete for primacy in agency decision-making and agencies sometimes do not administer or manage the competition effectively.

Let me describe how NEPA is often experienced by regulated parties, interested citizens, and even other government agencies. At the risk of unfairly generalizing, the stereotypical federal government agency has limited financial and personnel resources, resents criticism, resists sharing authority, and rewards conformity and predictability. For these and other reasons—increasingly because of budgetary constraints—many agencies are reluctant to give the public a meaningful voice in agency decisions.

When that happens, people feel left out and angry. Agency decisions made under NEPA are often challenged by parties who perceive their interests to have been ignored or handled without appropriate respect. Challenges come from all directions: ranchers downstream of federally permitted mining operations; communities facing loss of tax base due to land trades or closure of federal facilities; cities or states competing for water supplies; homeowners facing loss of property value or family safety due to new roads; environmentalists opposed to loss of natural places; developers denied economic opportunities.

There is also another common experience of NEPA implementation. Let me again invoke the stereotypical government agency. Especially in those cases where the agency has responsibilities that implicate both economic and environmental values, the agency often does not know what to do when those values appear to be in conflict. Though equipped with professional expertise—scientists, engineers, planners, economists, lawyers—and a genuine commitment to public service, agencies often face competing legislative mandates, conflicting political influences, and varied understandings of the public interest. Inaction or indecision often seems the safest choice. In my practice, which largely consists of representing business and other private sector development interests on environmental matters, I regularly experience the intense frustration of businesspeople over the apparent inability or unwillingness of agencies to simply make a decision, any decision, even a "no," in a reasonable time frame. Usually we can overcome the delay, but not always.

These sorts of experiences with NEPA reveal two major problems in NEPA implementation. These problems lie at the heart of much of the criticism directed at the statute and explain why NEPA has yet to fulfill the vision of its drafters.

The first problem is that the courts and federal agencies have mostly dismissed or ignored the law's statement of policy.[3] The U.S. Supreme Court has declined to enforce NEPA's statement of purpose, though the courts have generally been willing to enforce the law's procedural requirements. Agencies have taken the cue from the

[3] The judicial treatment of NEPA has been explored by numerous legal scholars. The articles in Appendix 2 are particularly useful.

Court and rarely paid more than lip service to achievement of NEPA's purposes, while pouring significant effort into NEPA's procedures. Yet NEPA is the National Environmental Policy Act, after all; and the policy is expressed clearly and forcefully in Section 101. It is there to be used, but it rarely plays a central role in decision-making.

As a consequence, NEPA's procedures are often mistaken for its policy. Process (i.e., the environmental review mandated by Section 102 of the law) was intended by the drafters of the statute to serve to fulfill the law's policy, not to substitute for it. Sections 101 and 102 are complementary, not interchangeable. The strength of NEPA's policy statement has been under-used and under-recognized. The fact that the federal courts have declined to enforce the law's policy does not mean that the federal government should not attempt to achieve it. The thing we need the most to resolve problems and understand each other is a common language. NEPA has it, it is in Section 101, and we need to use it.

The second major problem with NEPA is that federal agencies have not been adequately creative or strategic in deciding how to work with NEPA's provisions for public involvement. NEPA pushes agencies to be better informed and more thoughtful about their plans, and to involve the public, but it does not tell the agencies how to take optimal advantage of the thoughtfulness and knowledge of the American public in shaping agency plans. The NEPA process requires agencies to involve the public, but it does not say how best to engage informed interests and affected communities.

The burden has largely fallen on federal agencies to decide what to do with the diverse opinions of interested parties who choose to express their views on a proposed federal action. Under the traditional model for NEPA implementation, agencies announce their plans, share their analyses of potential impacts of a range of options, solicit public comment, make decisions, deal with the fallout, if any, and move on to the next project. The agency's decision, though based on a collection of views and interests, is generally not a collective decision. As noted above, that means that parties too often feel aggrieved or alienated by the decision.

Because many, though not all, decisions affecting the environment are made in the context of NEPA, NEPA often takes the blame for what is, in fact, not a problem with the law, but a problem with the style of governance that agencies follow. What prevents agencies from making timely decisions is not NEPA, it is the complexity of the decisions for which they are responsible. What prompts litigation is not NEPA, but the inadequate recognition or resolution of different values in the decision making process.

NEPA, used strategically, can actually help address the problem of the disaffected citizen litigant and the problem of the indecisive or equivocal agency. These problems result from the way in which federal agencies organize themselves to make decisions on matters that affect the environment. By using NEPA better, the agencies can bring NEPA closer to the intent of the framers of the statute.

Congress showed recognition of these problems with NEPA implementation in 1998 and the potential route to improvement when it directed the Morris K. Udall Foundation to create the U.S. Institute for Environmental Conflict Resolution as an independent, impartial federal institution to assist all parties in resolving environmental, natural resources, and public lands conflicts where a federal agency is involved, and "to assist the Federal Government in implementing Section 101 of the National Environmental Policy Act of 1969."

In 2000, a bipartisan group of U.S. Senators from Idaho, Montana, Nevada and Wyoming asked the U.S. Institute to investigate "strategies for using collaboration, consensus building, and dispute resolution to achieve the substantive goals of NEPA" and to "resolve environmental policy issues." The U.S. Institute conducted initial analytical work in response to the Senators' inquiry, then, in 2002, created a Federal Advisory Committee, formally known as the National Environmental Conflict Resolution Advisory Committee (NECRAC), to provide advice on future program directives—specifically how to address the U.S. Institute's statutory mandate to assist the federal government in implementing Section 101 of NEPA.

The NECRAC members come from every sort of community across the country and have served at every relevant level of public and private sector leadership. They are a remarkable group. The Committee includes ranchers, foresters, a utility executive, environmentalists, tribal leaders, litigators, planners, politicians, former and current Congressional staff, grant makers, farmers, and scientists—they cover the map. Many Committee members have strong partisan political credentials. The Committee's membership also includes several of the most seasoned dispute resolution professionals in the country; including individuals who literally pioneered the field of environmental conflict resolution over 30 years ago. The members are veterans of some of the most intense battles in the country's natural resource and envi-

ronmental wars—livestock grazing, air and water pollution, protected species, Indian rights, environmental justice, international boundaries, highway-building, forest management, water allocation.

This group is so diverse it had every reason to fracture and spin off in different directions long before it could render useful advice to the U.S. Institute. But that didn't happen. The Committee held together and found common ground. Despite the times, the Committee never fell prey to partisan division. The Committee produced and unanimously approved a very substantial report that is literally at the printers today, though a near final draft is posted on the U.S. Institute's website, http://ecr.gov/necrac/reports.htm. I encourage the Task Force to consider the views of the National Environmental Conflict Resolution Advisory Committee as you move forward to determine how to improve NEPA. Allow me to summarize the group's work.

The Advisory Committee:

- Analyzed the means by which environmental conflict resolution is employed by federal agencies, and, using detailed case studies, focused considerable effort on understanding the circumstances in which conflict resolution processes have helped agencies make decisions that earned broad and durable support from parties affected by or interested in the decision. The Committee considered cases where the U.S. Institute had been involved as well as others;
- Reviewed the language and legislative history of NEPA and federal court decisions interpreting the law;
- Surveyed federal agencies to determine whether and how agencies apply the national environmental policies articulated in Section 101 of NEPA;
- Developed a comparison between the principles and policies expressed in NEPA and the characteristics that define successful environmental conflict resolution;
- Met with community leaders and advocates to learn about their experiences with NEPA implementation; and,
- Identified the principles and practices that have proven effective at engaging those types of communities and interested parties who, though potentially affected by agency actions, typically lack the financial, technical or other resources that are needed to influence agency decisions or, irrespective of available resources, simply do not trust agencies to respect their interests.

The Committee found that, three decades after NEPA was enacted, environmental protection has become a widely accepted social goal, and the nation has enjoyed many successes in conservation of public resources, reduction of pollution, and remediation of damage done by prior generations. Many of these achievements came about through NEPA-governed decision processes. The traditional model for NEPA implementation is not a failure.

The Committee also found that the traditional model for NEPA is certainly is not a complete success, either. The number of points where interests are coming into conflict on environmental matters is not decreasing and environmental issues appear to be increasing in scope and complexity. The decision-making success stories, though real, are shadowed by too many failures. The Committee reported that:

> Agency decisions affecting the environment are often highly confrontational. Project and resource planning processes routinely are too lengthy and costly. Environmental protection measures are often delayed. Public and private investments are foregone. Decisions and plans often suffer in quality. Hostility and distrust among various segments of the public and between the public and the federal government seem to fester and worsen over time. The traditional model for NEPA is not responsible for all these problems—indeed it is not even applicable in all cases—but it does not take full advantage of the many strengths of Section 101. NEPA, a tool meant to foster better governance to help America find productive harmony between people and nature, is now, in some cases, used or experienced as a process available to delay or defer agency decisions or as a negative intrusion into socially important government and private sector initiatives.
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> People are inevitably going to have different views about federal actions potentially affecting the human environment, and there is absolutely nothing wrong with that. It is a deeply rooted American value that citizens and their government at all levels should be in continuous dialogue aimed at successfully reconciling our diverse interests and values. We are a country that prides itself on diversity—a hallmark of a pluralistic and democratic society. It should not be surprising or seen as problematic that interests and values will come into conflict—the fact that they do is a vital aspect of societal growth and fuels creative aspects of our collective lives. But freedom of expression and freedom of thought and the right to petition for redress, and ultimately the right to vote, are about more than shouting into a void.

> Americans expect to be able to work things out and make things better over time. It is not inevitable, and it is clearly not desirable, that society's ability to constructively address and resolve conflicts should languish or fail to adapt to changing times. The current state of environmental and natural resource decision-making is dominated by the traditional model, which too often fails to capture the breadth and quality of the values and purposes of NEPA. It cannot be the best we can do, nor can it be what NEPA's drafters intended.

Could a different approach, in appropriate circumstances, better reflect NEPA's policies and help our country achieve the law's valuable purposes? The U.S. Institute's Advisory Committee believes that we can, in fact, do a much better job.

During the same three decades that have passed since NEPA was enacted, a new profession has emerged that is committed to development and application of conflict-avoidance and conflict-resolution techniques in the context of environmental decision-making and environmental disputes. "Environmental Conflict Resolution," or "ECR," is best understood as a mechanism to assist diverse parties to gain an understanding of their respective interests and to work together to craft outcomes that address those interests in effective and implementable ways.

ECR takes many forms and can be applied in many settings, but in the context of federal decision-making, it enables interested parties (including state, tribal, and local governments, regulated parties, affected communities, and citizens) to engage more effectively in the decision-making process. Interested parties are no longer merely commenters on a federal proposal, but act as partners in defining federal plans, programs, and projects. ECR offers a set of tools, techniques and processes that can complement traditional NEPA processes and improve the procedural and substantive quality of agency decisions.

The Committee reviewed numerous case studies of environmental conflict and conflict resolution. Those studies revealed principles and practices of successful conflict resolution. These principles and practices significantly contribute to the establishment of appropriate levels of respect, trust, accountability, responsibility, and shared commitment. The key factors leading to these results are commitment of time and energy of all parties, balanced representation among interests, appropriate use of third party neutrals, significant autonomy for the decision making group and procedural fairness. Additional factors include reliance on an agreed scope of issues, careful consideration of "implementability," and access to reliable, relevant information.

The Advisory Committee found a striking similarity between the policies set forth in Section 101 of NEPA and the principles and practices that characterize effective environmental conflict resolution. Where NEPA calls for productive harmony, the protection of health and environmental quality, sustainability and general welfare, environmental conflict resolution practices call for balanced representation of affected interests and values. Where NEPA calls for social responsibility, intergenerational welfare, sustainability and stewardship, environmental conflict resolution calls for full consideration of the short- and long-term implications of agreements and decisions, responsible and sustained engagement of all parties and wide access to the best available information.

Well designed and executed environmental conflict resolution processes are capable of producing federal agency decisions that reflect NEPA's principles. Common interests can be identified. The range of disagreement can be narrowed. Decisions can be made in a timely way and social and intellectual capital can be built. Federal officials become partners with affected interests in a process where the issue is "owned" by all participants without the forfeiture of government's legal limits and responsibilities.

Said another way, NEPA's policies and environmental conflict resolution techniques are available to serve as mutually reinforcing tools, which work in tandem with NEPA's analytical requirements, to help the federal government make sound decisions. The policies framed in NEPA can provide a common language, while environmental conflict resolution practices can create the conditions under which a common language and productive strategies can be applied to reconcile different interests toward mutually agreed outcomes.

The Committee placed particular emphasis on the importance and effectiveness of agency efforts to engage with potentially interested parties very early in the process of setting policy, defining programs, or framing projects. The investment of time, effort, and thought "upstream" can reduce the risk of disputes "downstream," when positions may have hardened and options narrowed. Early engagement with potentially affected parties will also facilitate consideration of matters on broad substantive and temporal scales.

Mere involvement of appropriate interests is not enough, however, to improve decision-making. The decision-making process often can be improved if the involvement is governed by appropriate conflict resolution practices and principles and, where useful, guided by experienced facilitators or mediators. This is especially important in high conflict, complex, multi-party disputes. Where the process of making a federal decision involves the right parties, focuses on the full range of issues, uses scientific and other advice, and follows the appropriate conflict resolution principles and techniques, the odds are significantly improved that the quality of the decision will be higher and the degree of public support for agency programs will be strengthened.

Federal agencies bear a special responsibility to ensure that such processes are appropriately designed and implemented. It may be far worse to attempt a poorly designed environmental conflict resolution process than to follow the traditional practice of agency decision-making without any conflict resolution process. Well-managed environmental conflict resolution practices repair and build relationships and social capital, often critical to long-term implementation and administration of federal programs. Poorly structured processes can be detrimental in the long run, sowing or deepening distrust and disaffection.

The U.S. Institute's Advisory Committee, while seeing great value in the use of environmental conflict resolution and awareness of NEPA's policy goals, recognized that there are limits. Environmental conflict resolution techniques will not solve all problems and not every party will accept NEPA's policies or interpret them in the same way. There will always be cases where brewing disputes cannot be avoided and where existing disputes must be resolved through litigation or political intervention. Timing, parties, external events, information, rules, and resources: The pieces have to fit together to create common ground.

The Advisory Committee concluded, however, that the number and severity of "intractable" cases can be reduced significantly by proper use of environmental conflict resolution and awareness of NEPA's policy—not because the various techniques or statutory language possess any special remedial powers, but because our fellow citizens usually have the capacity to be creative and fair and to want good results for the Nation as a whole.

The Advisory Committee made a series of recommendations to the U.S. Institute designed to promote the use of environmental conflict resolution techniques across the federal government along with increased awareness and use of Section 101 of NEPA.[4] I would translate those recommendations somewhat to put them in the context of the work of this Task Force. First, the U.S. Institute's work deserves your full support. This is a valuable agency with tremendous potential to help avoid, resolve, or at least lower the temperature of the conflicts that plague environmental and natural resource management and policy. Second, the agencies under the Resources Committee's jurisdiction, at a minimum, should be challenged to demonstrate that they are committed to improving their governance of decisions potentially affecting the environment by using environmental conflict resolution and NEPA Section 101 as important, early, integral components of their decision making process. Finally, the agencies need adequate financial resources to do this work. I would argue that, over time, the benefit of avoiding or resolving problems "upstream" will save many millions of dollars now thrown at paperwork exercises and litigation.

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[4] The Committee recommended that the U.S. Institute:

- Work with the Council on Environmental Quality to develop approaches to implementing Section 101 of NEPA through environmental conflict resolution;
- Develop a "toolkit" of management approaches for federal executives to transform agency culture in support of environmental conflict resolution and collaboration;
- Develop cross-agency training on environmental conflict resolution and collaboration;
- Identify ways to expand its leadership in developing applications of collaborative monitoring in the context of alternative dispute resolution and adaptive management;
- Collaborate with the Council on Environmental Quality to guide federal agencies and Affected Communities in the application of NEPA using the Affected Communities Subcommittee's recommended framework for environmental conflict resolution and collaboration;
- Continue to foster networks and partnerships that promote the best environmental conflict resolution practices and promote use of technology to facilitate sharing of lessons learned, science, literature and data; and,
- Obtain funding for and implement the U.S. Institute's participation grant program.
- The Committee also recommends that other agencies of government, at all levels, take advantage of the resources represented by effective environmental conflict resolution techniques and the principles and policy of NEPA to improve the quality of agency decisions and earn broader support from affected interests.

NEPA can be used by agencies as a venue to bring interested parties together early. Miners and ranchers; host communities and military base planners; neighboring states sharing a river; neighborhoods and transportation engineers; environmentalists and foresters. Public involvement is more than simply allowing the public to comment on a draft EIS. One of the fundamental purposes of NEPA was to make our government smarter about what it does. Agencies do not have a monopoly on good ideas, useful information, or fair outcomes. The analytical requirements of NEPA can be carried out in a way that taps the knowledge, creativity, sense of responsibility, fairness and willingness to compromise that most of our fellow citizens bring to the table.

In sum, NEPA is a valuable law, but its implementation needs to be improved to address real problems experienced by affected interests. The statute will perform at its best if the three key components of the law—policy, analysis, and public involvement—are regularly and reliably used in a complementary, mutually reinforcing way. We need to move beyond the current state where too often lots of paper is linked to a limited amount of public involvement with little or no tie to national environmental policy. It is an unstable structure, but it can be repaired with tools that are at hand. When we get policy, analysis, and public involvement working together, we can fulfill the vision and intentions of NEPA's sponsors.

Thank you for this opportunity to testify. I will be happy to respond to questions.

Appendix 1

National Environmental Policy Act of 1969
Title I
Congressional Declaration of National Environmental Policy

Sec. 101 [42 USC 4331].

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Appendix 2

Law Review and Journal Articles on NEPA

1. Matthew J. Lindstrom, Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law, 20 J. Land Resources & Envtl. L. 245 (2000).
2. Sara E. Baynard, The Extraterritorial Reach of NEPA and The Creation of a Foreign Policy Exemption, 28 Vt. L. Rev. 173 (2003).
3. Lori Hackleman Patterson, Comment, NEPA's Stronghold: A Noose for the Endangered Species Act?, 27 Cumb. L. Rev. 753 (1996).
4. Nicholas C. Yost, NEPA's Evolution: The Decline of Substantive Review, NEPA's Promise—Partially Fulfilled., 20 Envtl. L. 533 (1990).
5. William H. Rodgers, Jr., Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act: Keynote: NEPA at Twenty: Mimicry and Recruitment in Environmental Law, 20 Envtl. L. 485 (1990).
6. Peggy Gentles & Donald N. Zillman, NEPA's Evolution: The Decline of Substantive Review: Article: Perspectives on NEPA in the Courts., 20 Envtl. L. 505 (1990).
7. Lois J. Schiffer, The National Environmental Policy Act Today, With An Emphasis on Its Application Across U.S. Borders, 14 Duke Env L & Pol'y F 325 (2004).
8. Sarah W. Rubenstein, Injunctions Under NEPA After Weinberger v. Romero-Barcelo and Amoco Production Co. v. Village of Gambell, 5 Wis. Envtl. L.J. 1 (1998).
9. Josh Schnell, Note, Natural Resources Defense Council v. United States Department of the Navy: The District Court for the Central District of California Applies NEPA to the United States Exclusive Economic Zone for the First Time, 16 Tul. Envtl. L.J. 215 (2002).
10. Michael C. Blumm, Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act: Introduction: The National Environmental Policy Act at Twenty: A Preface, 20 Envtl. L. 447 (1990).
11. Paul S. Weiland, Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century, 12 J. Land Use & Envtl. L. 275 (1997).
12. Katie Kendall, Note, The Long and Winding "Road": How NEPA Noncompliance for Preservation Actions Protects the Environment, 69 Brooklyn L. Rev. 663 (2004).
13. David S. Shilton, NEPA's Evolution: The Decline of Substantive Review: Article: Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record, 20 Envtl. L. 551 (1990).
14. James L. Connaughton, Keynote Address, Modernizing the National Environmental Policy Act: Back to the Future, 12 N.Y.U. Envtl. L.J. 1 (2003).
15. Leslye A. Herrmann, Comment, Injunctions for NEPA Violations: Balancing the Equities., 59 U. Chi. L. Rev. 1263 (1992).
16. Nathan G. Alley & James T.B. Tripp, Colloquium Article, Streamlining NEPA's Environmental Review Process: Suggestions for Agenda Reform, 12 N.Y.U. Envtl. L.J. 74 (2003).
17. William H. Ferguson III, Note, Westlands Water District v. United States: Forging NEPA into a Double-Edged Sword Against A Biodiversity Statute, 8 Tul. Envtl. L.J. 293 (1994).
18. Jason J. Czarnezki, Comment, Defining the Project Purpose under NEPA: Promoting Consideration of Viable EIS Alternatives, 70 U. Chi. L. Rev. 599 (2003).
19. Oliver A. Houck, Book Review, Is That All? A Review of the National Environmental Policy Act, An Agenda for the Future, 11 Duke Env L & Pol'y F 173 (2000).
20. Jim Davis, Case Note, Can NEPA and the ESA Work Together? Designations of Critical Habitat for an Endangered Species Must Fulfill National Environmental Policy Act Requirements. Catron County Board of County Commissioners v. United States Fish and Wildlife Service, 32 Land & Water L. Rev. 677 (1997).
21. David G. Perillo, Note, Designations of Critical Habitat Pursuant to the Endangered Species Act: Does NEPA Apply?, 7 Fordham Envtl. Law J. 397 (1996).

22. Paul J. Culhane, NEPA's Effect on Agency Decision Making: NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated, 20 Envtl. L. 681, (1990).
23. David J. Hayes & James A. Hourihan, NEPA Requirements for Private Projects, 13 B.C. Envtl. Aff. L. Rev. 61 (1985).
24. Lorna Jorgensen, Note, The Move Toward Participatory Democracy in Public Land Management Under NEPA: Is it Being Thwarted by the ESA?, 20 J. Land Resources & Envtl. L. 311 (2000).
25. L. Diane Schenke & Sharon Shutler, The Application of NEPA to Restoration Plans Under the Oil Pollution Act, 45 Baylor L. Rev. 345 (1993).
26. Silvia M. Riechel, Note, Governmental Hypocrisy and the Extraterritorial Application of NEPA, 26 Case W. Res. J. Int'l L. 115 (1994).
27. Douglas J. Rosinski, The Environmental Impact on Foreign Territory From a Proposed Federal Action, 4 S.C Envtl. L.J. 177 (1995).
28. Karen A. Klick, Note, The Extraterritorial Reach of NEPA's EIS Requirement After Environmental Defense Fund v. Massey, 44 Am. U.L. Rev. 291 (1994).
29. Wayne J. Carroll, International Application of the National Environmental Policy Act, 4 ILSA J Int'l & Comp L. 1 (1997).
30. Thomas J. Schoenbaum, Symposium, A Comparative Analysis of Vermont Yankee: A Preface to Three Foreign Views of Vermont Yankee, 55 Tul. L. Rev. 428 (1981).
31. Stephen H. Kupperman, Note, Environmental Law—NEPA Held Inapplicable to the Revenue Sharing Act, 51 Tul. L. Rev. 156 (1976).
32. Melanie E. Kleiss, Note, NEPA and Scientific Uncertainty: Using the Precautionary Principle to Bridge the Gap, 97 Minn. L. Rev. 1215 (2003).
33. Cynthia Carlson, NEPA and the Conservation of Biological Diversity, 19 Envtl. L. 15 (1988).
34. Erik Figlio, Stacking the Deck Against "Purely Economic Interests": Inequity and Intervention in Environmental Litigation, 35 Ga. L. Rev. 1219 (2001).
35. Harvey Bartlett, Comment, Is NEPA Substantive Review Extinct, or Merely Hibernating? Resurrecting NEPA Section 102(1), 13 Tul. Envtl. L.J. 411 (2000).
36. Stark Ackerman, NEPA's Effect on Agency Decision Making: Article: Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making, 20 Envtl. L. 703 (1990).
37. Thomas E. Digan, Comment, NEPA and the Presumption Against Extraterritorial Application: The Foreign Policy Exclusion, 11 J. Contemp. Health L. & Pol'y 165 (1994).
38. Stephanie Wagner, Recent Development, Douglas County v. Babbitt: NEPA Does Not Apply to the Creation of Critical Habitats Under the Endangered Species Act, 5 U. Balt. J. Envtl. L. 262 (1995).
39. Deirdre Goldfarb, Comment, NEPA: Application in the Territorial Seas, The Exclusive Economic Zone, The Global Commons, and Beyond, 32 Sw. U. L. Rev. 735 (2003).
40. Lynton K. Caldwell, Beyond NEPA: Future Significance of the National Environmental Policy Act, 22 Harv. Envtl. L. Rev. 203 (1998).
41. Margaret A. Shannon, Book Review, Will NEPA be "An Agenda for the Future" or Will It Become "A Requiem for the Past"?: A Book Review of the National Environmental Policy Act: An Agenda for the Future, 8 Buff. Envt'l. L.J. 143 (2000).
42. Seventh Annual Pace National Environmental Law Moot Court Competition: Brief for Appellant, United States Department of the Interior, 12 Pace Envtl. L. Rev. 635 (1995).
43. James Jay Tutchton, Case Note, Robertson v. Methow Valley Citizens Council and the New "Worst Case Analysis" Regulation, 8 UCLA J. Envtl. L. & Pol'y 287 (1989).
44. Robert Orsi, Comment, Emergency Exceptions from NEPA: Who Should Decide?, 14 B.C. Envtl. Aff. L. Rev. 481 (1987).
45. Browne C. Lewis, It's A Small World After All: Making the Case for the Extraterritorial Application of the National Environmental Policy Act, 25 Cardozo L. Rev. 2143 (2004).
46. Jean M. Emery, Comment, Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat under the Endangered Species Act?, 28 Ariz. St. L.J. 973 (1996).
47. Melaney Payne, Case Note, Critically Acclaimed but Not Critically Followed—the Inapplicability of the National Environmental Policy Act to Fed-

eral Agency Actions: Douglas County v. Babbitt, 7 Vill. Envtl. L.J. 339 (1996).
48. Heather N. Stevenson, Comment, Environmental Impact Assessment Laws in the Nineties: Can the United States and Mexico Learn from Each Other?, 32 U. Rich. L. Rev. 1675 (1999).
49. Stephen M. Johnson, NEPA and SEPA's in the Quest for Environmental Justice, 30 Loy. L.A. L. Rev. 565 (1997).
50. Amy J. Sauber, Comment, The Application of NEPA to Nuclear Weapons Production, Storage, and Testing: Weinberger v. Catholic Action of Hawaii/ Peace Education Project., 11 B.C. Envtl. Aff. L. Rev. 805 (1984).
51. Myron L. Scott, Forest Service Planning: Defining NEPA Out of Existence: Reflections on the Forest Service Experiment with "Case-By-Case" Categorical Exclusion, 21 Envtl. L. 807 (1991).
52. William C. Moorhouse, Note, The National Environmental Policy Act, U.S. Counter-Narcotic Policies in Colombia, and Whether Recent Aid Should Require an Environmental Impact Statement, 26 Suffolk Transnat'l L. Rev. 133 (2002).
53. Joan Newman, Comment, A Consideration of Federal Preemption in the Context of State and Local Environmental Regulation, 9 UCLA J. Envtl. L. & Pol'y 97 (1990).
54. Timothy Patrick Brady, Comment, "But Most Of It Belongs to Those Yet to Be Born:" The Public Trust Doctrine, NEPA and the Stewardship Ethic, 17 B.C. Envtl. Aff. L. Rev. 621 (1990).
55. James A. Kent & Kevin Preister, Using Social Ecology to Meet the Productive Harmony Intent of the National Environmental Policy Act, 7 Hastings W.-N.W. J. Env. L. & Pol'y 235 (2001).
56. Douglas J. Rosinski, Comment, South Carolina Battles Against the Department of Energy for Storage of Spent Nuclear Fuel at the Savannah River Site, 5 S.C Envtl. L.J. 157 (1997).
57. Mary Elizabeth Nelson, Note, Rejection of Risk Under NEPA: Stress and People Against Nuclear Energy, 33 Am. U.L. Rev. 535 (1984).
58. Silvia L. Serpe, Note, Reviewability of Environmental Impact Statements on Legislative Proposals After Franklin v. Massachusetts, 80 Cornell L. Rev. 413 (1995).
59. Jennifer L. Byrne, Note, Alaska Wilderness v. Morrison: The Return of Reasonableness to NEPA Review?, 26 Envtl. L. 1287 (1996).
60. Recent Case, Administrative Law—Administrative Procedure Act—D.C. Circuit Holds That Trade Representative's Failure to Prepare Environmental Impact Statement for NAFTA is Not Reviewable Under the Administrative Procedure Act.—Public Citizen v. United States Trade Representative, 5 F.3d 549 (D.C. Cir 1993), 107 Harv. L. Rev. 1819 (1994).
61. Victor B. Flatt, A Tribute To Honorable Raymond L. Sullivan: Article: The Human Environment of the Mind: Correcting NEPA Implementation by Treating Environmental Philosophy and Environmental Risk Allocation as Environmental Values Under NEPA, 46 Hastings L.J. 85 (1994).
62. Patrick A. Parenteau & Dean B. Suagee, Fashioning a Comprehensive Environmental Review Code for Tribal Governments: Institutions and Processes, 21 Am. Indian L. Rev. 297 (1997).
63. Note, EIS Supplements for Improperly Completed Projects: A Logical Extension of Judicial Review Under NEPA, 81 Mich. L. Rev. 221 (1982).
64. Jonathan M. Cosco, Note, NEPA for the Gander: NEPA's Applications to Critical Habitat Designations and Other "Benevolent" Federal Action, 8 Duke Env L & Pol'y F 345 (1998).
65. Seventh Annual Pace Environmental Law Moot Court Competition: Brief for Appellee-Respondent, Sunpeace, 12 Pace Envtl. L. Rev. 675 (1995).
66. Jeffrey E. Gonzalez-Perez & Douglas A. Klein, The D.C. Circuit Review: September 1992 - August 1993: Environmental Law: The International Reach of the Environmental Impact Statement Requirement of the National Environmental Policy Act, 62 Geo. Wash. L. Rev. 757 (1994).
67. Kristine Meindl, Case Note, Kootenai Tribe of Idaho v. Veneman: The Roadless Rule: Dead End or Never Ending Road?, 14 Vill. Envtl. L.J. 151 (2003).
68. Kevin H. Moriarty, Note, Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion, 79 N.Y.U.L. Rev. 2312 (2004).
69. Joel S. Jacobs, Compromising NEPA? The Interplay Between Settlement Agreements and the National Environmental Policy Act, 19 Harv. Envtl. L. Rev. 113 (1995).

70. Jeffrey A. Berger, False Promises: NEPA's Role in Airport Expansions and the Streamlining of the Environmental Review Process, 18 J. Envtl. L. & Litig. 279 (2003).
71. Recent Development, Fourth Circuit Grants Standing but Denies an Injunction Sought by the Governor of South Carolina to Prevent the Transportation of Plutonium into the State, 24 J. Land Resources & Envtl. L. 129 (2004).
72. Matthew William Nelson, Comment, NEPA and Standing: Halting the Spread of "Slash-and-Burn" Jurisprudence, 31 U.C. Davis L. Rev. 253 (1997).
73. Jill E. Horner, Note, People Against Nuclear Energy v. United States Nuclear Regulatory Commissions: Potential Psychological Harm Under NEPA, 32 Cath. U.L. Rev. 495 (1983).
74. R. David Kitchen, Case Comment, NEPA's Overseas Myopia: Real or Imagined? Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 71 Geo. L.J. 1201 (1983).
75. D. Kevin Dunn & Jessica L. Wood, Note, Substantive Enforcement of NEPA Through Strict Review of Procedural Compliance: Oregon Natural Resources Council v. Marsh in the Ninth Circuit, 10 J. Envtl. L. & Litig. 499 (1995).
76. Joan R. Goldfarb, Comment, Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm, 18 B.C. Envtl. Aff. L. Rev. 543 (1991).
77. Thomas O. McGarity, Implementing NEPA: Some Specific Issues: Article: Judicial Enforcement of NEPA-Inspired Promises, 20 Envtl. L. 569 (1990).
78. Seventh Annual Pace National Environmental Law Moot Court Competition: Brief for Appellee and Amicus, State of New Union, 12 Pace Envtl. L. Rev. 707 (1995).
79. Tracey Colton Green, Providing for the Common Defense versus Promoting the General Welfare: the Conflicts Between National Security and National Environmental Policy, 6 S.C Envtl. L.J. 137 (1997).
80. Thomas P. Rowland, Note, Metcalf v. Daley: The Makah Get Harpooned by NEPA, 36 Gonz. L. Rev. 395 (2000).
81. Richard M. Whitaker, Environmental Aspects of Overseas Operations, 1995 Army Law. 27 (1995).
82. Jennifer L. Davis, Comment, National Environmental Policy Act—Submission of the North American Free Trade Agreement Without Environmental Impact Statement To Congress Held Unreviewable, Public Citizen v. United States Trade Representative, Suffolk Transnat'l L. Rev. 775 (1995).
83. Korey A. Nelson, Comment, Judicial Review of Agency Action Under the National Environmental Policy Act: We Can't See the Forest Because There Are Too Many Trees, 17 Tul. Envtl. L.J. 177 (2003).
84. Jeffrey M. Lovely, Comment, Protecting Wetlands: Consideration of Secondary Social and Economic Effects by the United States Army Corps of Engineers in Its Wetlands Permitting Process, 17 B.C. Envtl. Aff. L. Rev. 647 (1990).
85. Robert P. Frank, Comment, Delegation of Environmental Impact Statement Preparation: A Critique of NEPA's Enforcement, 13 B.C. Envtl. Aff. L. Rev. 79 (1985).
86. Richard Heisler, Comment, A Whale of A Tale: NRDC v. U.S. Navy and the Attempt to Exempt the Exclusive Economic Zone from the National Environmental Policy Act, 10 Sw. J.L. & Trade Am. 125 (2003).
87. Robert L. Fischman, The EPA's NEPA Duties and Ecosystem Services, 20 Stan. Envtl. L.J. 497 (2001).
88. Mary K. Fitzgerald, Comment, Small-Handles, Big Impacts: When Should The National Environmental Policy Act Require An Environmental Impact Statement?, 23 B.C. Envtl. Aff. L. Rev. 437 (1996).
89. Sandra P. Montrose, Comment, To Police the Police: Functional Equivalence to the EIS Requirement and EPA Remedial Actions Under Superfund, 33 Cath. U.L. Rev. 863 (1984).
90. Paula A. Kelly, Comment, Judicial Review of Agency Decisions Under the National Environmental Policy Act of 1969—Strycker's Bay Neighborhood Council, Inc. v. Karlen, 10 B.C. Envtl. Aff. L. Rev. 79 (1982).
91. Kourtney Twenhafel, Comment, Freeport McMoran's Midas Touch: Testing the Application of the National Environmental Policy Act to Federal Agency Action Governing Multinational Corporations, 4 Tul. J. Int'l & Comp. L. 303 (1996).
92. George Cameron Coggins & Jane Elizabeth Van Dyke, Implementing NEPA: Some Specific Issues: Article; NEPA and Private Rights in Public Mineral Resources: The Fee Complex Relative?, 20 Envtl. L. 649 (1990).

93. The D.C. Circuit Rreview August 1999 - July 2000: Recent Decision of the United States Court of Appeals for the District of Columbia Circuit: Environmental Law, 69 Geo. Wash. L. Rev. 644 (2001).
94. Peter Bucklin, The Importance of Standing: The Need to Prioritize Standing Review Under the National Environmental Policy Act of 1969, 3 J.L. & Pol'y 289 (1994).
95. Case Note, Environmental Law—Retroactive Application of the National Environmental Policy Act, J. D. C., Jr., 39 Tenn. L. Rev. 735 (1972).
96. Comment, NEPA's Role in Protecting the World Environment, 131 U. Pa. L. Rev. 353 (1982).
97. Peter Fitzgerald & Vania J. Leveille, Note, When the National Environmental Policy Act Collides with the North American Free Trade Agreement: The Case of Public Citizen v. Office of the United States Trade Representative, 9 St. John's J.L. Comm. 751 (1994).
98. Maria C. Holland, Comment, Judicial Review of Compliance with the National Environmental Policy Act: An Opportunity for the Rule of Reason, 12 B.C. Envtl. Aff. L. Rev. 743 (1985).
99. The D.C. Circuit Review August 1998 - July 1999: Recent Decisions Environmental Law, 68 Geo. Wash. L. Rev. 728 (2000).
100. Loretta V. Chandler, Comment, Taking the "Hard Look": 9th Circuit Review of Forest Service Actions under NEPA, NFMA, and NHPA, 4 Great Plains Nat. Resources J. 204 (2000).

Miss MCMORRIS. Thank you very much.

[Applause.]

Miss MCMORRIS. Next is Doug MacDonald.

STATEMENT OF DOUG MacDONALD, SECRETARY, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

Mr. MACDONALD. Thank you, Congresswoman. I submitted my testimony, but I think it's more interesting just to follow on the remarks.

I've been Secretary of Transportation in Washington state. And we have two responsibilities. The first is to provide a transportation systems that work for our communities. And the second is to provide transportation systems that meet our citizens' goals just as strongly held that our environment be protected (unintelligible) by what we do with transportation.

NEPA is absolutely fundamental to our doing both of those things. NEPA, in our view, is one of the most important statutes passed in the second half of the 20th century. It's like the Civil Rights Act. It's fundamental to who we want to be as a people and what we want to do. But NEPA has got some problems. And I couldn't agree more that the problem is to look at the implementation issue not the fundamental purpose. The fundamental purpose is exactly right.

And I would also like to take up—I've never—we've never met before. We are reorganizing how we talk about working with the public in this state around the notion of engagement. I don't—the two words seem to be exactly right. It is just the point of engaging people in public decisionmaking that is NEPA's fundamental purpose and what we must recover from NEPA which in some instances we are (unintelligible) losing.

I want to make three small points about NEPA. I'm sure others will add more. Number one, if you want NEPA to be improved, we have to improve the ability of people to use NEPA. And that means that the time for these 2,000-page documents that no one can read and sit in the library untouched by any ordinary citizen or public

official who is supposed to take a view and then make a decision—those days have got to stop.

In our state we try to move that process by the draft Environmental Impact Statement that we used for Alaskan Way Viaduct project. It doesn't look like any other EIS in the country. And the main reason is we designed it so people could read it. And that is a radical notion at this point in time.

We found great support from the Department of Environmental Quality on this and some resistance from Federal agencies who think it doesn't have all the right checklists covered. We like to think that the prime checklist would be whether it was written in English so it could tell a story about what would have to happen for the project to be achieved. It's good. It's bad. And how it would work for the people of the community it serves.

We'd like to encourage you to look at the notion of a spreading notion called the Reader Friendly Environmental Impact Statement. And we think if we could do that we would respond to exactly the point Mr. Jensen made that it's time for the public to try to rebuild trust in government. And that means the government needs to try to talk simply and clearly with people about what they're doing.

The second point I want to make has to go to one of NEPA's great powers which has also been a problem. And that is the spread of NEPA which was originally designed to assess a project to decide whether it was to be a good project so that it now embraces this huge amount of detail about the specific provisions, the specific permits under specific aspects under environmental laws. And we find in order to analyze a project for NEPA, we virtually have to design a project and get a chicken-and-egg problem where we can never get out of the details (unintelligible) the fundamental question of whether we should do a project. And if we should do a project then let's write the permits under the Federal laws and state laws that protect our environment.

But we have so jumbled everything up that we are now spending years developing analysis when what we should be doing is try to figure out what's the right choice for our communities based on the issues we have to solve and the values that we hold.

We think this is a very technical problem. It is easy to state the vision for how it might work better. But we have to untangle in some respects NEPA assessment from the specific requirements of the Endangered Species Act from the Clean Water Act from the Clean Air Act from the—and now a whole range of new health issues and so on which are very important, but we can't do NEPA assessment in permit writing all at the same time in our view.

The third problem we have is fitting NEPA's role for Federal agencies against the local and state decisions that people want to make in their own communities about such sensitive matters as growth management. Unlike Montana, who as we've spoken earlier, we in Washington state have a very strong Growth Management Act. It is not universally popular. It is our law. It is implemented by our communities. And in local processes we have adopted comprehensive management growth plans which we try to fashion for our own communities.

We find in NEPA that many of the judgments about what our community is to be shaped like and should look from a growth management standpoint are now being second-guessed by people who I'm afraid I would have to call bureaucrats in the Federal government. We have no bureaucrats left in the state government. But there are still one or two in Federal government. And we do sometimes find that people want to come to our state and readjust how we are looking at the priorities we have set for our communities and do that through a whole new start in the NEPA process to fashion another set of visions on what our community should look like.

Now, whether it's the right vision is not easy to state. We are dealing with many issues of which there are many viewpoints. But we believe that having government be based where government lives and where people's lives are affected means that this is an important deference that NEPA should be paying and sometimes Federal agencies are losing in the NEPA process to local citizens and local governments as they make the decisions about how their communities should be shaped.

We'd love to explore further with the Committee some of those ideas. We have some others. But for the sake of time I'll stop there. We have to remember that we must have NEPA. We must, however, move more quickly. We have gridlock on important decisions that must be made because we are spending years doing things that people of common sense could do more quickly with goodwill and good information and a notion that decisions must be made.

I'm (unintelligible) from the '70s remembering that not to choose is to choose. We have things that must be corrected in our environment. We have roads we cannot build that will make water quality better. We are cooperating with the Sierra Club on important projects in this state where we know that highway improvements can benefit wildlife habitat.

We want to get to the place where good things can be done to make—to match up our citizens' expectations both for transportation and the environment. We need NEPA to help. NEPA is there for that purpose. We've got to cut away at some of the thickets of implementation issues which have made NEPA a less useful tool than it should be for our decisionmaking processes. Thank you.

[The prepared statement of Mr. MacDonald follows:]

Statement of Douglas B. MacDonald, Secretary, Washington State Department of Transportation

Thank you, Mr. Chairman, for convening and Representative McMorris for leading this Task Force and for holding this hearing so that people in our state can share with you a spectrum of our views.

I am Secretary of Transportation in a state where our citizens expect two goals to be met. They expect our transportation system to serve our state's economy and move people and goods efficiently in and between our communities. They also expect our transportation system and its improvements to protect and enhance environmental values that are strongly cherished in our state.

NEPA was passed in 1970 with what seems to have been the original intent of helping us to achieve both those two goals. NEPA is the foundation for harmonizing the natural and built environments within the context of earth-friendly social and political institutions. We are fond of saying that we regard NEPA as one of Congress' most important initiatives in the second half of the 20th Century.

However, we also believe that over more than three decades problems and tendencies have emerged in the implementation of NEPA that are inconsistent with

NEPA's original vision and detract from its usefulness. In those respects, there are certainly opportunities to make constructive course corrections for NEPA. We think these are opportunities to improve how NEPA is working today, not undercut its valuable role.

NEPA's core messages were clear and simple. Decision makers should understand and consider the environmental consequences of their proposed actions. Citizens should have access to assessment and disclosure of the environmental consequences and be able to use the results as communities and their officials try to make good choices of whether or not to undertake a project.

These messages can still be found in NEPA, but the trends of NEPA implementation often leave them deeply hidden by procedures that are too long and complicated and documents and reports that no ordinary citizen, much less a busy public official, would ever be able to understand.

So, one of the innovations and changes we have urged is that the documents prepared under NEPA be simpler and clearer, telling a story about a project and what will be its costs and benefits.

Recently our draft Environmental Impact Statement for the Alaskan Way Viaduct Replacement project—a major project in our state—took this course. Some have criticized it but others, including the Council on Environmental Quality (CEQ) have supported this effort to try and put citizens back in touch with NEPA and NEPA back in touch with citizens.

We hope you will join the CEO in supporting what we call the "reader-friendly" approach to make these documents easier for people really to use. Specifically, Congress can assist this effort by communicating its support for the flexibility allowed by NEPA, and opposing the continuing rigid, checklist approach which breed complex multi-layered documents.

Second, we are concerned about the way that practice under NEPA has allowed the Environmental Impact Statement to become larger and larger in scope until it is virtually an environmental umbrella document used to tease out, negotiate, settle and explain virtually every detailed feature of how permits will be given for a project.

NEPA should instead support a threshold decision whether or not a project seems likely to be a good project. That should involve analysis to a reasonable depth to allow the project to pass the "hard look" test advocated by federal court decisions.

We think that NEPA environmental assessment of a project should in most cases be separated out from the actual settling and drafting of the terms and conditions of permits under laws like the Clean Water Act or the Endangered Species Act.

But today NEPA implementers at federal agencies, instead of focusing on desired outcomes, want every detail of a project. For example, federal resource agencies staff are asking us to document all of the precise steps to build a new bridge, in order to determine whether there might be an adverse effect on an endangered or threatened species.

That requires a lot of detail and indeed sometimes a large measure of project design at a point in the process where final design may be years away. While too much design at the wrong time is very costly, there is great promise in reaching early agreement among the transportation agency, federal resource agencies, tribes, NGOs and the public on desired environmental outcomes, which is what NEPA should facilitate.

This is a complicated subject and our formulation is much over-simplified. But trying to do all the work at once, and before a decision is made about the wisdom of a project, is one of the reasons why the cost in money, and even more importantly, in time, seems to have spun totally out of control.

We recommend looking for ways for permit writers under the individual permitting laws to go back to writing permits—not trying to drive their specific agency agendas into the EIS process—which often results in making the process overly technical, overly rigid and conservative in its judgments, and overly opaque to regular citizens.

Finally, we believe that particularly at a number of offices of the Environmental Protection Agency—one of them is here in this state and we believe there are others elsewhere—EIS "reviewers" have taken up substantive agendas that are not sanctioned in NEPA or any other federal law. The employees holding these "reviewer" responsibilities have great power, because they can grant or withhold ratings of EIS that are very important in whether an EIS can survive public scrutiny.

The special issue we have is that in transportation the "reviewer" function is held by someone who is personally antagonistic to transportation improvements that build mobility for people who use automobiles. Why? Because more roads mean more cars mean more sprawl and sprawl is a bad thing.

The Washington State legislature has passed landmark growth management legislation that vests especially in local government with some state management the decisions about how growth will be managed. The law is complicated and not universally popular. It has supporters and critics. However, it is our law, in our state, and it makes land use judgments the purview largely of local government. Local governments have exercised their responsibilities to fill in the details of how growth will be managed in our separate cities and counties.

EPA, however, discounts and even disregards those judgments as its "reviewers" insist that new roads and other facilities that actually are consistent with local growth management designations will not pass the screen of the EPA's reviewers' personal opinions and biases. We think this is not NEPA's function and that the Environmental Protection Agency should be constrained from allowing its agency employees from participating in this fashion in ways that are contradictory to local land use judgments already made by our communities.

We feel this particularly because, as officials who care about transportation and the environment, the barriers to good transportation that these EPA employee judgments give rise to often have the effect, in our view, of worsening congestion, driving up housing prices and actually helping to create, rather than discourage, highly dispersed land use patters that made transportation less efficient.

We believe that when a project is demonstrated to produce environmental effects in the land use area that are consistent with land use plans adopted by our local governments under the power of our state's growth management act, that that should be the end of the discussion.

Our communities are better served by using NEPA as the means to achieve agreement among the transportation agency, federal resource agencies, tribes, NGO's and the public about the best environment outcomes.

We suggest that NEPA in and of itself is adequate and useful. But through the interpretation of federal agencies NEPA has become in many instances a blunt instrument that results in frustrating public involvement and makes it much more difficult to arrive at thoughtful tradeoffs among transportation needs, project costs, community values, and environmental issues.

Miss MCMORRIS. Thank you. Really appreciate you being here.

[Applause.]

Miss MCMORRIS. Bob, go ahead.

STATEMENT OF BOB GEDDES, GENERAL MANAGER, PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1

Mr. GEDDES. Thank you for opportunity to be here today. I am Bob Geddes, General Manager of a small public utility district that serves our county of about 12,000 residents. I have with me Mark Cache, our Director of Regulatory Environmental Affairs. Mark is the guy who gets to deal with the actual day-to-day ups and downs of NEPA. And brought him along to have some input, if necessary, also.

In trying to get a new license for our hydro project, which is a 60 megawatt hydro project on the Pend Oreille River, we have spent about over 70 years now. And I had a report from staff the other day that to get this far in the process, we have spent nearly $10-and-a-half million.

NEPA is not to blame for all of that but obviously part of that. And we just feel that there needs to be as—as many of the comments we've heard here already, that a better coordination with the agencies to help this particular process along for re-licensing our project.

So, I'll submit the following comments, most of them around the re-license effort that we are following.

In relation to that hydro project, obtaining a new license is generally considered to involve the potential for a significant environmental impact, and an EIS or EA is typically required. After an

agency issues a final EIS or EA that issues the record of decision. Even though not a requirement of NEPA, several agencies have policies that allow the administrative appeal process if NEPA review is triggered.

Under Section 4(e) of the Federal Power Act the Federal Energy Regulatory Commission is required to accept any license condition issued by a conditioning agency deemed necessary for protection of Federal land.

In the case of the Box Canyon re-licensing, those agencies involved for us were the Department of Interior and the U.S. Forest Service. The very nature of obtaining a new license and the submittal of conditions by the agency triggers the NEPA process for us and for other licensees around the northwest and around the Nation that are really getting into this process now. We're on the front edge of this, as you've heard many times.

In 2003, the Forest Service changed its policy with respect to NEPA compliance and the hydro re-licensing process. Currently the Forest Service maintains that it is no longer required to prepare its own NEPA document and issue a record of decision because they rely on the EIS that is done by FERC. Their reasoning was that the development of the Federal Power Act, Section 4(e) conditions does not constitute an independent agency action because the NEPA action regarding licensing of a hydro project is first responsibility.

The Department of Interior has never completed a NEPA document when filing their conditions under the Federal Power Act in hydro licensing proceedings. They also rely on FERC's EIS.

Our experience in the re-licensing project, the process has been that the Box Canyon Project, Interior filed with FERC their final conditions for the project on May of 2004 under the Federal Power Act Section 4(e) provision. FERC followed with issuing a final EIS in September of 2004. Then the Forest Service filed their final conditions in January of 2005 after the final EIS was completed.

Interestingly enough, FERC's EIS on the Box Canyon Project did not endorse many of the agency's conditions and therefore many of those conditions remain unsupported by a final record of decision.

Under CEQ regulations, as an alternative to issuing its own NEPA document, the agencies can review and adopt FERC's EIS or become cooperating agency in connection with the FERC prepared EIS. However, there is no indication that they adopted FERC's EIS. In fact, the Forest Service and Interior filed comments later in this process noting that they do not support the findings of FERC's EIS.

Also, they are not a cooperating agency. They are a party/intervener and FERC has specifically rejected the proposition that intervener can also act as a cooperating agency because that would violate the Administrative Procedures Act.

Finally, in the conditions filed by the agencies, that is a requirement that a NEPA document be completed for the subsequent implementation of each and every condition when it involves Federal lands. This is in addition to the NEPA process that FERC would conduct prior to issuing the new license or approving the implementation plan under the new license.

FERC's responsibility under the Federal Power Act also includes a developmental analysis, meaning they are required to review not only the environmental issues but also operational costs and socioeconomic issues. FERC's EIS in this case, for Box Canyon, did not include the District's rate information and impacts on the rates that were shown in a socioeconomic report done independently by a specialist for us in the field of economics.

So, really what's broken and what can be fixed? We have a couple of suggestions.

The Forest Service and Interior rely on FERC—FERC's NEPA document for their actions. But FERC's record of decision does not support final conditions. There is no accountability between the agencies, and there's no recourse for us except to go to court.

I really can't believe that that's what Congress intended when this process was set up. There should be better cooperation, we think, between the agencies so that would allow us to work with them to get to a final point.

There is a lack of proper NEPA process up front from the agencies when filing their conditions for the new license, but a duplication of the NEPA review afterwards when the condition is implemented. There again, we think better consistency is needed between the agencies.

Socioeconomic consequences of the agency conditions are not a factor in the NEPA process. In our case, we have shown that the implications for the re-licensing of Box Canyon are enormous on power rates, loss of jobs and overall impact to our county. We think that the socioeconomic impact should be integrated into the NEPA process.

It's just a fact of life with all decisions we make. We make those kind of determinations: Is the cost worth it? We're not going to get out of the conditions but there needs to be a reasonable point for what is being spent on those things too.

What is needed is better coordination between the agencies. When one Federal agency relies on another's NEPA document then they should be bound to support the results or, at a minimum, prepare a separate NEPA document to support any decision in conflict with the other agency's conclusions. Clearly the agencies should be working together for a better decision and not against each other that then leaves the public empty-handed at the end of process.

Simply our two recommendations are that one coordinated NEPA review by all the agencies should be enough and the socioeconomic impacts should be part of the NEPA analysis.

We, too, believe that NEPA process in concept is a good idea. We don't think it needs to be gutted. We just think there is room for some improvement here that would help in areas like ours.

Thank you for the opportunity to comment.

[The prepared statement of Mr. Geddes follows:]

Statement of Bob Geddes, Public Utility District No. 1 of Pend Oreille County

Background:

NEPA is a foundational national environmental statute applicable to nearly all actions taken or approved by federal agencies. NEPA requires that before a federal agency takes a major action it must disclose the environmental impact of the action and evaluate alternatives that would have fewer environmental costs. If the action

may have a significant impact on the quality of the human environment, the agency must prepare a detailed environmental impact statement (EIS) in accordance with CEQ regulations. If an EIS is not required, an agency must still prepare an environmental assessment (EA) to support a finding of no significant impact (FONSI).

In relation to a hydroelectric project, obtaining a new license is generally considered to involve the potential for significant environmental impacts, and EIS or EA is typically required. After an agency issues a final EIS or EA, it then issues a "record of decision" (ROD).

Even though not a requirement of NEPA, several agencies have policies that allow an administrative appeal process if a NEPA review is triggered.

Under Section 4(e) of the Federal Power Act (FPA), the Federal Energy Regulatory Commission (FERC) is required to accept any license condition issued by a conditioning agency deemed necessary for protection of federal lands. In the case of Box Canyon Dam relicensing those agencies are the Dept. of Interior and the USDA Forest Service.

The very nature of obtaining a new license and the submittal of conditions by the agencies triggers the NEPA process.

In 2003, the USDA Forest Service (Forest Service) changed its policy with respect to NEPA compliance in the hydroelectric relicensing process. Currently, the Forest Service maintains that it is no longer required to prepare its own NEPA document and issue a record of decision because they rely on the FERC EIS.

Their reasoning was that the development of Federal Power Act Section 4(e) conditions does not constitute an independent agency action because the NEPA action regarding licensing of a hydroelectric project is FERC's responsibility.

The Department of Interior (Interior) has never completed a NEPA document when filing their conditions under the FPA in a hydroelectric license proceeding. They, too, rely on FERC's EIS.

Our Experience: The Box Canyon Hydroelectric Case

In the FERC relicensing process for the Box Canyon Hydroelectric Project, Interior filed with FERC their final conditions for the project on May 2004 under the FPA Section 4(e).

FERC followed with issuing a final EIS in September 2004.

The Forest Service filed their final conditions January 2005, after the final EIS was completed.

Interestingly, FERC's EIS on the Box Canyon hydroelectric project did not endorse many of the agencies conditions, thus the conditions remain unsupported by a record of decision.

Under CEQ regulations, as alternative to issuing its own NEPA document, the agencies can review and adopt FERC's EIS or become a "cooperating agency" in connection with the preparation of the FERC EIS.

However, there is no indication that they adopted FERC's EIS. In fact, the FS and Interior filed comments noting that they do not support the findings of FERC's EIS.

Also, they are not a cooperating agency; they are party/intervener and FERC has specifically rejected the proposition that an intervener can also act as a cooperating agency because such a stance would violate the Administrative Procedures Act (APA).

Finally, in the conditions filed by the agencies, there is a requirement that a NEPA document be completed for the subsequent implementation of each condition when it involves federal lands. This is in addition to the NEPA process that FERC would conduct prior to issuing the new license or approving the implementation plan under the new license.

FERC's responsibility under the FPA also includes a developmental analysis, meaning they are required to review not only the environmental issues but also operational costs and socio-economical issues. FERC's EIS did not include the District's rate information and impacts on rates that were shown in a socio-economical report done by a specialist in the field of economics.

Conclusion: What's Broken? Can it be Fixed?

- The FS and Interior rely on FERC's NEPA document for their actions but FERC's record of decision does not support their final conditions. There is no accountability and the only recourse for the licensee is court. Was that what was intended by Congress in adopting the NEPA process?
- There is a lack of proper NEPA process upfront from the agencies when filing their conditions for the new license but a duplication of the NEPA review afterwards, when the condition is implemented. Is there any consistency in the NEPA process?

- Socio-economical consequences of the agency conditions are not a factor in the NEPA process. In our case, we have shown that the implications are enormous on power rates, loss of jobs and overall impact on the community. Socio-economic impacts should be integrated into the NEPA process.
- What is needed is better coordination between agencies. When one federal agency relies on another agency's NEPA document, then they should be bound to support the results, or at a minimum, prepare a separate NEPA document to support any decision in conflict with the other agency's conclusions. Clearly, the agencies should be working together for a better decision and not against each other and leave the public left empty handed.
- One coordinated NEPA review by all involved agencies should be enough.
- Socio-economic impacts need to be considered as part of the NEPA analysis.

Attachment A: Letter to Department of Interior to Prepare a NEPA Document excerpts Pg. 1-5.

Appendix B: Letter to Department of Interior to Prepare a NEPA Document excerpts Pg. 1-4.

ATTACHMENT A

March 17, 2005

Mr. Willie R. Taylor
Director, Office of Environmental
Policy and Compliance
United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

(Via Federal Express)

Re: Box Canyon Hydroelectric Project-FERC Docket No. P-2042-013 Request for U.S. Department of the Interior to Prepare a NEPA Document and Issue a Record of Decision regarding its Modified Conditions and Prescriptions Filed Pursuant to Sections 4(e) and 18 of the Federal Power Act on May 20, 2004

Dear Mr. Taylor:

This letter is being submitted on behalf of the Public Utility District No. 1 of Pend Oreille County, Washington ("District"), Licensee for the Box Canyon Project (FERC No. 2042-013). On May 20, 2004, the Department of the Interior ("DOI") filed its modified conditions and prescriptions ("MCPs") under sections 4(e) and 18 of the Federal Power Act ("FPA")[1] with the Federal Energy Regulatory Commission ("FERC") for the Box Canyon Project. However, FERC's Environmental Impact Statement ("EIS") does not endorse many of DOI's MCPs, and in turn, DOI is highly critical of FERC's EIS. Thus, DOI's MCPs remain unsupported by a Record of Decision ("ROD") in violation of the requirements of the National Environmental Policy Act ("NEPA")[2] and the Council on Environment Quality ("CEQ") regulations thereunder.[3] Further, DOI has failed to issue a supplemental EIS supporting its MCPs and has thus improperly denied the District an opportunity to file an administrative appeal of DOI's MCPs in violation of NEPA and due process.

As will be discussed herein, DOI's failure to comply with NEPA is unlawful. First, due to the mandatory nature of § 4(e) conditions and § 18 fishway prescriptions, DOI is the action agency for purposes of NEPA, not FERC, and therefore DOI retains the responsibility to see to it that its MCPs are supported by a NEPA decision document. Moreover, DOI cannot avoid its responsibilities to issue a supporting NEPA document because in this instance it has not properly relied on or "adopted" FERC's NEPA document. DOI is attempting to selectively rely upon FERC's EIS on an issue-by-issue basis as a supporting NEPA document for some purposes, while at the same time rejecting it and declaring it inadequate wherever it is inconsistent with DOI's MCPs. DOI cannot have it both ways.

The purpose of this letter is to demonstrate that by failing to issue its own NEPA decision document, DOI has not fulfilled its responsibilities under NEPA; and to suggest two options DOI could undertake to bring itself into compliance with the requirements of NEPA. The first option would require DOI to retract all of its criticism of the FERC EIS and properly "adopt" it and its recommendations and with-

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[1] 16 U.S.C. §§ 797(e) and 811.
[2] 42 U.S.C. § 4321, et seq.
[3] 40 C.F.R. § 1500, et seq.

draw the § 4(e) and § 18 MCPs that the FERC EIS does not endorse. Alternatively, should DOI wish to stand by its criticism of the FERC EIS, it must issue its own supplemental EIS that provides the necessary support for its MCPs that the record currently lacks. Following this, DOI must prepare a Record of Decision that will allow access to an administrative appeal process that DOI has improperly foreclosed through its arbitrary and capricious policy.

I. Background

A. The NEPA Requirements

NEPA is the foundational national environmental statute applicable to nearly all actions taken or approved by federal agencies. NEPA requires that before a federal agency takes a major action, it must disclose the environmental impact of the action and evaluate alternatives that would have fewer environmental costs. With the limited exception of the President, the Congress and the courts, NEPA's requirements apply to all agencies of the federal government. Specifically, NEPA Section 102(2) requires federal agencies to include an environmental document in "every recommendation or report on...major Federal actions significantly affecting the quality of the human environment."[4]

Under the CEQ regulations that implement NEPA,[5] an agency must first prepare an environmental assessment ("EA") if an agency's regulations do not require the preparation of a full EIS.[6] If the EA establishes that the agency action may have a significant effect on the environment, an EIS must be prepared.[7] Otherwise, the agency must issue a "finding of no significant impact" ("FONSI") accompanied by a "convincing statement of reasons" to explain why a project's impacts are insignificant.[8] Since the issuance of a new license for a hydroelectric project is generally considered to involve the potential of significant environmental impacts, an EIS or EA is typically required.[9] After an agency issues a final EIS, it then issues a "record of decision" ("ROD") that notifies the public of its decision and triggers the administrative appeals process.[10]

B. DOI's NEPA Practice and Policy

1. The DOI Manual

Under its current practices, when an action is initiated by a bureau of the DOI, then that bureau prepares environmental documents.

> NEPA applies to Department and bureau decision making and focuses on major Federal actions significantly affecting the quality of the human environment.[11]

By contrast, when another agency is the lead agency, DOI only provides "review and comment."[12] DOI does not prepare environmental documents for hydroelectric projects that are licensed by FERC because DOI considers the "major federal action" to be FERC's. Instead, DOI reviews and comments on FERC's NEPA document and submits its mandatory conditions and prescriptions pursuant to the FPA. Chapter 7 of Part 516 of DOI's Departmental Manual ("Review of EISs and Project Proposals by Other Federal Agencies") conveys this process. Section 7.2 states:

> The Department considers it a priority to provide competent and timely review comments on EISs and other environmental or project review documents prepared by other Federal agencies for their major actions which significantly affect the quality of the human environment. All such documents are hereinafter referred to as environmental review documents. The term environmental review document as used in this chapter is separate from and broader than the term environmental document found in 40 CFR 1508.10 of the CEQ Regulations. These reviews are predicated on the Department's jurisdiction by law or special expertise with respect to the environmental impact involved and shall provide constructive comments to other Federal agencies to assist them in meeting their environmental responsibilities. (Emphasis added).

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[4] 42 U.S.C. § 4332 (2)(C).
[5] 40 C.F.R. Part 1500.
[6] National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001) (citing 40 C.F.R. § 1501.4).
[7] Id.
[8] Id.
[9] Confederated Tribes and Bands of Yakima Indian Nation v. F.E.R.C., 746 F.2d 466 (9th Cir. 1984).
[10] 40 C.F.R. § 1505.2.
[11] Department of the Interior Department Manual, Part 516, Chapter 2.2(F) (May 27, 2004).
[12] See generally, id. at Part 516 and specifically Chapter 7.

This language appears to be based on section 102(C) of NEPA, which provides: "Prior to making any detailed statement [EIS], the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." Indeed, its Manual indicates that DOI considers itself bound by the requirements of NEPA[13] and specifically states:

> The Department hereby adopts the CEQ Regulations implementing the procedural provisions of NEPA [Sec. 102(2)(C)] except where compliance would be inconsistent with other statutory requirements.[14]

2. DOI's Environmental Review Memorandum No. ERM00-2

In 2000, the Director of DOI's Office of Environmental Policy and Compliance issued a memo regarding "Departmental Participation in Hydroelectric Power Licensing by the Federal Energy Regulatory Commission."[15] In the memo, the Director states:

> Following an extensive Secretarial hydropower initiative (1998-2000) to improve bureau coordination, a number of existing Departmental policies and practices in this area were revised and a number of new policies and practices were introduced. In addition, measures are provided to coordinate legal and technical review and to assure the development of a sound administrative record in FERC licensing proceedings.[16]

Regarding mandatory conditions and prescriptions, the Director states:

(1) Section 4(e) of the FPA requires FERC to accept any license terms and conditions, which the Secretary deems necessary for the protection and utilization of a reservation under the Department's supervision. The project must occupy land within the reservation.... The Department's comments will specifically identify any Section 4(e) conditions and be supported by substantial evidence in the record....

(2) Section 18 of the FPA requires FERC to accept any license terms and conditions for the construction, maintenance, and operation of such fishways as may be prescribed by the Secretary. Departmental comments will specifically identify any Section 18 prescriptions and be supported by appropriate fisheries information and substantial evidence in the record....[17]

Thus DOI, by its own admission, is bound by the requirements of NEPA, the CEQ regulations thereunder and the requirement that its MCPs be supported in the record by substantial evidence. As will be seen however, DOI's application of its policy in the Box Canyon relicensing violates these very requirements.

Attachment B

March 4, 2005

Ms. Linda Goodman
Regional Forester
U.S. Department of Agriculture
Forest Service Pacific Northwest Region
333 SW First Avenue
Portland, OR 97204

Re: Box Canyon Hydroelectric Project-FERC Docket No. P-2042-013 Request for U.S. Forest Service to Prepare a NEPA Document and Issue a Record of Decision regarding Conditions and Recommendations Filed Pursuant to Sections 4(e) and 10 of the Federal Power Act on January 12, 2005

Dear Ms. Goodman:

This letter is being submitted on behalf of the Public Utility District No. 1 of Pend Oreille County, Washington ("District"), Licensee for the Box Canyon Project (FERC No. 2042-013). On January 12, 2005, the Forest Service ("FS") filed its final conditions under section 4(e) of the Federal Power Act ("FPA")[1] with the Federal Energy Regulatory Commission ("FERC") for the Box Canyon Project. In the past, pursuant to its prior practice and policies, FS provided an opportunity to file an administrative appeal of final 4(e) conditions pursuant to 36 C.F.R. Part 215, which applies

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[13] See id. at Chapter 1.1.
[14] Id. at 1.7(B).
[15] ERM00-2 (March 27, 2000).
[16] Id. at section 1.
[17] Id. at section 4(B).
[1] 16 U.S.C. § 797(e).

to FS decisions documented in a Record of Decision ("ROD") following preparation of an environmental analysis as required by the National Environmental Policy Act ("NEPA").

However, in a memorandum dated May 12, 2003, the FS announced a change in its policy regarding its role in the hydropower licensing process. Under the new policy the FS purportedly "relies" on FERC's NEPA analysis, instead of its own, to support its section 4(e) conditions. As a result, the FS no longer issues a separate "NEPA decision document" to support its conditions, and as a consequence of this change in policy, these conditions are no longer subject to appeal under Part 215 of the FS's regulations.

FS has attempted to justify its new policy that it no longer needs to issue an appealable NEPA decision document on two grounds: (1) the NEPA "action" is actually FERC's and not the FS's; and (2) instead of issuing its own NEPA document as it had traditionally done, FS will instead rely on the document prepared by FERC. As will be outlined below, neither justification is warranted.

FS's first justification fails due to the mandatory nature of 4(e) conditions; FS remains the action agency for purposes of NEPA, not FERC. FS's second argument fails because FS has not properly relied on or "adopted" FERC's NEPA document. FS is attempting to selectively rely upon FERC's Final Environmental Impact Statement ("FEIS") on an issue-by-issue basis as a supporting NEPA document for some purposes, while at the same time rejecting it and declaring it inadequate wherever it is inconsistent with FS's 4(e) conditions. FS cannot have it both ways.

The purpose of this letter is to demonstrate that FS's new policy is inconsistent with the requirements of NEPA and to suggest two options FS could undertake to bring itself back in compliance with the requirements of NEPA. The first option would require FS to retract all of its criticism of the FERC FEIS and properly "adopt" it and its recommendations and withdraw the 4(e) conditions that the FERC FEIS does not endorse. Alternatively, should FS wish to stand by its criticism of the FERC FEIS, it must return to its prior policy of issuing its own EIS that provides the necessary support for its 4(e) conditions. Following this, FS must prepare a Record of Decision that will reopen access to the administrative appeal process that FS has improperly foreclosed through its arbitrary and capricious 2003 policy change.

I. Background

A. NEPA Requirements and FS's Practices

NEPA is the foundational national environmental statute applicable to nearly all actions taken or approved by federal agencies. NEPA requires that before a federal agency takes a major action, it must disclose the environmental impact of the action and evaluate alternatives that would have fewer environmental costs. With the limited exception of the President, the Congress and the courts, NEPA's requirements apply to all agencies of the federal government. Specifically, NEPA Section 102(2) requires federal agencies to include an environmental document in "every recommendation or report on...major Federal actions significantly affecting the quality of the human environment."[2]

Under the Counsel on Environment Quality ("CEQ") regulations that implement NEPA,[3] an agency must first prepare an environmental assessment ("EA") if an agency's regulations do not require the preparation of a full environmental impact statement ("EIS").[4] If the EA establishes that the agency action may have a significant effect on the environment, an EIS must be prepared.[5] Otherwise, the agency must issue a "finding of no significant impact" ("FONSI") accompanied by a "convincing statement of reasons" to explain why a project's impacts are insignificant.[6] Since the issuance of a new license for a hydroelectric project is generally considered to involve the potential of significant environmental impacts, an EIS or EA is typically required.[7] After an agency issues a final EIS, it then issues a "record of decision" ("ROD") that notifies the public of its decision and triggers the administrative appeals process.

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[2] 42 U.S.C. § 4332 (2)(c).

[3] 40 C.F.R. Part 1500.

[4] National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001) (citing 40 C.F.R. 1501.4).

[5] Id.

[6] Id.

[7] Confederated Tribes and Bands of Yakima Indian Nation v. F.E.R.C., 746 F.2d 466 (9th Cir. 1984).

B. FS's Prior Practice and Policy Were Consistent with the Requirements of NEPA

Prior to 2003, FS's policies and practices were consistent with the NEPA requirements outlined above. In FS's own Hydroelectric Handbook, § 32.53b "Documentation for the 4(e) Report," FS stated:

> When an Environmental Impact Statement is Necessary. If the proposed project may have a significant impact on the quality of the human environment as it relates to National Forest System lands, it is necessary to prepare an environmental impact statement (EIS) before responding with a 4(e) report containing conditions or making a recommendation concerning the project's compatibility with National Forest purposes. In that case inform FERC, in the initial 4(e) report, that there are significant impacts and request designation as a cooperating agency. Prepare the 4(e) report containing conditions after issuance of the final EIS and record of decision (sec. 52.11 and sec. 54.43).

In § 32.6(2)(b) "Decision Documents," the FS Hydroelectric Handbook, FS stated:

> Restate the decision in the 4(e) report cover letter (sec. 52.21). If an environmental impact statement was necessary, issue a separate record of decision according to the procedures in FSH 1909.15 section 47 (sec. 32.53b). If an environmental assessment was prepared, issue a decision notice and finding of no significant impact (sec. 32.7).

Furthermore, under its prior regulations, FS listed the types of agency decisions that were subject to appeal and included the following:

(a) Project and activity decisions documented in a Record of Decision [ROD] or Decision Notice [DN], including those which, as a part of the project approval decision, contain a nonsignificant amendment to a National Forest Land and Resource Management Plan (36 CFR 219.10).[8]

As indicated above, decisions subject to appeal had to have a ROD or DN, which meant that the decision had to be supported by either an environmental impact statement or an environmental assessment and declaration of no significant impact prepared by the FS. Thus, under its traditional practice in a hydroelectric relicensing, FS would issue an ROD pursuant to NEPA that would give interested parties access to an administrative appeal of its final 4(e) conditions.

[Applause.]

Miss MCMORRIS. Thank you. Ms. Kimbell.

STATEMENT OF ABIGAIL KIMBELL, REGIONAL FORESTER, REGION 1, U.S. FOREST SERVICE

Ms. KIMBELL. Thank you. Madam Chairperson and members of the Task Force, my name is Gail Kimbell. I'm the Regional Forester for the Northern Region of the U.S. Forest Service.

The Northern Region comprises 25 million acres on 13 National Forests and Grasslands in Idaho, Montana and North Dakota and is headquartered in Missoula, Montana.

Previously, I served as Associate Deputy Chief for the National Forest System in Washington, D.C. And 20 years ago I served as District Ranger in Kettle Falls. So, it's nice to be here.

I'm joined today by Mike Oliver, who's my Deputy Director of Public and Governmental Affairs, by Kim (unintelligible), who's the Resource Forester at Sullivan Lake on the Colville National Forest, and by Rick Braswell who is the Forest Supervisor on the Colville National Forest.

I'm here today to address concerns regarding the ability of the Forest Service to respond to restoration and forest health needs in a timely manner. During the past two decades, forests and grasslands in the Northern Region have experienced protracted drought accompanied by associated wildfires and forest insect epidemics.

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[8] 36 C.F.R. § 215.7 (2002).

To assess forest health of the national forests of the Northern Region, one need only drive Interstate 90.

Traveling west from Billings, Montana, you can view the Custer National Forest in the distance to the south. You drive through big timber at Livingston on the Gallatin National Forest, and you start looking closer at pockets of dead trees.

As you climb up out of Livingston, you go through a pass with some very interesting rock formations but where most of the pines are dead. You continue west through the Gallatin National Forest through Bozeman and on to Butte. As you drop down into Butte, look south onto the Beaverhead-Deerlodge National Forest into the Basin Creek watershed, which supplies the City of Butte with its water. Look that nearly every tree is dead. I always make a wish that a lightning bolt doesn't strike anywhere near for the sake of all the residents of Butte and certainly for those with homes in the path of the prevailing winds.

You'll continue north and west, you'll see more beetle killed timber and trees across the Beaverhead-Deerlodge National Forest. There are many privately held forested lands all along here that have experienced the very same drought, the very same insect infestations. Many have been treated to removed the dead and dying trees. There will be much of the same as you continue onto the Lolo National Forest, and in addition you'll see clear evidence of recent forest fires. Again, some lands have been treated to remove the killed trees.

Coming into Missoula, you see slopes of purple and yellow depending on the season. Pretty from a distance, but up close you find that it's knapweed, leafy spurge and yellow toadflax. All invasive species. Further down the Clark Fork River, the hillsides are covered with pockets of trees, large and small, of trees that have succumbed to insects. You'll also be driving through grossly overstocked stands of trees highly susceptible to wildfire with homes mixed in.

You'll come through Superior and then climb to Lookout Pass. Perhaps the toughest sight is the big sign welcoming you to Idaho with a backdrop of extensive stands of dead trees on the Idaho Panhandle National Forest. I can understand why Governor Kempthorne is not thrilled with that view.

The forest health issues are real and the impacts are extensive. So, what are we doing about this? A lot. Is it enough to effect ecological change? Perhaps not.

The District Rangers across the Northern Region have been very active with communities developing community wildfire protection plans and designing hazardous field reduction projects. They have used the Categorical Exclusions and other tools provided by the Healthy Forest Initiative and the authorities in Title I of the Healthy Forests Restoration Act. They're also using all the old tools as well.

We are currently using the most current science available from our own research branch and from the universities in Montana and Idaho to help design our projects. And, yes, we continue to be challenged on many of our decisions in both our own administrative review process and in the courts. In fact, we currently have at least 23 vegetation management projects in litigation today.

To respond to these challenges requires more staff time, more documentation. Our limited resources are employed to defend the decisions so crucial to restoring ecosystems.

There is no special budget for litigation, no special team of resource specialists. The same resource specialist charged with environmental analysis on future projects must delay work—must delay that work to prepare extensive administrative records for legal challenges.

Several speakers before me noted the stack of boxes behind you. That, in fact, is an administrative record. That's the administrative record from the Colville National Forest for a road access project. It was for the construction of 1.88 miles of road and .81 miles of road reconstruction to access private lands adjacent to the Sullivan Lake Ranger District on the Colville National Forest.

This was over a 10-year period. And, yes, it involves the complex intertwining with the Endangered Species Act, the Clean Water Act and others. And this is the administrative record. The good folks from the Colville brought it in on a dolly today. It's 16,000 pages. And, I'm sorry, the district judge who reviewed this said it had been studied to death and for a small impact, and he didn't want to see it again.

In my testimony, there is attached an Exhibit 1. And I have a larger copy of that photo. This photo demonstrates the judicial review requirements for documentation of the administrative record for a project on the Helena National Forest in Montana. The original EIS was 592 pages. It seems paltry compared to the 15,000 pages in the administrative record. Judicial review also requires the record be submitted in electronic format. Electronic formats are extensive with hundreds of hyperlinks that must be carefully inspected to insure all supporting documents are appropriately referenced. As the required analysis and documentation increases, these limited resources must also be committed to reassessing projects adding another layer of delay—level of delay.

Delays in restoration and forest health treatments compound the problem. More acres become more susceptible to catastrophic wildfire, insect, diseases and weeds continue to spread. Another example is the Jimtown project also on the Helena National Forest. This project proposed to thin and underburn about 900 acres and underburn 220 acres to make ponderosa pine stands less prone to stand replacing wildfires and protect private property in the wildland-urban interface.

There are 15 residences on inholdings in this area.

There is extensive public involvement. There were ground visits to the 22 property owners in and around the area. And the Environmental Impact and Decision Notice were released in May of 2001.

There were a series of delays. Court date was set for October 2003, but it burned in July of 2003. And it burned quite hot on National Forest, and it did not burn on the private lands that had been treated along with it—or just before it. We were trying to mimic the work that had been done on the private lands.

The decisions made in the courts can themselves have some serious impacts. The National Environmental Policy Act is sound policy for evaluating proposals, alternatives and (unintelligible) for in-

volving the public and for disclosing environmental effects and presenting the rationale for decisionmaking. But the Act in its implementing regulations lack definitive standards.

Just recently a project from the Idaho Panhandle National Forest was considered in Idaho District Court and was upheld. It was appealed to the United States Court of Appeals for the 9th Circuit, and a panel of judges overturned the lower court and in their ruling said they were raising the bar for evaluation of cumulative effects.

My resource specialists work hard to meet the goals and expectations but that bar keeps moving. There are no standards in the law to make the regulations and judges are free to set their own. Still there is hope.

I see a change in the way interest groups of all kinds want to come together and effect a better future for the resources and for their communities. They all talk of sustaining healthy forest and grasslands. Just this week the Bitterroot National Forest (unintelligible) the draft Environmental Impact Statement for a project in the vicinity of the community of Sula. This response——

Mr. CANNON. Madam Chairman, I apologize for interrupting. But I need to—I have to catch a plane a little later, and I noticed that we're significantly over time here. And I didn't mean to interrupt, Ms. Kimbell, but—may I just suggest that the Chair consider an instruction to panelists.

Miss MCMORRIS. OK. I appreciate the testimony. If you can wrap up, I want to get some time in here for questions. It's very good.

Ms. KIMBELL. The Northern Region will continue to do what we can, working with all the interested parties, with all the new tools and lots of the old ones too.

Collaborative community planning is not an inexpensive or quick process. But it's a very necessary process. And we're very excited about the results of many of our collaborative efforts with communities across the Northern Region.

This concludes my statement. I'll be happy to answer any questions you may have.

[The prepared statement of Ms. Kimbell follows:]

Statement of Abigail R. Kimbell, Regional Forester, USDA Forest Service, Northern Region

Madam Chairperson and Members of the Task Force;

My name is Gail Kimbell. I am Regional Forester for the USDA Forest Service Northern Region, which comprises 25 million acres on 13 National Forests and Grasslands, in Idaho, Montana and North Dakota. I am based in Missoula, Montana. Previously, I served as Associate Deputy Chief for the National Forest System in Washington, D.C.

I am here today to address you about the concerns regarding the ability of the Forest Service to respond to restoration and forest health needs in a timely manner. During the past two decades, Forests and Grasslands in the Northern Region have experienced protracted drought accompanied by associated wildfires and forest health issues such as invasive species and stress induced insect epidemics.

To assess forest health of the National Forests and Grasslands in the Northern Region, one need only drive Interstate-90. From Billings you can view the Custer National Forest in the distance and then the Gallatin National Forest up close. As you climb out of Livingston, you start noting all the dead pine in amongst the very cool rocks on the pass. As you drive into Butte, you can look south into the city's Basin Creek watershed on the Beaverhead-Deerlodge National Forest and fervently hope a lightning bolt doesn't strike anywhere near. Going further west, you drive through parts of the Helena National Forest and onto the Lolo National Forest,

intermixed with private lands of many ownerships. You'll note acres and acres of burned forest. You will also see abundant understories of purple and yellow characterizing the presence of spotted knapweed, leafy spurge and yellow toadflax, all invasive pest species. Keep driving I-90 down the Clark Fork River through Missoula and then on to Superior. There you will see pockets or hillsides of dead trees or trees exhibiting stress as you continue on up the pass. Perhaps the toughest sight is the big sign "Welcome to Idaho" as you cross onto the Idaho Panhandle National Forests with the spectacular backdrop of extensive stands of dead trees. I can understand why Governor Kempthorne is not thrilled with that view. My point here is that the forest health issue is real and the impacts are extensive. We are working in cooperation with Forest Service Research, the State of Idaho and State of Montana using the Forest Inventory and Analysis (FIA) process to develop quantitative data that will help determine the magnitude of various forest health problems. This, along with the application of other science based evaluation provides a foundation for the collaborative processes that are used to spend taxpayer dollars in the highest priority places.

Yes, we are being challenged on our decisions in the Northern Region. Many go on to court. In fact, we have 44 projects in some stage of litigation right now. These projects represent an array of forest and rangeland management needs including 16 green timber sales, 5 salvage timber sales, 2 fuels reduction projects, 4 grazing allotments and combinations of these activities. The balance of the projects in litigation cover a wide range of management activities such as easements, access, travel management, threatened and endangered species, and mining. Adequately responding to these challenges continues to require more extensive environmental analysis and more documentation. It is also important to note that each time we go through the appeal process or the courts, much of our limited resources are employed to defend the decisions we feel are crucial to restoring ecosystems and addressing forest health concerns. There is no special budget for litigation, no special team of resource specialists. The same resource teams that are charged with completing required analysis on current and future projects must delay that work to prepare extensive administrative records for legal challenges.

Please refer to Exhibit (1). This photo demonstrates judicial review requirements for documentation of the administrative record for the Clancy-Unionville project on the Helena National Forest in Montana. The original Environmental Impact Statement was a sizeable 592 pages with the appendices, but this seems paltry compared to over 15,000 pages now in the administrative record. Judicial review also requires this record be submitted in electronic format in addition to this mountain of paperwork. These electronic records are extensive with hundreds of hyperlinks that must be carefully inspected to ensure all the supporting documents are appropriately referenced. As the required analysis and documentation increases, these limited resources must also be committed to re-assessing projects that have previously been initiated thus adding another level of delay.

Delays in restoration and forest health treatments compound the problem as more acres move into conditions that promote invasions of exotics, leave forests susceptible to insect and disease and predispose ecosystems to unwanted wildfire. An example of how process delays can negate the advantages of appropriate treatment is the Jimtown project on the Helena National Forest in Montana. This project proposed to thin and underburn about 900 acres and underburn 220 acres to make ponderosa pine stands less prone to stand replacing wildfires and protect private property in the wildland-urban fire interface.

The project involved extensive public involvement. Letters were sent to the 22 property owners in the immediate area of the project and the District Ranger met with 12 of the landowners individually on the ground. The public participation was conducted in cooperation with the rural fire district. Public meetings and field trips to the area were held and were attended by County officials, landowners and other interested parties. The project also received letters of support from Lewis and Clark County Disaster and Emergency Services and the Tri-County Fire Working Group (A coalition of federal, state and local fire officials from Lewis and Clark, Jefferson and Broadwater counties).

An Environmental Impact Statement and Decision Notice were released in May of 2001. The project was subsequently appealed. At the appeals resolution meeting, eight individual landowners requested the appellants withdraw their appeal, which they did not. The project decision was upheld in August of 2001. The appellant filed a complaint with Federal District Court to permanently enjoin the project which was granted. A hearing date was set for October of 2003; however, in July of 2003, approximately 45% of the project area burned in a running crown wildfire. The chronology (Exhibit 2) of this project shows how process and procedural delays hamper the ability to get on top of forest health restoration needs especially when treatment

needs are time sensitive. Often delay is the objective of individuals or groups that do not want to see any trees harvested. This is particularly true with fire and insect salvage. Usually the value of any forest product is greatly reduced before the final disposition of the appeals and litigation.

Still, the Forest Service is starting to see a change in the way communities are working together with land managers to address the most important priorities that must be addressed if we are to sustain healthy forest and range lands. People want something better for Idaho and Montana and I am sensing there is an evolution underway in the manner in which interest groups are willing to come together and talk. This week, the Northern Region released the Draft Environmental Impact Statement for our first project developed under HFRA. This project was developed in a collaborative manner with the community of Sula, Montana and it responds to the needs outlined in the Community Fire Protection Plan.

The Forest Service and other federal agencies are working hard to address these ecosystem health issues. These are huge problems and many factors such as weather and other natural processes are out of our control. However, we are making progress using new tools we have been given by Congress and the Administration. We are doing lots of community collaboration and environmental analysis. We've completed over 100 projects using Categorical Exclusions (CEs) from the Healthy Forests Initiative (HFI). We have several project proposals ongoing using the authorities under Title I from the Healthy Forests Restoration Act (HFRA) and have initiated another based on the Council on Environmental Quality's Guidance for Environmental Assessment of Healthy Forest Projects on the Butte Ranger District of the Beaverhead-Deerlodge National Forest.(http://www.fs.fed.us/r1/bdnf/)

The Northern Region leads the nation in application of Forest Stewardship Contracting. Projects such as the Clearwater Stewardship Pilot project on the Lolo National Forest are producing tangible results in forest health restoration while helping local economies. This project included 640 acres of selective timber harvest, much of which was in the wildland-urban fire interface around the town of Seeley Lake, Montana. We are making good use of all these new authorities where it is appropriate. We also recognize the tools have size and other legal limitations, so there are still places where treatments need to be applied on a landscape level.

The Northern Region will continue to do what we can, working with all the interested parties, using the tools we have been given. Undoubtedly, everyone is interested in healthy, diverse and vibrant ecosystems that are managed in a sustainable manner. We need to focus our efforts and resources on what we collectively agree are good for the land and not continue to expend an inordinate amount of time mired in process. We believe the President's Healthy Forests Initiative and the new authorities provided under HRFA put us on a strong path toward addressing these problems and focusing on solutions that ultimately improve the health of the land.

This concludes my statement. I will be glad to answer any questions you may have.

NOTE: Exhibit 1 has been retained in the Committee's official files.

Exhibit 2

Task Force on Improving NEPA

TESTIMONY OF REGIONAL FORESTER GAIL KIMBELL

APRIL 23, 2005 - SPOKANE, WASHINGTON

Chronology Jimtown Vegetation Project

May 2000	Scoping initiated for project. The purpose of the project is to create sustainable conditions less prone to stand-replacing fire within a ponderosa pine forest.
May 2001	Decision Notice issued. The decision implements 860 acres of forest thinning using timber harvest with subsequent underburning and 220 acres of underburning alone.
June 2001	Native Ecosystems Council appeals the decision.
August 2001	Regional Forester affirms the decision, appeal denied.
October 2001	Native Ecosystems Council files a complaint in District Court to permanently enjoin the project.
July 2003	A human-caused fire which originated within the Jimtown Project area was reported about noon west of the Jimtown Road. By nightfall the fire had jumped the county road, forced evacuation of the area residents, taken out the power for the nearby commu-

	nity of York, and burned about 600 acres. The fire ultimately burned just over 1,000 acres and cost $1 million to suppress. Approximately 50% of the project area slated for thinning was burned in a mixed lethal fire or running crown fire. The fire spread was quite rapid and fire intensity was severe. For that reason, firefighting activities were essentially limited to slurry drops by air tankers and flanking actions by ground forces with more aggressive action along defensible spaces on private property. FS personnel have concluded that completion of the fuel reduction actions tied to the Jimtown project would have allowed firefighters to safely take more direct action against a lower intensity ground fire, resulting in much quicker control with fewer burned acres.
March 2004	The U.S. District Court issues an order denying Native Ecosystem Council's motion for Summary Judgement.
March 2004	Native Ecosystem appeals the District Court ruling to the Ninth Circuit Court.
February 2005	Ninth Circuit panel hears oral argument of the case. As of 4/19/05, the case is awaiting disposition.

Miss MCMORRIS. Thank you very much. Really appreciate it. [Applause.]

STATEMENT OF MICHAEL KAKUK, ATTORNEY, KAKUK LAW OFFICES, P.C.

Mr. KAKUK. Madam Chair, members of the Task Force, Michael Kakuk from Helena, Montana. I'm an attorney in private practice. And I will get you folks back on time.

I represent the Montana Contractors' Association, which is highway contractors, the Montana Building Industries Association, home builders, the Montana Association of Realtors and the Western Environmental Trade Association, which is a trade association composed of development, construction, extractive and motorized recreation. But I'm not here representing them today. I'm here on own time. So, any of my comments should not be attributed to any of my clients, simply myself. But for these clients, I would not be here.

As far as my clients are concerned, there's two goals to the National Environmental Policy Act or the Montana Environmental Policy Act and that would be the opportunity for public involvement. And I liked Mr. Jensen's comments about public engagement. I'm hoping that's going to go someplace. And the other goal is to understand the potential impacts of your actions. However, some of the perceived issues that were coming out of the implementation of trying to reach these two goals, and I again agree with Mr. Jensen, that these are symptoms. These are not the root cause.

These are the symptoms.

Never ending study. We've heard of that. How do you know when we're done with an environmental review? The judge tells you you're done. We've got inappropriate level of review. The level of review, whether it's an EA or an EIS or a mitigated EA, is not (unintelligible) so much by the level of potential impacts as it is by the level of public and privacy regarding that proposed project.

And, three, we have inappropriate use. I'm a member of the American Federation of Musicians, you'd think I'd know feedback, right.

We're seeing inappropriate use of the environmental policy reviews. For example, we've got Highway 93 in Montana, one of the

most deadly stretches of highway in the country. And the Montana Department of Transportation said we've got to go from two to four lanes. And we had people living down south of Missoula that said, well, go ahead and do that. But we want you to study the impacts of growth.

And not only do we want you to study it, we want the Federal Highway Commission to actually regulate growth alongside those roads. That's inappropriate.

You can go ahead and study it. There is a connection between building roads and growth. Of course there is. But the control should come from the local government. And, again, we don't have a growth management act at a statewide level. And local government's very difficult to get them to do basic planning and zoning. And that again goes back to this idea of public engagement. If we can get a more creative dialog, I think some of these things are going to go away.

So, what have we done in Montana?

You'll see on page 2 of my testimony that one—the first thing we did was increase due process protections for project sponsors. Not cutting the public out, just making sure the project sponsor has the opportunity to be as involved in the process as the public.

Second, we clarified the distinction that in Montana you cannot—the agency may not withhold, deny or impose conditions on any permit based on MEPA. I don't care what you find in the Montana Environmental Policy Act, you can't mitigate or deny based on that. You've got to have it.

You've got to have that authority in your underlying statutes, the Water Quality Act, the Air Quality Act, et cetera.

Montana Environmental—and that P doesn't stand for protection. This is not a protection act; this is a policy act. And we felt that going beyond that was actually unconstitutional delegation of legislative authority. That was changed in 2001.

What have we seen? We've actually seen a decrease in lawsuits regarding this. Now, it's anecdotal. I didn't have the time to actually go through and do a statistical analysis. I can't sit here and say that but for this change we wouldn't have seen the decrease in lawsuits. But the agencies are telling me—and I checked with the agencies.

I even checked with the environmental organization as well, one, the Montana Environmental Information Center before I came here said this is my role. What would you like me to tell them about? And I'm seeing a decrease in lawsuits. Again, anecdotal.

OK. So, what's next? Very interested in Mr. Jensen's three-part approach. Getting back to the policy. We've got the same policy in Montana. And it isn't applied because it is so broad and it's nebulous. Difficult to put qualifiers on it. And, again, I really like the idea of this going from public involvement to public engagement.

If we can take the heat down, I think things are going to smooth out. But until that happens, the first thing we're going to do this interim we're looking at more modifications. Though I have to tell you the last thing we did this year in 2005 just a couple weeks ago, we put a clear trigger. How do you go from an EA to an EIS? We know that if it's significant, you're going to do significant impacts, you do an EIS. How do you make that determination?

We're now requiring in Montana that there is a written determination by the agency based on material evidence identified in the determination that there will be a significant impact or a potential for significant environmental impact before the agencies can charge the sponsor for this EIS.

What's next? We're looking at side boards. We've got to help the agencies determine when they are finished. What makes a valid environmental document.

Two, we're going to—we're looking at categorizing impacts; primary, secondary, tertiary. For example, the tertiary impacts maybe that doesn't trigger an EIS. Maybe tertiary impacts are raised but not analyzed. And, third, we're looking at the distinction between the actual substantive laws, the regulatory laws, and NEPA and the state act.

NEPA predates our Water Quality Act and our Air Quality Act. Those two acts have taken a lot of the responsibilities that were under MEPA and they've included it in the substantive acts themselves. Maybe it's time to contrast and compare and making sure that those twin goals which my clients support and endorse public involvement, public engagement, and look before you leap are met in an efficient and effective manner. Thank you.

[The prepared statement of Mr. Kakuk follows:]

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APRIL 20, 2005

Representative Cathy McMorris
Chairwoman
Task Force on Improving NEPA
Committee on Resources

Re: NEPA/MEPA — A Montana Perspective

Dear Representative McMorris:

Thank you for the invitation to address the Task Force on Improving NEPA regarding my experiences with the National and State Environmental Policy Acts. I hope that these brief comments will prove useful. It's important to note that while I have represented many clients and their associations regarding environmental issues, these comments are my own and should not be attributed to any other person or organization.

Environmental Review Goals

- Opportunity for public involvement
- Understand the potential impact of the action

Perceived Implementation Issues

- Never ending study
  - Increased cost
  - Delays
    - Short Montana construction season
  - Agencies have no clear stopping point
- Inappropriate issues
  - Sewer extension—road impacts
  - Road construction—water quality impacts
  - Road construction—land use issues
- Inappropriate level of review
  - EIS not warranted for non-regulatory impacts

Montana's Response

- Increased due process protection. (See Attachment 1.)

- Project alternatives proposed by the agency must be reasonable, technologically achievable, and economically feasible.
- Agency must consult with project sponsor regarding alternatives identification.
- Sponsor may request a review of the agency's alternatives identification before the appropriate board.
- Agency director must endorse any findings of significance.
- Sponsor may request a review of the agency's findings of significance before the appropriate board.
- Clear time limit, and time limit extension process, for review completion.
- Sponsor may request a review of the agency's time limit extensions before the appropriate board.
- Agency must conduct a meaningful "no-action" alternative review, looking at all impacts of the project's non-completion.
- Agency must consider regulatory impacts on private property.
- Sponsor may appear before the EQC or agency director to discuss the review process issues.
- In any challenge to an agency's MEPA decision, the burden of proof is on the challenger to show that the review was inadequate.
- Court may not consider evidence not submitted to the agency during the review process and must remand back to the agency for consideration.
- Court may only set aside MEPA decision with clear and convincing evidence that the decision was arbitrary or not in compliance with the law.

- Clarification between substantive and procedural agency authority, i.e., the agency may not withhold, deny, or impose conditions on any permit or other authority to act based on MEPA.
- EIS trigger, i.e., the agency must make a written determination, based on material evidence identified in the determination, that there will be a significant environmental impact or a potential for a significant environmental impact.

Next Steps

- Get the agencies out of the "weighing game", e.g. no significance determinations.
- Ensure compliance with MEPA goals of "public involvement" and "hard look" through other means: web sites, regulatory statutes, etc.

Thank you again for the opportunity to appear before the Task Force and I appreciate your attention to these important matters.

SINCERELY,
MICHAEL S. KAKUK, ATTORNEY

75-1-201. General directions—environmental impact statements. (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) under this part, all agencies of the state, except the legislature and except as provided in subsection (2), shall:

(i) use a systematic, interdisciplinary approach that will ensure:

(A) the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment; and

(B) that in any environmental review that is not subject to subsection (1)(b)(iv), when an agency considers alternatives, the alternative analysis will be in compliance with the provisions of subsections (1)(b)(iv)(C)(I) through (1)(b)(iv)(C)(III) and, if requested by the project sponsor or if determined by the agency to be necessary, subsection (1)(b)(iv)(C)(IV);

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(D);

(iv) include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects that cannot be avoided if the proposal is implemented;

(C) alternatives to the proposed action. An analysis of any alternative included in the environmental review must comply with the following criteria:

(I) any alternative proposed must be reasonable, in that the alternative must be achievable under current technology and the alternative must be economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor;

(II) the agency proposing the alternative shall consult with the project sponsor regarding any proposed alternative, and the agency shall give due weight and consideration to the project sponsor's comments regarding the proposed alternative;

(III) if the project sponsor believes that an alternative is not reasonable as provided in subsection (1)(b)(iv)(C)(I), the project sponsor may request a review by the appropriate board, if any, of the agency's determination regarding the reasonableness of the alternative. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The agency may not charge the project sponsor for any of its activities associated with any review under this section. The period of time between the request for a review and completion of a review under this subsection may not be included for the purposes of determining compliance with the time limits established for environmental review in 75-1-208.

(IV) the agency shall complete a meaningful no-action alternative analysis. The no-action alternative analysis must include the projected beneficial and adverse environmental, social, and economic impact of the project's noncompletion.

(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented; and

(G) the details of the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal;

(v) in accordance with the criteria set forth in subsection (1)(b)(iv)(C), study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;

(vi) recognize the national and long-range character of environmental problems and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(viii) initiate and use ecological information in the planning and development of resource-oriented projects; and

(ix) assist the environmental quality council established by 5-16-101;

(c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved and with any local government, as defined in 7-12-1103, that may be directly impacted by the project. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized to develop and enforce environmental standards must be made available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes.

(d) a transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for use or permission to act by an agency, either singly or in combination with other state agencies, does not trigger review under subsection (1)(b)(iv) if there is not a material change in terms or conditions of the entitlement or unless otherwise provided by law.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(3) (a) In any action challenging or seeking review of an agency's decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement, a court may not consider any issue relating to the adequacy or content of the agency's environmental review document or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

(b) When new, material, and significant evidence or issues relating to the adequacy or content of the agency's environmental review document are presented to the district court that had not previously been presented to the agency for its consideration, the district court shall remand the new evidence or issue relating to the adequacy or content of the agency's environmental review document back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence or issue relating to the adequacy or content of the agency's environmental review document within the administrative record under review. Immaterial or insignificant evidence or issues relating to the adequacy or content of the agency's environmental review document may not be remanded to the agency. The district court shall review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review.

(4) To the extent that the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) are inconsistent with federal requirements, the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) do not apply to an environmental review that is being prepared by a state agency pursuant to this part and a federal agency pursuant to the National Environmental Policy Act or to an environmental review that is being prepared by a state agency to comply with the requirements of the National Environmental Policy Act.

(5) (a) The agency may not withhold, deny, or impose conditions on any permit or other authority to act based on parts 1 through 3 of this chapter.

(b) Nothing in this subsection (5) prevents a project sponsor and an agency from mutually developing measures that may, at the request of a project sponsor, be incorporated into a permit or other authority to act.

(c) Parts 1 through 3 of this chapter do not confer authority to an agency that is a project sponsor to modify a proposed project or action.

(6) (a) (i) A challenge to an agency action under this part may only be brought against a final agency action and may only be brought in district court or in federal court, whichever is appropriate.

(ii) Any action or proceeding challenging a final agency action alleging failure to comply with or inadequate compliance with a requirement under this part must be brought within 60 days of the action that is the subject of the challenge.

(iii) For an action taken by the board of land commissioners or the department of natural resources and conservation under Title 77, "final agency action" means the date that the board of land commissioners or the department of natural resources and conservation issues a final environmental review document under this part or the date that the board approves the action that is subject to this part, whichever is later.

(b) Any action or proceeding under subsection (6)(a)(ii) must take precedence over other cases or matters in the district court unless otherwise provided by law.

(7) The director of the agency responsible for the determination or recommendation shall endorse in writing any determination of significance made under subsection (1)(b)(iv) or any recommendation that a determination of significance be made.

(8) A project sponsor may request a review of the significance determination or recommendation made under subsection (7) by the appropriate board, if any. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The period of time between the request for a review and completion of a review under this subsection may not be included for the purposes of determining compliance with the time limits established for environmental review in 75-1-208.

75-1-208. Environmental review procedure. (1) (a) Except as provided in subsection (1)(b), an agency shall comply with this section when completing any environmental review required under this part.

(b) To the extent that the requirements of this section are inconsistent with federal requirements, the requirements of this section do not apply to an environmental review that is being prepared jointly by a state agency pursuant to this part

and a federal agency pursuant to the National Environmental Policy Act or to an environmental review that must comply with the requirements of the National Environmental Policy Act.

(2) A project sponsor may, after providing a 30-day notice, appear before the environmental quality council at any regularly scheduled meeting to discuss issues regarding the agency's environmental review of the project. The environmental quality council shall ensure that the appropriate agency personnel are available to answer questions.

(3) If a project sponsor experiences problems in dealing with the agency or any consultant hired by the agency regarding an environmental review, the project sponsor may submit a written request to the agency director requesting a meeting to discuss the issues. The written request must sufficiently state the issues to allow the agency to prepare for the meeting. If the issues remain unresolved after the meeting with the agency director, the project sponsor may submit a written request to appear before the appropriate board, if any, to discuss the remaining issues. A written request to the appropriate board must sufficiently state the issues to allow the agency and the board to prepare for the meeting.

(4) (a) Subject to the requirements of subsection (5), to ensure a timely completion of the environmental review process, an agency is subject to the time limits listed in this subsection (4) unless other time limits are provided by law. All time limits are measured from the date the agency receives a complete application. An agency has:

(i) 60 days to complete a public scoping process, if any;

(ii) 90 days to complete an environmental review unless a detailed statement pursuant to 75-1-201(1)(b)(iv) is required; and

(iii) 180 days to complete a detailed statement pursuant to 75-1-201(1)(b)(iv).

(b) The period of time between the request for a review by a board and the completion of a review by a board under 75-1-201(1)(b)(iv)(C)(III) or (8) or subsection (10) of this section may not be included for the purposes of determining compliance with the time limits established for conducting an environmental review under this subsection or the time limits established for permitting in 75-2-211, 75-2-218, 75-10-922, 75-20-216, 75-20-231, 76-4-125, 82-4-122, 82-4-231, 82-4-337, and 82-4-432.

(5) An agency may extend the time limits in subsection (4) by notifying the project sponsor in writing that an extension is necessary and stating the basis for the extension. The agency may extend the time limit one time, and the extension may not exceed 50% of the original time period as listed in subsection (4). After one extension, the agency may not extend the time limit unless the agency and the project sponsor mutually agree to the extension.

(6) If the project sponsor disagrees with the need for the extension, the project sponsor may request that the appropriate board, if any, conduct a review of the agency's decision to extend the time period. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue.

(7) (a) Except as provided in subsection (7)(b), if an agency has not completed the environmental review by the expiration of the original or extended time period, the agency may not withhold a permit or other authority to act unless the agency makes a written finding that there is a likelihood that permit issuance or other approval to act would result in the violation of a statutory or regulatory requirement.

(b) Subsection (7)(a) does not apply to a permit granted under Title 75, chapter 2, or under Title 82, chapter 4, parts 1 and 2.

(8) Under this part, an agency may only request that information from the project sponsor that is relevant to the environmental review required under this part.

(9) An agency shall ensure that the notification for any public scoping process associated with an environmental review conducted by the agency is presented in an objective and neutral manner and that the notification does not speculate on the potential impacts of the project.

(10) An agency may not require the project sponsor to provide engineering designs in greater detail than that necessary to fairly evaluate the proposed project. The project sponsor may request that the appropriate board, if any, review an agency's request regarding the level of design detail information that the agency believes is necessary to conduct the environmental review. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue.

(11) An agency shall, when appropriate, consider the cumulative impacts of a proposed project. However, related future actions may only be considered when these actions are under concurrent consideration by any agency through preimpact statement studies, separate impact statement evaluations, or permit processing procedures.

Miss MCMORRIS. Thank you. Thank you very much.
[Applause.]

STATEMENT OF JOHN ROSKELLEY, MEMBER, EASTERN WASHINGTON GROWTH MANAGEMENT ACT HEARINGS BOARD

Mr. ROSKELLEY. Madam Chair and distinguished members of the Task Force, my name is John Roskelley. And I was a Spokane County Commissioner from 1995 to 2004. I currently serve on the Eastern Washington Growth Management Hearings Board. I'm here to testify in support of the National Environmental Policy Act. And I will be done when that red light pops on.

Lewis and Clark explored the west 200 years ago. They were in awe of this country's pristine rivers, endless forests and abundant wildlife. Today they would turn over in their graves if they were to see what 200 years of our stewardship has done to our environment. They would embrace and strengthen the NEPA.

The National Environmental Policy Act is one of the most important environmental laws this nation's government has passed to the benefit of its people and the environment. No other law protects this nation's greatest assets; its water, air and natural resources, and yet allows reasonable use of these resources.

As it is stated in the purpose of the Act, the NEPA is a policy which encourages productive and enjoyable harmony between man and his environment. Those who wrote the law in 1969 took into consideration that there has to be a degree of compromise between our citizens' societal needs and the degree of impact of those needs on the environment. As a responsible society, we need to find a balance, a harmony, as written by Congress, between man's wants and the environment he needs to sustain life.

The NEPA is about democracy. Congress, in its wisdom, declared that is the continuing policy of the Federal government, in cooperation with state and local governments, and other concerned public and private organizations to create and maintain conditions under which man and nature can exist in productive harmony. They included present and future generations of America. Here, Congress explicitly states that not only are governments responsible to protect the environment, the people of this nation have a definite role to play in this policy as well.

One of the key components in the NEPA concerns the public. The NEPA is designed to ensure broad opportunities for public involvement. Congress realized when they wrote the Act that they represented their constituents, but who better than local citizens would be able to address the impacts of Federal actions in their area. The United States is an enormous country, well over 250 million people. Not everyone will be happy with certain decisions concerning their home area, but at least the opportunity is there for them to express their opinion.

The NEPA is also the law not only requires Federal agencies to look before they leap, but also forces these agencies to think outside the box. The NEPA's requirement that decisionmakers prepare and provide the public with an adequate range of alternatives is the mechanism that forces agencies to look beyond the "our way or the highway" approach.

Most experts consider the law's requirement to study, develop and describe appropriate alternatives to recommended courses of action to be the very heart of the Act. Not only does the development of alternatives help result in better decisions on the ground, the process educates the public as to the potential risks and benefits these various alternatives could have on the environment and communities.

On a personal level, the NEPA has allowed me the opportunity for the past 20 years to monitor timber sales and other actions in the panhandle of north Idaho. I'm on their contact list. I have used our national forests for decades for elk, deer and bear hunting. As the years went by, my hunting areas were decimated by inappropriate logging techniques and opened up to four-wheelers and snowmobiles by road building. I fought back the only way possible: Monitoring individual timber sales in areas I was familiar with. The NEPA required the agencies to create alternatives and allows me to voice my concerns.

The NEPA fulfills its mission. It has proved to be effective and requires Federal agencies to look to the future when designing or implementing large projects or actions. I suggest Congress investigate the 133-year-old Mining Act rather than the NEPA. The Mining Act——

[Applause.]

Mr. ROSKELLEY. The Mining Act has cost taxpayers billions and destroyed millions of acres, yet Congress refuses to take on the powerful mining industry.

I have traveled extensively throughout the world, spending months in places like Pakistan, India, Tibet, Nepal and Bhutan. And it has been my experience, whether the country is led by a president or a dictator or a king, that how they take care of their environment is symbolic of how they take care of their citizens. In other words, I would not like to live in some of those countries.

Congress needs to stay the course and enthusiastically support the National Environmental Policy Act and strengthen it. Generations will thank you for your vision. Thank you.

[The prepared statement of Mr. Roskelley follows:]

Statement of John Roskelley, Board Member,
Eastern Washington Growth Management Hearings Board

Madame Chair and distinguished members of the Task Force, my name is John Roskelley. I was a Spokane County Commissioner from 1995 to 2004 and currently serve on the Eastern Washington Growth Management Hearings Board, which is a quasi-judicial Board that "hears and determines" appeals concerning counties, cities comprehensive plans, the Shoreline Management Act and State Environmental Policy Act.

The National Environmental Policy Act is one of the most important environmental laws this nation's government has passed to the benefit of its people and environment. No other law protects this nation's greatest assets; its water, air and natural resources, and yet allows reasonable use of these resources. As is stated in the Purpose of the Act, NEPA is a policy which encourages "productive and enjoyable harmony between man and his environment." Those who wrote the law in 1969 took into consideration that there has to be a degree of compromise between our citizen's societal needs and the degree of impact of those needs on the environment. As a responsible society, we need to find a balance, a harmony, as written by Congress, between man's wants and the environment he needs to sustain life.

NEPA is about democracy. Congress, in its wisdom, declared that it is "the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations...to create and

maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." Here, Congress, the representatives of the people, explicitly state that not only are governments responsible to protect the environment, the people of this nation have a definite role to play in this policy as well.

One of the key components in NEPA concerns the public. NEPA is designed to ensure broad opportunities for public involvement. Congress realized when they wrote the Act that they represented their constituents and who better would be able to address the impacts of federal actions in their area. The United States is an enormous country, with well over 250 million people. Not everyone will be happy with certain decisions concerning their home area, but at least the opportunity is there for them to express their opinion.

NEPA is also the law that not only requires federal agencies to "look before they leap," but also forces them to do something that can be challenging inside the federal bureaucracy—to think outside of the box. NEPA's requirement that decision makers prepare, and provide the public with, an adequate range of alternatives is the mechanism that forces agencies to look beyond the "our way or the highway" approach. Most experts consider the law's requirement to "study, develop, and describe appropriate alternatives to recommended courses of action" to be the very heart of the Act. Not only does the development of alternatives help result in better decisions on the ground, but it educates the public as to the potential risks and benefits various approaches being contemplated in a major federal action that could adversely impact the environment and communities.

Although I can't say I was an enthusiastic supporter of the North-South Spokane Freeway, especially where it has now been located, I had ample opportunity to express my concerns thanks to NEPA. Through NEPA, the public was able to not only participate in the process, but substantially improve this Federal highway project. The process is long and it involves listening to the public and sister agencies, but NEPA prevents many mistakes that would cost the public a lot more in the long run.

In the case of the North-South Freeway, the NEPA allowed the public to help choose the location and route for this road based on where the least damaging impacts to the community was likely to occur. Rather than eliminate hundreds of single family homes along the Nevada or Crestline corridors, both alternative routes, citizen input convinced the transportation planners to move the freeway to an railroad corridor, saving those homes and creating the potential for commercial development in another area of town.

NEPA fulfills its mission. It has proven to be effective and requires Federal agencies to look to the future when designing or implementing large projects or actions. I suggest Congress investigate the 133 year-old Mining Act, rather than the NEPA. The Mining Act has cost taxpayers billions and destroyed millions of acres, yet Congress refuses to take on the powerful mining industry.

I have traveled extensively throughout the world, spending months in places like Pakistan, India, Tibet, Nepal and Bhutan. It has been my experience, whether the country is led by a president, dictator or king, that how they take care of their environment is symbolic of how they take care of their citizens. In other words, I would not like to live in some of those countries. Congress needs to stay the course and enthusiastically support the National Environmental Policy Act and strengthen it. Our children and our children's children will thank you for your vision.

Thank you.

Miss MCMORRIS. I also want to recognize Judy Olson is here from Senator Murray's office. She's the District Director. Thanks, Judy.

At this time, we're going to open it up for questions.

And we'll have five minutes for each Member. And we'll just go back and forth between the Republicans and the Democrats.

So, Mr. Cannon, if you want to start.

Mr. CANNON. Thank you, Madam Chair. And, Ms. Kimbell, I would like to apologize for interrupting you. There ought to be a more gracious way to do that, but under the circumstances there's not. And again I apologize. I'm going to have to leave quite soon.

Could I ask you one question. Just if you're aware—there's been some studies. Are you aware of what the cost incurred by the

Forest Service is in anticipation of or for litigation? Have you seen any of those studies?

Ms. KIMBELL. I have seen a number of studies. And yet just in having had a lot of personal experience with our budgeting and tracking systems, I don't know that we have real accurate numbers, where we could talk about what exactly litigation costs. There are a lot of hidden costs in responding to litigation.

Mr. CANNON. Just for the group and for the discussion here. I've seen numbers between 48 and 58 percent of the department's budget. Is that consistent with your experience.

Ms. KIMBELL. I would think that would be high. But it is—but it is——

Mr. CANNON. The 58 percent would be the high end including loss of the activity that goes into the permitting process. Is 48 percent high in your experience? Prior to the Act?

Ms. KIMBELL. It's a very difficult number to ascertain because you need to be able to value the loss of resources, as I talked about with the loss of commercial value and different resources when there are delays in the litigation process.

Mr. CANNON. The reason I suggest that number, this is a—we spend an inordinately large amount of money on talking and thinking and analyzing and not enough money—I think everybody in this room is going to agree that we don't spend enough money on actually helping the forests.

In fact, Utah was I think the first state to actually do forest wilderness. We're very proud of that. And I don't think—if we ask for vote—and I'm going to ask for a vote later on—but if we ask for a vote on this issue, I don't think anybody would want to tradeoff our watersheds and our forests for litigation preparation.

You know, I was a real fan of Scoop Jackson's. And I just want to (unintelligible) momentarily. He did many things and he did them very well and had a great balanced idea. But he was also famous for his determination that America be powerful, both economically and militarily, and in virtually every other way. I suspect he actually would like to encourage mining in America. I'm not sure if he'd want to discourage it, just reviewing the Mining Act. We may have to do that at some point. Maybe do it in—and do it in a way that would improve the way we use our land. But personally you should all know that I like the idea of mining and getting the resources here.

But on the other hand, I was also a big fan of Mo Udall who was the Chairman of the House Interior and Insular Affairs Committee when NEPA was passed. I think he was Chairman then. And his brother, Stewart Udall, was the Secretary of the Interior at the time. And my first job as a lawyer was working for Stewart (unintelligible), who I still call a close friend.

So, I was sort of intrigued by what Mr. MacDonald said when he focused on the purpose of NEPA. And here's where we're going to ask you guys for some involvement here. Like somebody on the outside had a sign saying how can you hear if you don't hear, and you can't hear if people don't speak. So, we'd like to have at least some feedback on this.

How many of you all are familiar—you've heard Mr. MacDonald. How many of you feel like you're fairly familiar with the language of Section 101 of NEPA, which is the Purpose.

[Show of hands.]

Mr. CANNON. We want a little more participation. I think that Mr. Inslee said there were about 120 green stickers. I haven't counted them all, but—you heard—in fact, Mr. MacDonald, would you just sort of repeat what the purpose of NEPA is.

Mr. MACDONALD. I'm happy to give you my sense. It's to develop information about environmental consequences, the governmental action, so that the people who have to make decisions about what to do can make wise decisions. And so that the citizens can see how those decisions are made on what basis and can participate with public officials.

Mr. CANNON. I'm going to cut you off because we actually have the Purpose here, so—because I want everybody to vote. OK.

And that is the—The purposes of the Act are to declare a national policy to encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

So, with that statement out in front—and we're all familiar with it—can I just ask how many of you believe those words and think that those are appropriate framework or context for the National Environmental Policy Act.

[Show of hands.]

Mr. CANNON. I think that that's—that's almost unanimous. Is anyone opposed to that approach?

I just want the record here of this hearing to reflect that we have a consensus on a framework. And I hope that we are able in our legislative and (unintelligible) processes to come up with a way to stay within that framework and help things work a little better. Because we have—we are doing things to the environment today—I think, Mr. MacDonald, you said that not acting is acting. Things are happening in our environment today that we need to be able to deal with more judiciously, more quickly, and in a way that actually enhances the environment for all of us. Thank you.

Miss MCMORRIS. Thank you very much. Mr. Inslee.

Mr. INSLEE. Thank you. Mr. Geddes, I wanted to ask you about your Box Canyon concerns a little bit. And the best I get a sense of what you're talking about is that the agencies were not coordinated that you had different decisions. And in fact one decision did not support the other by a different agency. That's the way I would characterize what I heard is the agencies were really not coordinating their decisionmaking. Is that a fair kind of characterization.

Mr. GEDDES. Yes, it is.

Mr. INSLEE. Now, this happened in 2001, 2002, 2003, 2004, all the way to 2005. It's going on. Is that kind of a fair——

Mr. GEDDES. Yes.

Mr. INSLEE. And who was the President during those years?

Mr. GEDDES. [No response.]

Mr. INSLEE. I'll fill in. It was President Bush. And the reason I ask you this is that isn't it the responsibility of the President of the United States in a circumstance like this to pick up the phone and knock some heads together, agency heads, and tell them to coordinate their activities so that we could get a responsible decision and the agencies that are consistent with one another. And that apparently has not happened. Why has it not happened?

Mr. INSLEE. Why hasn't the leader of the executive branch got these two agencies to work together?

Mr. GEDDES. I can't answer it. I don't know why it hasn't happened.

Mr. INSLEE. Have you called the President? This is a serious question. I mean, this is a serious question to me whether you've tried to use the elected officials to get the agencies to do the job that they should do.

Mr. GEDDES. Actually, I have in the last couple of years have spent way more time in Washington, D.C., than I care to. We have——

Mr. INSLEE. That's not a majority, I hope.

Mr. GEDDES. We have made some efforts in that area, some serious effort, to work politically through this with some success and obviously not the ultimate success.

Mr. INSLEE. Well, let me just suggest to you that—that what I'm hearing is not necessarily a failure of the statute that's drafted by Henry Jackson. But it's a failure of the executive branch to insist that these Federal agencies get their act together and work together in a consistent way, which I think may be able to be resolved by the executive branch headed by the President George Bush. I encourage you to at least think about that.

One other issue, if I can. We had a bill go through Congress Thursday, the Energy Bill. And there was a provision in it that affected hydroelectric re-licensing. And I'm not actually positive whether it was changed to the NEPA or the—or the licensing. I think it was just a licensing provision referred rather than NEPA. And it—what it did is it said that if there was—if the licensee, the applicant, disagreed with the decision by the agency, the licensee would have the right to appeal the decision to an expedited process. But nobody else could. Nobody else in this room could. None of the people with green stickers.

None of the environmental community. None of the tribes.

None of the faith community. Nobody except the licensee.

Now, I have a little problem with that because to me just allowing the licensee to ask for an appeal right isn't fair when you're not asking or allowing any of the citizens to do that.

What's your reaction to that issue? How should we think about it when it comes time to looking at NEPA.

Mr. GEDDES. I can understand your concern in that. We were interested in seeing that kind of an approach in the Federal reform area. I think it's a balance to—an effort to balance the mandatory conditioning authority that the agencies now have under the 4(e) conditions.

We are simply dictated to in the 4(e) conditioning authority. FERC is the final agency there, but they have to accept the 4(e) conditions that are submitted by the Interior and Forest Service,

in our case, and include them in the license, whether they've gone through NEPA review or not.

And in this case they have not.

Mr. INSLEE. Would you ever suggest to this panel that we adopt a law to allow the licensee to have a right, for instance, to appeal that other citizens do not have?

Mr. GEDDES. [No response.]

Mr. INSLEE. I hope you're going to say no. It's a rhetorical question.

Mr. GEDDES. OK. I'm sensing there's more to your question. So, what is the rest of it.

Mr. INSLEE. No. I'm just—it's a serious question.

Do you think when we're looking at NEPA, broadly speaking, should we ever give, you know, the licensee or the applicant who wants to build a mine or a dam or a building or whatever else, give them a right to a hearing or an appeal that the citizens would not have?

Mr. GEDDES. No, that wouldn't seem fair. No.

Mr. INSLEE. I'm with you on that. I (unintelligible) to Congress later.

Mr. MacDonald, I'm intrigued by your—your efforts of making the EIS's readable. And looking at yours in the Viaduct (unintelligible) about 160 pages and pretty easy reading and comprehensible. Tell us how you achieved that. What obstacles you had. And how we think about that in Federal——

Mr. MACDONALD. The first obstacle we had was to convince all the consultants that they should go to an (unintelligible) writing course. And we did that. And the second obstacle we had was to engage people who could draw pictures of the thing, because pictures are worth a thousand words. The third thing we had was to address the document.

Who is the audience for the document? And we decided that the audience for the document was people who were going to use the viaduct, not the permit writers and not just the judge but the judge's clerk. But we had to draft the documents so that the people who wanted to use it could read it.

And then we worked on it for a long time. And wrote it and rewrote it. And we actually got a lot of people signing it. There were a lot of our friends at the Federal Highway Administration. They saw the value of trying to get people together in a program.

Now, (unintelligible) programs. Even people here in Spokane know it's a long way from rebuilding a road. You're going to have to pay for it. But what we do what we can do is get citizens together about how it will serve the community and what will happen with fish in Elliott Bay or with air quality to the neighbors in ways that they can make good, solid consensus, common sense judgments about what to do.

Miss MCMORRIS. Thank you. What I'm thinking is I'll just go back and forth.

Mr. INSLEE. Thank you.

Miss MCMORRIS. Mr. Gohmert.

Mr. GOHMERT. Thank you. I appreciate all the testimony and, of course, we want to hear from anybody that wants to be heard. Ob-

viously our time is limited in this hearing. But anybody that wants to submit anything in writing, please do so.

You know, I've seen an ad that ran in the paper about this. And it seemed like it was doing a bit of fear mongering, saying that now what's—there's a move afoot spearheaded by California Congressman Richard Pombo to weaken the National Environmental Policy Act to silence our say in what the government does to our property, parks, waterways, lands and wildlife. We can't let that happen. You know. We want to hear from people. And I'm telling you what so that people understand where I'm coming from. I don't need this job. I've got three daughters that I could do a whole lot better for if I were not in public service. And the day I feel like I'm not going to help make this place better for my kids, I'm going home. I'm not—I'm away from home today trying to participate in this process. I do want to hear.

And as a former judge for a lot of years, credibility to me is so important. So, you got to be careful when you're saying I'm not going to use all my time. I'm going to be short and go over it hurts credibility. When you say something that kind of mongers fear, you know, like I'm sure—surely, Mr. Roskelley, you didn't mean that we all need to quit and go home and set up another task force.

Maybe you did.

Mr. ROSKELLEY. Absolutely not.

Mr. GOHMERT. To review the National Mining Act.

Because you said we ought to be spending our time doing that and not doing this. What you're telling me, you're wasting your time. You ought to be back home with your kids instead of wasting it here. Let somebody review the Mining Act.

I mean—so words have meaning. I'd encourage you to please be careful because I think most of us do want to create a better world and better environment we're living in.

Secretary MacDonald, as a judge one of the things I had to keep pounding on lawyers was that they like to copy and paste. And, you know, computers have been bad about that. They allow people to make a copy of this, paste it on here, and before you know it, you've got this huge ridiculous report.

And the thing that I pounded into people that came before me—and I'm wondering if we may need some restrictions to get people to use—or to create EIS's that actually can be read. But my slogan was, and nobody came to understand it, "Longer is lazier." If you want a long document, you're just copying and pasting just to create—you know, just to tear down trees, just so you can have this big record. That's lazy.

And if you want—if you go beyond a certain number of pages then that's too lazy and your document loses credibility. If you want it better and to be considered as credible then it ought to be shorter. And you ought to go through and, like you all did, edit, edit, edit until you get it succinctly where people can understand it. So, I appreciate the efforts there.

Ms. Kimbell, let me ask you, you talked about the trees—all the dead trees and beetles. Could you tell me how you feel Federal law prevents you from helping create more healthy forests.

Ms. KIMBELL. Federal law doesn't prevent us from creating healthier forests. There's only so far that budget and time will

allow. And we've—given the extended drought that we've experienced here in the Northwest and with the stress on trees, the trees are dying faster than we're able to respond. So, we're prioritizing our work and working directly with communities that have concerns about their communities from a wildfire perspective. And that's where we're prioritizing our work.

Mr. GOHMERT. Well, when you talked about the beetle infestation, I got the impression that you were saying somebody's laws were preventing you from going in and preventing the spread of those beetles that were killing off all the forests.

Ms. KIMBELL. I intended to give an impression of an assessment of health of the forests in the Northern Region.

We are experiencing pretty extensive beetle attacks. And we've had some very extensive wildfires that are getting to those overstocked stands.

No. There are no Federal laws preventing us from treating lands. There are some different considerations that we have to take certainly in planning for treatment of different areas.

Mr. GOHMERT. Well, you'd agree that our goal is healthy forests. And it's a matter of getting there. So, when you talk about, you know, all the dead trees, I'm just trying to get what we do in Washington to help you locally, which is where things need to happen where people know what's going on, make the forests healthy. If there's a beetle infestation, then go stop it. What do we need to do to help you do that.

Ms. KIMBELL. The local level people are very committed and working together just for interest of working together every day to help make—for a healthier forest. We do have this difference—or we have a lack of standards in the law and the regulations that would give people both communities and my resource professionals a target to work against.

Mr. GOHMERT. So, you're saying we need better standards.

Ms. KIMBELL. We need better standards in the regulations for the implementation of the National Environmental Policy Act.

Mr. GOHMERT. Do you have any recommendations in that regard.

Ms. KIMBELL. Certainly, for——

Mr. GOHMERT. I'd be interested, if you would submit any in writing. I mean, it's easy to say we all need to come together. But we need something that we can work on from Washington.

Ms. KIMBELL. In fact, I can submit that to the Chairwoman next week.

Mr. GOHMERT. Thank you.

Miss MCMORRIS. That would be great. Thank you.

I wanted to just go back to Mr. Jensen. And I appreciated your big picture analysis and I think many in the room did. Could you just describe some of the on-the-ground problems that we've run into and if you have some thoughts. Related to—I think you were wanting to comment on possibly——

Mr. JENSEN. I have an on-the-ground problem.

Mr. Geddes' point about hydropower licensing. It's a good example but it's not quite the predictable one.

The Federal agencies set mandatory conditions on hydropower licenses. They don't review those conditions under NEPA before they

hand them off to FERC. FERC reviews them under NEPA, but they have no discretion as to those conditions.

There are elements throughout government where agencies who are doing things, you know, put quotes around it, for the environment, think that NEPA doesn't apply to those things for the environment. When I talked about the Purpose, Section 101, being taken out of NEPA, that's evidence of the problem. Because the response by the hydropower industry in the most recent legislation can be understood as an effort to get an alternative analysis, get public involvement, get engagement in that part of the hydropower licensing decision that sets these conditions. There really isn't a meaningful opportunity. You either believe in the conditions or you don't. The fact is that mandatory conditions don't get scrubbed through NEPA.

It's an artifact of the way the laws were written. It wasn't an intentional design. It's fixable by administrative action. The agencies won't want to do it because it's time and it's effort. But if the Forest Service has to think about how it manages forests, the people who are setting 4(e) conditions, mandatory conditions under the Federal Power Act, ought to be thinking about those conditions. You know, ought to be getting public involvement.

There are good conditions and bad conditions from whatever perspective you take. That's an on-the-ground problem. It's an in-the-agency problem. But for the hydropower industry, it's a real issue. And it's driven—this misapplication of NEPA has driven a tremendous amount of advocacy and rhetoric around hydropower licenses. And a lot of the legislature we've see in the last ten years, if somebody had really sat down and thought about it, it would have been about fixing resource agency NEPA process and not about fixing Federal hydropower licensing.

I'll say this is gratuitous in a way. But FERC has done a better job, Federal Energy Regulatory Commission, has done a better job than virtually any other agency in trying to figure out how to implement NEPA. And it's an artifact of the way Congress has piled responsibilities on that agency.

There are very few other agencies that have to think about as many things concurrently as FERC does when they're issuing a hydropower license or the other major areas, interstate natural gas lines. They go through—that agency does virtually all of the NEPA compliance, virtually all of the Clean Water Act compliance, virtually all the Endangered Species compliance.

It's one of the few places in government where, for the most part, one brain has to get around all of the issues.

And it's natural in the hydropower context because when you put a big chunk of concrete in the middle of a river, everybody's values are implicated; energy, environment, recreation, residents. So, FERC has done a very good job.

This is an outliner in the FERC process. And it's one that deserves some attention. It may have a fault that addressed in the legislation. I think there might be a more direct way of getting there.

You asked for on-the-ground examples. The—NEPA doesn't write bloated EIS's. Agencies write bloated EIS's. The EIS's get like that when agencies don't know what they're doing, don't know how to

decide about what they're doing, or when they're uncomfortable with the facts of what they're doing.

And so you just start papering stuff. And it goes on and on and on. It's not ill will. It's not contempt for parties. It's not bad—it's not a bad attitude. It's just confusion in the agencies, 99 percent of the time. Because they're under such pressure. They have resource constraints. They don't know which way to jump.

I'll give you an example. I assume you're going to head down to the (unintelligible) southwest. I practice a lot of NEPA law. One of my clients had been ordered by a state agency to build power line that would cross the border between U.S. And Mexico. The region needed additional transmission support. The power kept going out. And the state decided that the place to put the power line was on Federal land.

Miss MCMORRIS. I'm going to have to ask you to wrap up.

Mr. JENSEN. I'm sorry. OK.

The state ordered the utility to put the power line on Federal land. Federal land agency hadn't been consulted.

You can imagine that the NEPA process run by that Federal agency decided whether to issue a right-of-way for a line it didn't ask for, that the state had imposed on it. Went on and on and on. When you get down to—if you get to Arizona, that's one to look at.

Miss MCMORRIS. Good.

Mr. JENSEN. But Delay, confusion, excess paper and people being frozen out of the process, whether it be the project proponent, such as my clients are, or they're the neighbors.

Ms. KIMBELL. Madam Chairman, may I provide a very quick comment.

Miss MCMORRIS. Sure. Very quick and then I'll have to move on.

Ms. KIMBELL. There are many, many layers of law. Many, many layers of regulations. And I think, you know, with the previous FERC example, you know, those 4(e) conditions come from the forest planning process, which has tremendous public involvement and who does go through administrative review, very often goes through litigation. So, they do go through a NEPA process, and yet there are many overlapping laws and it certainly deserves a look.

Miss MCMORRIS. Thank you. OK. Mr. Inslee, do you have any other questions.

Mr. INSLEE. Ms. Kimbell, I want to ask you about this cumulative impact issue. You indicated its difficult in that regard. And I've got to tell you, I am deathly afraid of the condition of our forests in basically the entire western United States with the huge insect infestations. It has some thinning issues. And we have this incredible drought. It's been on us for six or seven years in the western United States, grossly speaking.

The best evidence that I've been able to see suggests that we're in a period of climate change globally. And the evidence suggests that this has the potential and maybe the probability of putting us in a regimes much more frequent droughts in the western United States. Which I understand stress of trees make them more susceptible to insect infestation.

Now, this is caused by a cumulative impact of our carbon dioxide issues throughout the world, not just America. It's a cumulative effect. About as cumulative as you get.

Now, some of us think that this is a major environmental issue we should deal with. And that Congress and the agencies need the science to decide and make decisions on energy, whether it's going to result in more global warming (unintelligible) drought (unintelligible) more insect infestation.

So, to do that, I—you know, I would think we need actually more cumulative information than we have right now, because frankly the Congress has—it's like an ostrich.

It's doing absolutely nothing about this problem, which I think is affecting our forests.

How do we dovetail your concern about a moving target on what is a cumulative impact and where we set that bar compared to this issue? Do you have any thoughts?

Ms. KIMBELL. I think you've got a double pronged thing going there in that one part of that is the science. The science of what's happening on the forested stands across the United States. What's happening with differences in climate with climate shifts, climate—perhaps climate change. And we work very, very closely with Forest Service research. In fact, most of the research that's done on things like (unintelligible) is done by the United States Forest Service. It's done in concert with different universities.

In the work that we do, we—and when we analyze the facts, we work closely with forest research with the local universities, in my case with the Universities of Montana, Idaho and North Dakota, in analyzing the effects of our projects.

The other piece is where is there a standard, a standard of cumulative effects. There is a standard that can measured in process that isn't a measure of science but rather a measure of using that available science and using it in your analysis to develop your project and to make your decision.

Mr. INSLEE. Mr. Jensen was talking about problems in the implementation of the Act. He said it several times that he foresees bigger problems in the implementation of the Act than the statute itself. And he has ascribed some of that to lack of training, lack of understanding by the agency employees about their requirements. Or I think he added a discomfort with what was going on, too. That might be a little pejorative, but I think that's what he said.

Tell us about your budgetary situation. Is the budget a concern in your ability, for instance, to train and really bring your employee staff to be really knowledgeable of the standards—the difficult standards you have? Is that an issue you have now.

Ms. KIMBELL. Budget for training is a matter of prioritizing where you put your training dollars. And that is not the specific issue I don't believe. It is when—in my case, I have 23 vegetation management projects that are in litigation now. There was a decision made several months ago that changes the bar. It raised the bar for analysis for all those 23 projects that were completed some years ago. So, in order for those projects to be able to meet that—they are not going to meet that current raised bar because of the decision made at the 9th Circuit.

That's been something that over my 31-year career has been happening on a pretty regular basis. That bar keeps raising so all those projects that were completed in recent years may not meet that bar by the time it gets in front of a judge.

Mr. INSLEE. Thank you.

Miss MCMORRIS. I want to just thank all the panelists for being here. I have found your comments to be very helpful. And I think we all did. I recognize you all have busy schedules and taking your time today is very helpful to us.

We may have some additional questions that we'll submit to you in writing. And I'd just appreciate it if you would respond to those questions in writing as we move through the next six months of this Task Force work.

We're on a goal of being out of here by 1:00 o'clock.

So, I'm going to go ahead and get the next panel up so we can try to stay on track.

Miss MCMORRIS. On the second panel, we have Duane Vaagen. He's President of Vaagen Brothers Lumber.

Luke Russell, Director of Environmental Affairs for Coeur d'Alene Mines Corporation. He joins us from Idaho to talk about NEPA's role in projects in Idaho and Alaska.

William D. Kennedy, Chairman, Board of Directors of the Family Farm Alliance. He comes to us from Klamath Falls, Oregon, to tell us about how NEPA can affect farming.

Craig Urness, General Counsel of Pacific Seafood Group who will tell us about NEPA's role in fisheries conservation and management.

Janine Blaeloch, Director of the Western Land Exchange Project. Janine has extensive experience with NEPA in the land exchange's context and is here to share some of those with us.

And last, but certainly not least, is Paul Fish, President of Mountain Gear, Incorporated, a locally based and rapidly growing business here in Spokane. And he will share his perspective on public participation.

The Task Force welcomes all of you.

As I mentioned earlier, it's the policy of the Resources Committee to swear in witnesses. So, I'll just ask you to stand and raise your right hand at this time.

[Witnesses sworn.]

Miss MCMORRIS. Thank you. Let the record reflect that the witnesses answered in the affirmative.

And, once again, I'll just point out this is the clock. Each one has been given five minutes to make their opening comments. And I'm going to try to keep us better on track so we can have more questions. And your testimony will appear in full for the record.

So, Mr. Vaagen, will you please begin.

STATEMENT OF DUANE VAAGEN, PRESIDENT, VAAGEN BROTHERS LUMBER

Mr. VAAGEN. Thank you, Task Force Chairwoman McMorris and other members of the Task Force. Five minutes for 35 years is awful quick. But I'll do my best here.

I'm the President of Vaagen Brothers Lumber in Colville, Washington. I appreciate the opportunity to testify before this hearing about NEPA. Vaagen Brothers dates back over 50 years in Colville. Two guys, my dad and uncle, started it making railroad ties. They grew to Colville, Chewelah and Spokane, Washington. And hit high

strides in the early '80s with operations further, too, with Republic and Ione employing 500 employees.

But in the recent years, we've had to adjust quickly. We're down to Colville. We're back at 135. Unfortunately Republic and Ione have been (unintelligible) and that's because of the process, policy and people, some of our own.

We have adjusted to small diameter logs to treat the small diameter stands (unintelligible). (Unintelligible) works very well. We also have a (unintelligible) plant and we make our own energy. We've done this out of where this situation was take us last 50 years. And we would like to salvage the burnt logs and the dead wood. But there is a delay. And if you don't get them before they're worthless, they are worthless.

We are in forest health crisis. It appears it's getting worse every year with no—or with a lack of vision, leadership or direction. Despite the efforts of Healthy Forests Restoration Act, the problem is worsening faster than our constrained ability to solve it. I believe the inaction is driven by the analysis paralysis that has created—is created at this time by the NEPA.

Wildfires average 5 million acres in this country every year. We salvage and rehabilitate less than 5 percent of those acres, as we disagree on how to treat them. Gifford Pinchot, the founder of the U.S. Forest Service, said that the cornerstone of conservation was to prevent waste of forest resources. We are now wasting our resources because of an environmental analysis process that can't recognize a dying forest from the dead trees.

I would like to give a couple examples to the Task Force. North of us here about 70 miles (unintelligible) is—there was a fire at Mt. Leona in 2002. 5,000 acres. There was a debate on what we could do with that. The Republic mill was (unintelligible) to shutting down but later did. We agreed on 1200 acres to salvage, and in the last few weeks we settled on 225 acres. That produced about a week-and-a-half run for the Republic mill. If we would have salvaged 80 percent, we'd have half a year.

The following year at Togo, 2003, 5,000-acre fire. This time we had done much better. I don't know how they got (unintelligible) with the NEPA, but it was very fast. We salvaged 1200 acres, about 10 million feet. That was enough for a two months' supply at Colville. If we'd done 80 percent, it probably would have been enough for almost a year. And at this time we only have about a 2- to 3-month supply of Federal timber contract.

Anybody that relies on 50 percent on Federal timber is out of business or is going out of business. So, we either have to further downsize, move to another place of need, or fold up the tent if something isn't changed soon. There is a time factor that is important.

So, why can't the dead and the dying trees be salvaged? Well, we think NEPA is part of it. We think it does need some streamlining. It used to be EIS, EA's. There's just so many delays. And with small diameter stands, it's a big issue. They don't have a very long shelf life. Very, very short shelf life. A matter of six months.

On the Colville National Forest, we have about 300,000 acres in need of thinning. The solution is to treat all these stands before wildfires devastate them. We have the technology. We have the in-

frastructure. We can treat that within 20 years. But the problem that we're dealing with NEPA, we don't see it when we get there. I would like to see somebody help us with this situation.

We have a local stewardship group, when we talk about public involvement. It's very unique. It's called the Northeast Washington Forestry Coalition. It's made up of community business, elected officials, environmental and forest representatives. After two years of collaboration, intense collaboration, we all agree that the Colville Forest needs to thin 10 to 15,000 acres of trees annually. With NEPA in its current form, we're struggling to get that done.

We'd like to help the Forest Service, but it's like sending your athletes to the Olympics with handcuffs behind their back. We're just not getting there.

So, we need the regulations to settle the shock and the turmoil. The cost for the Federal government is $121 per thousand, probably runs us about $20 per thousand. And we have a state SEPA, which is State Environmental Policy Act. And that makes business difficult but you stay in business.

If you had to rely on NEPA and Federal timber supply, you're out of business.

I would offer four recommendations. I'm going to brief here.

Miss MCMORRIS. Thank you.

Mr. VAAGEN. Reform NEPA to expedite salvage and rehabilitation projects that will treat areas within six months of forest fires and bug infestation.

Two: Require Federal agencies to consider the environmental impacts of not taking action on a specific project.

Three: Require our land managers to treat and manage our dying forests which will help ensure that the current infrastructure and capacity of our industry will remain. Without the infrastructure in place, the risk of catastrophic fire and managing our forests becomes nearly impossible.

And four: Promote and streamline NEPA approvals for large-scale and long-term stewardship programs on the national forests. NEPA analysis procedures are limiting our ability to undertake these common-sense stewardship programs.

And five. Encourage and streamline NEPA requirements for small local community forest thinning projects that are 80 acres and under.

And I also have a report that I would like to submit and testimony of a program I did two weeks ago in Coeur d'Alene.

[The prepared statement of Mr. Vaagen follows:]

Statement of Duane Vaagen, President, Vaagen Bros. Lumber Inc.

Good morning Task Force Chairwoman McMorris, and other members of the Task Force, my name is Duane Vaagen, and I am the President of Vaagen Bros. Lumber, (VBL) located in Colville, Washington. I sincerely appreciate the opportunity to testify before you today on the very important issue of streamlining and improving the National Environmental Policy Act (NEPA). This issue is of critical importance to efforts to conserve watersheds and wildlife habitat, and to protect people and property, in and around our national forests and other public lands in northeast Washington.

The history of Vaagen Bros Lumber, Inc. dates back to the 1950's when Bert and Bud Vaagen began making railroad ties. Over the next 20 years, they grew the business and employed 135 people with operations in Colville, Chewelah, and Spokane, Washington. They also were the first in the area to put in a biomass cogeneration plant in the late 1970's. These independent sawmillers hit full stride in the mid

1980's, with 3 operations in Colville, Ione, and Republic, Washington, eventually employing 500 employees. With the pullback of federal timber programs in the early 1990s, VBL had to adjust quickly to stay in business.

VBL became a leader in the development of small log technology and forest thinning, and innovation has always been a corner stone for our company's success. Today, our only active operation is our state-of-the-art sawmill, co-generation facility, and small log handling facility located in Colville that employs 135 people full-time. However, without a program to restore forest health and thin small diameter stands on federal lands, VBL will have to shrink our operation further, move to another area of need, or just fold up the tent.

We are in a forest health crisis that appears to be getting worse every year with no apparent vision, leadership, and direction. Despite recent efforts like the Healthy Forests Restoration Act, the problem is worsening faster than our constrained ability to solve it. Simply stated, insect and disease epidemics from over-stocked stands lead to a dying forest. Dead forests lead to catastrophic wildfire. This leads to communities and lives being threatened or destroyed from out-of-control wildfires. This problem has been building momentum and gaining severity for the past 15 years.

I believe that this inaction is being driven by the analysis paralysis that has been created by the National Environmental Policy Act. Each of us has a responsibility to care for our national forests, unfortunately, the very laws that were intended to ensure for that care are actually preventing us from taking action. It is not right and every American should be appalled by the federal government's mismanagement of our public lands.

Wildfires are burning an average of over 5,000,000 acres per year annually. Sadly, less than 5% of those forests are being salvaged and rehabilitated and vast tracts of our damaged forests, watersheds, and wildlife habitat are being left to rot, reburn, and degrade. Gifford Pinchot, the founder of the U.S. Forest Service, said that the cornerstone of conservation was to prevent waste of forest resources. We are now wasting our resources because of an environmental analysis process that can't recognize a dying forest form the dead trees.

I would like to give the Task Force a good example of what I'm talking about. In 2002, 5,000 acres burned on Mt. Leona on the Colville National Forest located less than 15 miles from our mill in the tiny town of Republic, which was the town's largest employer. As a result of the initial cumbersome NEPA process, it was determined that only 1,500 acres would be salvaged. Additional NEPA process delays and appeals further reduced this to only 220 acres that were actually salvaged, and this only happened because of the attention of high level officials at the Department of Agriculture. Salvaging only 4 percent of the burned and devastated area, over a year after the burn occurred, resulted in less than 2 weeks worth of timber for the Republic mill. Salvaging 80% of the Mt. Leona Fire would have kept that mill running for 1 year and provided funds for the restoration of the forest. NEPA failed both the forest and the local community.

In another instance, the 2003 Togo wildfire fire resulted in 5,000 acres being burned with only 1,200 acres being salvaged. In this case, the 10 million board feet that was salvaged represented a 2-month supply for our small-log sawmill in Colville. Again, had we salvaged 80% of this fire, this would have generated 80 million board feet or over 1-year supply for the Colville mill and provided money to rehabilitate the forest, wildlife habitat, and watersheds.

Why can't burnt, dead, and dying wood be salvaged? I believe that answer is NEPA. Burnt wood has a commercial value for 1-2 years. After that, restoration of the forest can only be accomplished at a high cost to the federal treasury; a cost that government does not presently have the means to provide. Presently, the Forest Service NEPA process, complete with inevitable protests, lawsuits, and analysis paralysis, usually takes 1.5 to 2 years leaving little to no value to the dead timber. The fact of the matter is the Colville National Forest is dying and burning-up at least twice as fast as it is being salvaged. It is a sad state of affairs when we now see that VBL could operate solely on the dead and burned timber on the Colville, without ever cutting a green tree, yet NEPA constrains federal land managers from restoring our national forests to benefit clean air, clean water, and wildlife habitat, let alone providing jobs in our local communities. We can and must do better than this.

I previously said the problem is gaining momentum and getting worse. On the Colville National Forest, there are approximately 300,000 acres of forest in need of thinning. The solution is to treat all of these stands before wildfires devastate these areas. We have the current capability, and current infrastructure, to treat all of these acres within 20 years. Unfortunately, the application of NEPA is preventing us from being good stewards of our forests and the communities that depend upon them.

Sadly, we are presently treating less than 1% of the acres needed each year. We have a local stewardship collaboration group called the Northeast Washington Forestry Coalition. It is made up of elected officials, community business, environmental, and forest representatives. We have concluded after 2 years of collaboration that the Colville National Forest needs to thin 10,000 to 15,000 acres annually. With NEPA in its current form, it is virtually impossible for the Forest Service to address the backlog, let alone get ahead of mortality on our forests.

NEPA regulations have the agency in shock and turmoil. The cost of putting timber sales up on the Colville is now a staggering $121.00 per thousand board feet. The majority of this cost is associated with NEPA compliance. By comparison, that is the entire cost of local private wood delivered to our mill in Colville. I will tell you that we have local and state regulations, including a State Environmental Policy Act (SEPA) that are very difficult, but we can work with them and stay in business. To rely on USFS timber for 50% or more of your supply is the kiss of death for our businesses and local communities!

What I find interesting is that our good neighbors to the west, the Colville Confederated Tribes, coincidentally have the same amount of timber management acres as the Colville National Forest. They have an exemplary forest management program. They also have to comply with NEPA. Their annual harvest is 75 million feet. The Colville National Forest is approximately 25 million feet and is now forecasted to decline to about half this amount within 2 years. As a further comparison, the tribe has one NEPA Coordinator while the adjoining Okanogan National Forest has 31 people.

I keep hearing that the National Forest System needs more funding and people to treat the forest. When the analysis paralysis first set in, we were told that the Forest Service needed to complete "bigger and better" Environmental Assessments (EA). When EAs were being successfully challenged in court, we were told that "bigger and better" Environmental Impact Statements (EIS) would get the process moving again. These "bigger and better" documents have only presented those who wish to stop all land management activities more procedural targets to challenge in court. Quite frankly, without improvements to NEPA, I have little hope that our trusted federal land managers will be able to get back to managing our national forests, as envisioned by Gifford Pinchot.

I am a practical person. For me, common sense dictates that we ask what are the environmental consequences of not treating and restoring our national forests? In my view, smoke-filled air, wasted natural resources, impaired watersheds, and destroyed wildlife habitats are the antithesis of the protections originally envisioned by NEPA. Unfortunately, the federal agencies aren't even considering the impact of not taking action in NEPA process. Simply put, NEPA is killing the very forest that it seeks to protect. Unfortunately, nobody is apparently asking this common sense question.

As I said earlier, it is your job and mine to restore our national forests and protect our local communities. I would like to offer the following solutions as a first step:

1. Reform NEPA to expedite salvage and rehabilitation projects that will treat areas within 6 months of forest fires and bug infestation.
2. Require federal agencies to consider the environmental impact of NOT taking action on a specific project
3. Require our land managers to treat and manage our dying forests, which will help ensure that the current infrastructure and capacity of our industry will remain. Without this infrastructure in place, reducing the risk of catastrophic fire and managing our forests becomes nearly impossible
4. Promote and streamline NEPA approvals for large-scale and long-term stewardship programs on national forests. NEPA analysis procedures are limiting our ability to undertake these common-sense stewardship programs.
5. Encourage and streamline NEPA requirements for small local community forest thinning projects that are 80 acres and under.

Finally, I would like to introduce into the record a presentation that I gave just last week to the second annual international Small Log Conference. As part of this conference, over 120 participants from all over the world toured our facility in Colville. Without exception, there was unanimous agreement that what we're doing at Colville is part of the answer, not the problem, in restoring our forests. Unfortunately, as now implemented, the same cannot be said about NEPA.

Thank you for the opportunity to testify and I would be happy to attempt to answer any questions that you might have.

Miss MCMORRIS. Thank you. Thank you very much.

Mr. Russell.

STATEMENT OF LUKE RUSSELL, DIRECTOR, ENVIRONMENTAL AFFAIRS, COEUR D'ALENE MINES CORP.

Mr. RUSSELL. Ms. McMorris, members of the Committee. Thank you very much for the opportunity to be here. My name is Luke Russell. I'm the Environmental Director for the Coeur d'Alene Mines Corporation located in Coeur d'Alene just across the state line. And based on an earlier comment, I see I brought a hundred of my closest friends.

Coeur d'Alene Mines is an international mining company. We have operations throughout the world but also in Idaho, Alaska and Nevada. My personal experience includes over 22 years working with NEPA on the permitting, reclamation of hard rock mines.

As it's been stated earlier, the original intent of NEPA was simple and appropriate. Environmental considerations must be included in the decisionmaking process of Federal agencies. We've already heard testimony with regard to the extensive litigation, delays and escalating costs which have created a lot of uncertainty in the business climate today. It's very difficult to make a business decision.

As part of my job, I'm asked to review mergers, acquisitions. And the first thing I'm asked is, How long will it take and what will it cost to permit. In most jurisdictions of the world, I can answer that with a high level of certainty. In the United States, however, that's a very difficult decision and, as we heard earlier, the bar is moving.

I'd like to give you a few examples of my company's experience with NEPA.

In the early '80s, we permitted a mine called the Thunder Mountain Mine. It's located in central Idaho in the cherry stem of the Frank Church River of No Return Wilderness. It was an open pit, a cyanide heap leach operation. The company spent about $360,000 on baseline environmental studies getting ready for the EIS. The EIS itself cost about $160,000. That mine was built, operated and closed successfully.

Fast forward to 1992. My company permitted an underground mine in Alaska outside of Juneau. The company spent about $10.8 million in engineering and environmental studies. And the EIS itself cost $1.3 million. That process took four years. And the gold prices dropped from about 500 to $380 an ounce. The company needed to retool the project and redesign it due to the economic conditions.

Five years later, we proposed a new plan of operation. And the Forest Service conducted a supplemental EIS to tier off that first EIS. That project, again, engineering and environmental studies was about 4.4 million. And that supplemental EIS was $1.6 million.

Some of the reasons I think for this expanding time and escalation in cost you've already heard. Inefficient scoping. Most issues are considered significant due to the threat of litigation and appeals. Alternatives are sometimes carried in analysis that are not economically viable that are akin to (unintelligible) who forced to carry an alternative that had a negative 15 percent rate of a return because of the concern, again, of appeal and litigation.

Well, how can this Task Force help improve NEPA.

First, I believe that the statute (unintelligible) and the regulations need a very hard look and an overhaul. We need certainty in the business climate. And in this process we'd recommend that the statute and its implemented regulations have mandatory timeframes. The public, the applicant, the agencies need to be involved, but they can't be an never ending process. There needs to be mandatory timeframes.

A screening process. NEPA envisioned that there would be scoping that would identify the significant issues for analysis and then dismiss those that were insignificant. As I mentioned, alternatives that are studied must be viable. Recommend that the Act take a good hard look at the (unintelligible) of the Clean Water Act where they look at practicability. For an alternative to be considered practical, it needs to be capable of being implemented after taking into account the cost, existing technology and logistics in light of the overall project purpose and balance of relevant environmental considerations.

Cooperating agencies. We heard already that the agencies sometimes don't engage until very late in the process. The statute should be revised to ensure and encourage and enforce all agencies involved with interest in the decisionmaking get involved early.

We've also heard about due process for the process proponent. The applicant needs to be involved. With our project in Alaska, the U.S. Forest Service said we could not be an active participant or other publics, NGO's, environmental organizations would also have to be active participants. It seems crazy that the project proponent would not be active in the process of a NEPA valuation.

One final recommendation is we go to court. That's the way the decisions are made. We recommend that NEPA consider establishing under counsel environmental regulations the creation of an ombudsman with decisionmaking authority, where parties could go to resolve conflicts rather than go to court.

Conclusion. A year or so ago, former EPA Administrator Whitman stood on the shores of Lake Coeur d'Alene and said what we need is more progress and less process.

Two weeks ago, I sat with a NEPA coordinator for a project in Alaska. And he said don't talk to me about project changes. Whether they're good or bad, we're tied to the process. Clearly such focus away from better decisionmaking and paralysis by process was not the original intent of NEPA.

Thank you for your time this morning.

[The prepared statement of Mr. Russell follows:]

Statement of Luke Russell, Director, Environmental Affairs, Coeur d'Alene Mines Corporation

INTRODUCTION

On behalf of Coeur d'Alene Mines Corporation, I am pleased to present testimony today before this Task Force formed to examine potential improvements in the National Environmental Policy Act (NEPA).

Coeur d'Alene Mines Corporation, based in Coeur d'Alene Idaho, is the world's largest primary silver producer, as well as a significant, low-cost producer of gold. The Company has mining interests in Idaho, Alaska, and Nevada as well as in Argentina, Australia, Chile and Bolivia. The company has extensive experience with the NEPA process in Idaho, Alaska as well as in Nevada in the permitting and closure of hard rock mining projects.

My experience includes over 22 years working with NEPA in the permitting, reclamation and closure of hard rock mines in the western United States. I have worked in government and in industry and am currently the Environmental Director for the company.

The National Environmental Policy Act was passed at the dawn of our countries environmental awareness. In the late 1950's President Eisenhower created a commission to develop a 10 year plan for America. Of the 15 listed priority items the environment was not one of them. Then came two important publications: Silent Spring and Night Comes to the Cumberland. These were clarion calls for the public consciousness on the environment and for federal agencies to seriously consider environmental effects of its actions. The passing of NEPA created the Council on Environmental Quality (CEQ) and lead to creation of the Environmental Protection Agency along with several environmental legal centers which through litigation helped defined the law we have today. This began a continuum of environmental awareness by our society, American industry, including mining, and the federal regulatory agencies.

The original intent of NEPA was simple and appropriate: Federal agencies must ensure that environmental amenities and values be given appropriate consideration in decision making, along with economic and technical considerations. Federal actions significantly affecting the quality of the human environmental are to include a detailed statement which has became known as the Environmental Impact Statement (EIS), on the environmental impact of the proposed action, any adverse environmental affects, alternatives to the proposed action, relationship between local short-term uses and enhancement of long-term productivity, as well as any irreversible and irretrievable commitments of resources associated with the proposed action. The Act was envisioned to supplement existing federal authorities and programs.

The simplicity of the law, however, may have lead to its shortcomings. While the statute includes no judicial review provision the early court decisions set the course that NEPA would not be enforced by the federal agencies charged with considering the environmental affects of its decisions, but by the courts. Thus NEPA is implemented and enforced by costly and time consuming litigation.

NEPA's brief and often vague provisions have provided the courts opportunity to create extensive NEPA "common law". For example, the statute does not specify:

- The definition of a significant impact to the "human environment" which then triggers preparing an EIS,
- The timeline for completing an EIS,
- The scope of an impact statement and level of necessary baseline study,
- The level of analysis in relation to scope of project,
- The range and extent of alternatives an agency must consider,
- When an agency must hold hearings as part of its environmental review process and who may have standing in such hearings,
- Whether agencies may decide not to prepare an EIS. The CEQ has authorized agencies to make a decision that an EIS is not required, but the courts have placed limitations on whether this decision can be made.

The federal courts have thus been left to define and enforce the act. The courts have been influenced by the hard look doctrine, as the purpose of NEPA was to ensure federal agencies consider environmental values in decision making. Agencies today are driven by this fear of appeal or litigation. The result is a longer and more costly process, not necessarily the making of better decisions.

As a part of my job, I participate in evaluations of potential mergers and acquisitions of mining projects throughout the world. In considering a new project the first thing I am asked is how long will it take and what will it cost to get it permitted. I can answer this questions will a high degree of confidence in most jurisdictions around the world, with the exception of the United States. When I first began working with NEPA in the mid 1980's the time and cost to prepare an EIS for a mining project took about 18 months and cost about $250,000-$300,000. Today an EIS for a mining project may take 5-8 years and cost $7-8 million or more, before factoring in expected appeals and litigation of the ultimate decision. Thus, it is very difficult to make business decisions in the U.S. under the current permitting environment on federal lands.

CASE HISTORIES

In the mid-1980's, Coeur developed the Thunder Mountain Mine in Central Idaho which was located in the cherry stem of the Frank Church River of No Return Wilderness area on private and U.S. Forest Service administered lands. The project was an open pit mine and cyanide heap leach operation. It was located upgradient of Outstanding Resource Waters (ORW) that supported steelhead and salmon fisheries. The company spent approximately $360,000 in baseline studies for the EIS while

the NEPA third-party contractor costs were approximately $160,000. The project was operated and closed successfully.

In comparison, in 1992 a Final EIS and Record of Decision (ROD) were issued for the company's Kensington Project in Alaska, culminating a four-year environmental baseline and EIS analysis. The cost of the engineering and environmental baseline programs involving freshwater quality and fisheries, wildlife, geotechnical, and the marine environment, to mention only a few categories, was approximately $10.8 million with the attendant third-party EIS totaling $1.3 million. The project was not built because gold prices had fallen from nearly $500/oz. to about $380/oz. during this exhaustive NEPA analysis; and one of the cooperating agencies, EPA, took the position that the project as designed would not meet water quality standards.

In 1997, the company retooled the project to address improving the project economics and agencies concerns. Only a Supplemental EIS was determined to be required by the USFS lead agency. However, the cost of this "supplemental" analysis was an additional $4.4 million and $1.6 million more was spent for engineering and environmental studies and the SEIS.

Once again, while the highest engineering and environmental design standards were maintained throughout the process, the price of gold had further declined to about $290/oz. Once again, an optimization program was initiated by Coeur to reduce capital and operating costs, and maintain environmental performance. A second Supplemental EIS was required for the scaled-down project, and in 2004 the Final Supplemental EIS was issued. The cost: approximately $4 million in engineering feasibility studies and a new environmental baseline program, and $1.7 million for the Supplemental EIS.

One reason for this expanding time and escalation in cost to complete NEPA is there are now very few issues an agency is willing to consider insignificant, due to concern about having their decision appealed. NEPA intended agencies to scope a project to identify and eliminate from detailed study the issues which are not significant. Applicants today, however, are required to fund exhaustive study and analysis on almost every issue. We are expected to prove effects are negative and then mitigate for any change in the environment whether or not it would have a significant impact to the environment.

There is nothing in NEPA that requires mitigation for environmental effects. While mitigation is addressed under other federal laws including the Clean Water Act, federal agencies in response to fear of litigation are attempting to require mitigation or compensation under the Act for even temporary effects. This is contrary to the originally intent of the law.

NEPA intended to encourage agency cooperation however, this is not mandatory nor is it happening very well. For example at the Beartrack Mine Project near Salmon, Idaho the National Marine Fisheries Services (NMFS) did not engaged in the NEPA process. They also did not engage during the public comment period in the Corps 404 permit process. Yet, after the close of the NEPA process and a week after the close of the Corps 30 day public notice on the wetland mitigation plan for the project, NMFS provided comments that the ROD be reopened and the 404 permit should be denied. This lead to company, state and federal agencies embarking on a multi year and 1/2 million dollar effort to address NMFS concerns; Concerns that were ultimately proven to be overstated.

There is increasing emphasis by federal agencies to use consensus based management in the NEPA process. This involves seeking that all potential stakeholders come to agreement on the scope of NEPA analysis and alternatives for consideration. The NEPA process was intended to involve and inform the public, but ultimately the decision must be made by the federal agencies, not by a vote of the participants.

Another reason for escalating time and costs to complete NEPA has been pressure on agencies to require all other permits and approvals be obtained before completing the NEPA process. This presents a catch 22 scenario. This strategy by project opponents only adds to the cost and time to compete NEPA. For example, again from our Kensington mine, the Forest Service's 2004 ROD was appealed on the basis that other permitting processes had not yet been completed. While the Regional Forester denied this appeal it created project and investment uncertainty, caused delay in the processing of other state and federal permits, and added to the cost as the third party contractor that assisted in preparing documents for review by the regional forester. NEPA was not intended to be the master approval of a project but rather ensure environmental effects be given appropriate consideration in the decision making process

NEPA was intended to be a forwarding looking to guide federal decision making through evaluation of environmental impacts, along with economic and technical aspects, of proposed actions. Our Rochester Mine in Nevada has been an operating a

surface mine since 1988 and has undergone several NEPA analyses. The mine is fully developed and the area of impact defined by as built drawings. We are nearing the end of the mine's life and have an approved reclamation and closure plan for the project by the state and Bureau of Land Management. Now that the mine is nearing closure we have been required to embark on an EIS for closure. The no-action alternative will be the currently approved reclamation plan for the project. We must question what major federal decision will be made under these circumstances that requires an EIS? Requiring an EIS after a mine is developed and operated, only adds cost and uncertainty to the project.

These examples illustrate the uncertainty, delay and associated escalating costs in the federal permitting process as a result of NEPA. As a consequence many companies, including mining companies, look overseas for their project investments. Figure 1 provides data presented in the recent National Academy of Sciences review of hardrock mining regulation and clearly illustrates the declining trend in the number of plans of operations being filed for mining projects. I am confident these trends are continuing today. For most projects, the time, cost and uncertainty of obtaining approvals is simply too great in the United States and mining investment looks elsewhere. The cumbersome NEPA process is key to this circumstance. What has been lost over the years is the balanced look as envisioned under NEPA to consider environmental, economic and technical considerations.

A year or so ago, former EPA Administrator Whitman stood on the shores of Lake Coeur d'Alene and stated that what was needed in the environmental debate today was progress and less process. Two weeks ago, I sat with the NEPA coordinator on our project in Alaska and was told we were not talking about more or less impact of proposed project changes, but that we were tied to process. Clearly such focus away from better decision making and paralysis by process was not the original intent of NEPA.

RECOMMENDATIONS

How can this Task Force help improve NEPA?

First, the statute is in need of major overhaul not simply a tune up. Some key areas this Task Force could evaluate in improving NEPA include:

1) Mandatory timelines. The NEPA process typically begins by the applicant entering into a memorandum of agreement with the lead agency that outlines funding and contractor selection to prepare the EIS. This typically includes a schedule for completing the statement. Yet, neither the schedule nor cost is considered binding by the agencies. There is no enforcement mechanism in NEPA to ensure that project schedules are met and costs to perform the analysis are appropriate to the level of decision to be made. An updated Act should include enforceable time limits to complete the NEPA process timely.
2) Local Government Involvement. Local communities, most affected by federal decisions, tend to be disenfranchised from the NEPA process. They find it difficult to become cooperating agencies. The federal agencies may not recognize them as they don't have a land use plan, or they lack the resources to participate. While the BLM has recently initiated a program to reach out to local communities the NEPA statute needs to be amended to formally include local communities and governments in this role.

   The benefits of granting cooperating agency status to local governments include; disclosure of relevant information early in the analytical process, receipt of technical expertise, avoidance of duplication with state, tribal and local procedures, and establishment of a mechanism for addressing intergovernmental issues. Such status would neither enlarge nor diminish the decision making authority for either federal or non-federal entities.
3) Criteria for Standing. For the price of a postage stamp a party can appeal a NEPA decision even if they were not actively involved in the process. The statute should be amended to clarify that parties must be involved throughout the process in order to have standing in an appeal.
4) Cooperating Agencies. The intent of NEPA was to ensure agency coordination in making federal decisions that significantly affect the human environment. In practice, however, some federal agencies are seen as less than cooperating. EPA for instance has had a track record of not providing meaningful comment until very late in the process. This leads to delay and additional cost as the lead agency then tries to address their comments or concerns very late in the game. As discussed previously, the National Marine Fisheries Services also has a track record of weighing in very late in the process to escalate Endangered Species Act issues or concerns. The statute should be modified to clarify that federal agencies with an interest must also be engaged throughout the NEPA process.

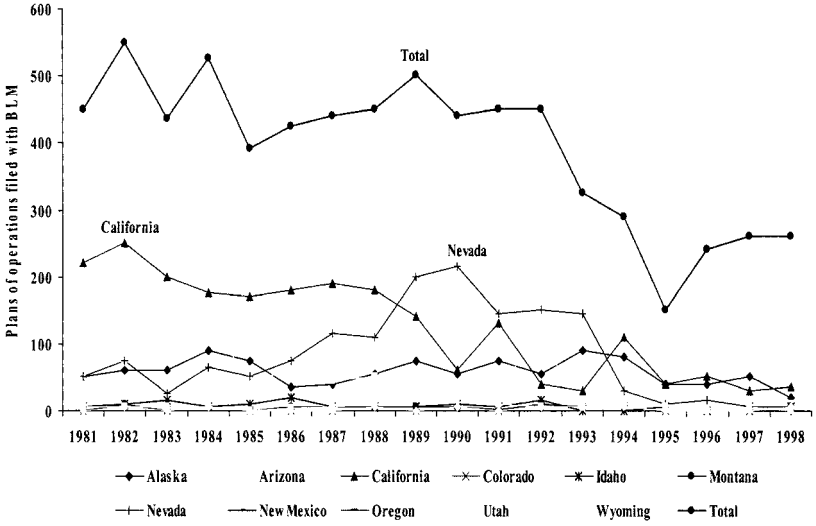
5) Applicant Involvement. The current NEPA process minimizes the role of the applicant. The applicant is expected to pay for the third party analysis and has the technical expertise to assist in evaluation of technical and economic aspects of the proposal as well as reasonable alternatives. Yet, the role of applicants is generally minimized due to perceived biases in the evaluation. During the recent supplemental EIS for our Kensington project the U.S. Forest Service took the position that Coeur, as the applicant, could not actively participate in the process, or other "publics" such as the Sierra Club or other NGO's would also need to be afforded a seat at the table. The statute should be amended to clarify that the applicant is to have standing as an integral player in the NEPA evaluation process.
6) NEPA Baseline Data. A plan of operation that will trigger a NEPA analysis typically is prepared using considerable amounts of baseline information on project aspects like climate, geology, hydrology and engineering evaluations used in designing the proposed project. Once NEPA is triggered however, federal agencies tend to minimize this information and then begin anew to obtain baseline environmental and engineering information. This duplication adds to the cost and time required to compete NEPA. The statute should be revised to allow early baseline information to be utilized in the formal NEPA process.
7) Scope of Analysis, NEPA makes no distinction between level of analysis for a new project, an existing project, or a project entering into closure. A 20 acre mine may go through the same rigorous process as a 2000 acre mine. The analysis should be commensurate with federal decision to be made and status of a project. The analysis must consider not only the environment, but cost and technology as well.
8) Litigation Bonds. Under other legal precedents a litigating party may be asked to post a bond for delays in a project in order to avoid frivolous lawsuits. Such a provision does not exist under NEPA. If a party firmly believed it had grounds to challenge a federal decision following NEPA, then it should be reasonable for them to post a bond should their challenge be overturned.
9) Screening Process. NEPA envisioned that the scoping process would identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (Sec. 1506.3). Yet in practice the agencies commit a large amount of time, resources and applicants money, evaluating alternatives and issues raised by agencies or the public that are not significant, simply to try to avoid future litigation. Again at our Kensington project one alternative that was carried throughout the analysis and required exhaustive analysis had an estimated negative 15% return on investment for the company. This analysis obviously did not balance the environmental, economic or technical considerations as required under NEPA. The law needs to be fixed to require the consideration of economic criteria in determining reasonably alternatives for the analysis.

   The accepted regulatory concept of practicability, as taken from the Clean Water Act implementing regulations, should be incorporated into the NEPA regulatory framework. For a project alternative to be considered, it should be required to be supported by feasibility and engineering studies, and be capable of being implemented after taking into account: a) cost, b) existing technology, and c) logistics in light of the overall project purposes to be balanced with relevant environmental considerations.
10) NEPA Ombudsman. One option that may deserve consideration would be to create within CEQ an Ombudsman with decision making authority to resolve conflicts within the NEPA process. This would provide a much needed balance to the pressures put on agencies by environmental law centers, NGO's and by applicants so the original intent of consideration of environment, cost, and technology was being made.

CONCLUSION

The original intent of NEPA was simple and appropriate: Federal agencies must insure that environmental amenities and values be given appropriate consideration in decision making, along with economic and technical considerations. The implementation of the Act has been and continues to be bogged down in unnecessary analysis, litigation and escalating costs. The Act needs an overhaul to return to its original purpose and some suggestions for doing so have been presented herein. I thank you for the opportunity to comment before this Task Force today.

FIGURE 1-1 Plans of operations filed with BLM for mining or exploration activities on BLM lands.
Source: BLM, 1992, 1994, 1999b



Miss MCMORRIS. Thank you for being here. Mr. Kennedy.

STATEMENT OF WILLIAM D. KENNEDY, CHAIRMAN, BOARD OF DIRECTORS, THE FAMILY FARM ALLIANCE

Mr. KENNEDY. Chairwoman McMorris and all members of the Task Force. My name is Bill Kennedy. And I've traveled here today from Klamath Falls, Oregon, on behalf of the Family Farm Alliance. The Alliance is focused on one mission, to ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers.

Our ranch is operating one of 1400 family farms and ranches that depend on water supplies from the Klamath Irrigation Project. Our ranch is designated as a private wildlife refuge for their operation stronghold.

The members of the Family Farm Alliance have many examples of how onerous and expensive processes associated with NEPA compliance contributed to halting the development of otherwise feasible water supply enhancement projects in the western states. As a matter of fact, just last week our President, Pat O'Toole, provided two detailed case studies relative to this matter to the House Subcommittee on Water and Power at an oversight hearing in Washington, D.C.

Today I want to provide a sobering example that demonstrates the apparent double-standard agencies sometimes exhibit when it comes to NEPA compliance. In my example, compliance with NEPA by Federal agencies was bypassed to the detriment of my entire community. I'm talking, of course, about the 2001 curtailment of Upper Klamath Lake water to the landowners in the Klamath Irri-

gation Project. Proper treatment of NEPA in 2001 would have served to protect our rights and livelihoods, prevent destruction of the human environment and their communities and avoid outright catastrophe.

For 90 years, Klamath Project reservoirs and diversion facilities were operated to serve the authorized irrigation purpose of the Klamath Project. There were no downstream river—Klamath River flow requirements; no minimum upper lake reservoir requirements. The focus on the project was to optimize irrigation diversions.

In 1995, Reclamation announced that it would develop a plan for the long-term operation of the Klamath Project. The Klamath Project Operations Plan, or KPOP, was to define water allocation scenarios in various year types. Reclamation also stated that it would prepare an analysis of environmental impacts under NEPA prior to adopting the KPOP.

In 1997, Reclamation made a fundamental change in the operation of the Klamath Irrigation Project. In 1997 the Project was operated to increase flows in the Klamath River and to maintain high lake levels in the Upper Klamath Lake reservoir.

The change in operations led to a lawsuit under NEPA. Water users in 1997 contended that the change in operating criteria required an EIS under NEPA. The court admonished Reclamation to comply with NEPA with respect to any such future plans regarding Project operations.

Reclamation at that time represented that it would conduct NEPA review in the future and, in particular, it would complete an EIS for long-term operations of the Project by 1999.

Move forward to 2001. Four years have elapsed since Reclamation's commitment to comply with NEPA and two years have passed since Reclamation represented to the court that it would complete an EIS for long-term operation of the project.

NEPA requires Federal agencies to prepare an EIS before the implementation of major Federal actions significantly affecting the quality of the human environment. The Federal government in 2001 fulfilled none of the NEPA obligations. Instead they merely adopted an Operating Plan in 2001 that ultimately harmed our rural communities.

One of NEPA's goals is to facilitate widespread discussion and consideration of the environmental risks and remedies associated with a project, thereby augmenting the informed decisionmaking process. NEPA is a deliberate command that the consideration of environmental factors not be shunted aside in the bureaucratic shuffle.

The Committee should be aware that in 2001 when a lawsuit was filed by water users claiming violations of NEPA and seeking immediate water deliveries, the court in its preliminary injunction found there was likely not a violation of NEPA because the Endangered Species Act would trump NEPA.

In effect, the multi-year delay in evaluating potential impacts to agricultural communities and wildlife led to a situation where such impacts did not have to be evaluated at all. We were told that impacts to our environment, our communities, our wildlife, do not count.

In summary, the issuance of the Biological Opinions and the adoption of the 2001 Klamath Project Operations Plan were subject to full NEPA compliance, which Reclamation admitted it did not undertake. Even though the EA prepared by Reclamation disclosed potential environmental effects from Project operations that could prove significant, Reclamation did not issue a finding of no significant impact. Additionally, Reclamation admitted that it not prepare an EIS prior to the issuance of the 2001 plan.

Federal agencies cannot pick and choose when they will comply with NEPA, or do so in a way that will destroy families, social structures, communities and the environment. A massive change in historical operations does require NEPA compliance.

We have several recommendations about how NEPA can be applied in an arbitrary fashion. On the one hand, an advocacy group points out that NEPA has not been adequately addressed and the court shuts down the intended action. On the other hand, in my case, a judge agrees with the plaintiff that NEPA has not been implemented and still allows for the action in question to continue.

While the 2001 Klamath/NEPA issue is personally frustrating to me, I can tell you that the Family Farm Alliance is very concerned with this issue from a broader policy standpoint, especially as it relates to the development of new water supply enhancement proposals. We have a few specific recommendations that we hope the Task Force will consider as it deliberates this matter. And many of them have already been stated—or are found in my written testimony.

In conclusion, I believe that the 2001 Klamath Basin crisis opened the eyes of many policymakers and agency managers in rural communities throughout the United States.

We are seeing improved coordination and cooperation on the Basin, particularly from local officials employed by the Bureau of Reclamation and the U.S. Fish and Wildlife Service. Cooperative efforts are important for moving projects through NEPA and permitting processes. Establishing working relationships with agencies involved in the NEPA process and permitting critical. Good cooperation and communications between agencies and groups with an understanding of each participant's expectations will help in future problem resolution.

Keep it out of the court. Thank you.

[The prepared statement of Mr. Kennedy follows:]

Statement of William Kennedy, Chairman of the Board, Family Farm Alliance

Chairwoman McMorris and Members of the Task Force:

My name is Bill Kennedy, and I traveled here today from Klamath Falls, Oregon on behalf of the Family Farm Alliance. The Alliance advocates for family farmers, ranchers, irrigation districts, and allied industries in seventeen Western states. The Alliance is focused on one mission—To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers.

The ranch that I operate is one of 1,400 family farms and ranches that depend on water supplies from the Klamath Irrigation Project ("Project"). I sit on the Board of Directors for several irrigation districts, and I'm also a board member of the Klamath Water Users Association.

I am encouraged that the Task Force on Improving the National Environmental Policy Act (NEPA) has been formed to address the current state of this important environmental law. While the Task Force will likely hear many stories of how agency interpretation of NEPA compliance has slowed or even stopped development of

projects throughout the West, I would like to give you a slightly different perspective today. The members of the Family Farm Alliance have many examples of how onerous and expensive processes associated with NEPA compliance contributed to slowing and complicating the development of otherwise feasible water supply enhancement projects in Western states. In fact, the president of the Alliance—Patrick O'Toole of Savery, Wyoming—recently provided two detailed case studies relative to this matter to the House Subcommittee on Water and Power at an oversight hearing last week in Washington, D.C.

However, today I want to provide another, even more serious example that demonstrates the apparent double-standard agencies sometimes exhibit when it comes to NEPA compliance. While NEPA can sometimes be employed by agency staff in a manner that makes development very difficult and expensive, in my situation, compliance with NEPA by federal agencies was bypassed, to the detriment of my entire community. I am talking, of course, about the 2001 curtailment of Upper Klamath Lake water to the landowners in the Klamath Irrigation Project. We believe that a proper treatment of NEPA in 2001 would have served to protect our rights and livelihoods, prevent destruction of the human environment and their communities, and avoid outright catastrophe. Ultimately, however, the federal government chose to operate Project facilities in a way that eliminated any and all deliveries of water for Klamath Project irrigation on 170,000 acres of land. In addition, two national wildlife refuges went dry.

The heart of this matter is a change in the operating criteria or rules for the Klamath Project announced on April 6, 2001, well into the normal irrigation season. Instead of operating to serve irrigation water needs, the Klamath Project that year was to be operated to cause water shortage and devastate water users, ignoring all other water use and activities in the Klamath Basin.

Klamath Project Farming

Thousands of people—family farmers and ranchers, their employees, and agriculture-related businesses—make their living directly from farming and ranching in the Klamath Project. In turn, their activities support the communities of Malin, Merrill, Bonanza, Tulelake, Newell, and Klamath Falls.

The irrigated farm land of the Klamath Project includes about 230,000 acres. Of this, the great majority is served from diversions from Upper Klamath Lake and points immediately below on the Klamath River. Another area is served via Lost River and the two smaller reservoirs on the Lost River System—Clear Lake and Gerber Reservoirs. Farmland in the Klamath Project produces well over $100 million annually in direct revenue, and generates roughly $300 million in economic activity, supporting the farm families, farm workers, businesses and local communities. In addition, there are two national wildlife refuges in the Klamath Project area: Lower Klamath National Wildlife Refuge and Tulelake National Wildlife Refuge. The refuges have rights inferior to irrigation for water, but rely on the same delivery system for water as irrigation. The refuges are heavily dependent on "return flows" from irrigated agriculture in the Klamath Project.

Klamath Project irrigation and refuges are, of course, only some of the many uses of water in the much-larger Klamath Basin. Upstream of Upper Klamath Lake, there is an estimated 200,000 acres of irrigated land and other uses that divert water. Downstream, on tributaries to the Klamath River in California, there are large areas of irrigated lands, particularly in the Shasta and Scott River Valleys, and an out-of-basin export to the Central Valley of California from the Trinity River that, in the recent past, amounted to one million acre-feet of water per year. Nevertheless, in the long history of the Klamath Project up to 2001, the water supply has ordinarily been sufficient to meet these uses, and there have been only a few years when water shortage occurred to either Klamath Project irrigation or refuges. These shortages occurred late in the irrigation season when forecasted supplies did not fully materialize.

Historic Operations

For 90 years, Klamath Project reservoirs and diversion facilities were operated to serve the authorized irrigation purpose of the Klamath Project. There were no downstream Klamath River flow requirements or minimum Upper Klamath Lake reservoir elevations binding on Klamath Project irrigation users. The focus of Project operations was to optimize irrigation diversions. Upper Klamath Lake reservoir elevations were the result of releases for power generation, judged against irrigation. Clear Lake and Gerber Reservoirs have also been operated historically to conserve water for, and provide water to, the irrigation districts on the east side of the Klamath Project.

Demand for Change in Purposes of Operation

Starting in the 1990's, political and regulatory demands have affected activities at the Klamath Project. For example, in 1988, the short nose sucker and the Lost River sucker, two species that live in Upper Klamath Lake, were designated as endangered under the Endangered Species Act (ESA). Biological opinions issued by the U.S. Fish and Wildlife Service in 1992 and 1994 concerning operation of the Klamath Project identified Reasonable and Prudent Alternatives (RPAs) to avoid jeopardy to suckers. When the suckers were listed, there had been no mention whatsoever of reservoir elevations as a factor affecting sucker populations. Nonetheless, these biological opinions included minimum reservoir elevations to protect the suckers. These operating elevations were adopted by the Bureau of Reclamation (Reclamation). The reservoir elevations pertaining to Upper Klamath Lake generally allowed the Project to operate for its intended purposes. During the mid-1990's, a court found the reservoir elevations pertaining to sucker populations in Clear Lake and Gerber Reservoirs to be arbitrary and capricious, and they were invalidated in a succession of decisions.

In late 1994, demands were made by various parties that Reclamation reprioritize and reallocate water. In particular, demands were made that Reclamation take steps to increase both Klamath River flows (as measured at Iron Gate in California) and Upper Klamath Lake reservoir elevations above and beyond the adopted ESA lake levels. The demand was that new flow requirements and lake elevations be set with Klamath Project irrigation and refuges eligible for only the amount of water left over.

In 1995, Reclamation announced that it would develop a plan for the long-term operation of the Klamath Project. The Klamath Project Operations Plan ("KPOP") was to define water allocation scenarios in various year types. Reclamation also stated that it would prepare an analysis of environmental impacts under NEPA prior to adopting a KPOP. The KPOP was to be adopted before the 1996 irrigation season. A draft long-term KPOP was prepared but not released. Instead, a water "advisory" was released for 1996, and Reclamation stated that it would prepare a long-term KPOP and Environmental Impact Statement (EIS) by 1998.

Changes to Klamath Project Operations

In 1997, Reclamation made a fundamental change in the operation of the Klamath Irrigation Project. Prior to that time, Project reservoirs and other facilities were operated to ensure irrigation deliveries; the authorized purpose of the Project. In 1997, priorities were reversed, such that the Project was operated to increase flows in the Klamath River and to maintain high lake levels in the Upper Klamath Lake reservoir, with only the water left over being available for irrigation and wildlife refuges that the Project had previously served for nearly a century. In more blunt terms, the Project was operated in a manner to promote the potential for water shortages.

The change in operations led to a lawsuit under NEPA. Water users in 1997 contended that the change in operating criteria required an EIS under NEPA. The matter did not come before the court until July of 1997, by which time the court concluded that there would not be any injury (i.e., there turned out to be enough water to meet irrigation and wildlife refuge needs during the irrigation season in 1997). The court admonished Reclamation, however, to comply with NEPA with respect to any such future plans regarding Project operations.

Reclamation, at that time, represented that it would conduct NEPA review in the future and, in particular, that it would complete an EIS for long-term (multi-year) operations of the Klamath Project by 1999. The NEPA claim was ultimately dismissed as moot. In the stipulation for dismissal, Reclamation represented that it would comply with NEPA for its future operations plans. The stipulation also recognizes that for purposes of the NEPA analysis, the "baseline" for determining impacts would be full agricultural water deliveries.

2001 Operations Plan

By 2001, four years had elapsed since Reclamation's commitment to comply with NEPA and two years had passed since Reclamation represented to the court that it would complete an EIS for long-term operation of the Project. However, that year the federal agencies sought to bypass both their legal duties to the water users and NEPA, based on provisions of the ESA. The resulting action was based, in part, on the amazing conclusion that such shortages are a "reasonable and prudent" alternative that fulfills the purposes of the Project.

On April 6, 2001, Reclamation announced another one-year change in the historic operation of the Project. That change ultimately had dire repercussions for our community. On that day, USFWS and NMFS each issued new biological opinions (for

suckers and newly-listed coho salmon, respectively) for Klamath Project operations. To achieve the Klamath River flows at Iron Gate in California and the Upper Klamath Lake elevations specified as "reasonable and prudent alternatives" in these opinions would result in no water whatever for 170,000 acres in 2001. The same date, Reclamation issued a plan adopting these standards, literally triggering disaster.

NEPA requires federal agencies to prepare an EIS before the implementation of "major Federal actions significantly affecting the quality of the human environment." The federal government in 2001 did not fulfill their NEPA obligations. Instead, they merely adopted an Operating Plan in 2001 that ultimately harmed our family farms and rural communities.

Impacts to the Community

The types of economic, human, and environmental suffering threatened by the 2001 Plan were catastrophic. Hundreds of farm and ranch families without income experienced hardship trying to support themselves. Their ability to pay bills and service debt was impaired. Collateral (land, equipment) was forfeited. Bankruptcy occurred. Similar types of impacts occurred for farm employees, and for the owners and employees of the agriculture related businesses. Long-term supply arrangements were lost because of nonperformance. The demand for social services increased. Some people simply moved out.

City parks, schoolyards, and cemeteries went without water. Farm fields became fields of weeds and dust. Tremendous wind-borne soil erosion occurred, impairing land productivity and causing air pollution.

Irrigated farmland provides food and habitat for the abundant waterfowl, deer, antelope, and other species. This value was also lost. Tragically, two of the nation's premier national wildlife refuges were left without water for wetlands and waterfowl habitat.

Increased chemical use needed to control weeds and pests has occurred in the years since 2001. Fields left fallow in 2001 showed decreased production in subsequent years.

The harm to the Upper Klamath Basin was overwhelming, and we are to this day feeling its effects.

NEPA Disregarded

As previously noted, NEPA requires the preparation of an EIS before the implementation of actions significantly affecting the quality of the human environment. One of NEPA's goals is to facilitate widespread discussion and consideration of the environmental risks and remedies associated with a project, thereby augmenting an informed decision-making process. NEPA is a deliberate command that the consideration of environmental factors not be shunted aside in the bureaucratic shuffle. The requirement for pre-decision environmental review applies both to new projects and changes to an ongoing project.

In addition to the discussion of impacts of an action, core elements of an EIS are the identification of alternatives and mitigation measures. If an agency is uncertain whether an EIS is required, before making any decision to go forward with a federal action, the agency must prepare an environmental assessment (EA). If the agency determines, based on the EA, that a proposed action has the potential to "significantly affect the quality of the human environment," then the agency must prepare an EIS. But the agency must prepare at least an EA and "convincing" findings in the record before concluding that impacts will not be significant. Otherwise, the failure to prepare an EIS is inconsistent with the law.

In the 2001 Klamath Project case, there was no EIS and no EA, and, it would appear, no NEPA compliance.

The 2001 Plan Represented "changes in the programmed operation of an existing Project."

The 2001 Operating Plan was a revision to the ongoing management of the Klamath Project. In addition to revising the water allocation scheme, the authorized purposes of the Project were subordinated to guaranteeing Klamath Lake reservoir elevations and flows at a specific location in the Klamath River. Regardless of the purpose of the change, the reallocation was a dramatic change from historic operation of the Klamath Project, and NEPA should have applied.

In 1996, Reclamation committed to NEPA compliance for both annual and long-term plans. The federal government took no action to comply with NEPA before deciding to adopt the 2001 Plan. Four years had elapsed since the court admonished the federal government to comply with NEPA for its changes from historic operations. The completion of an EIS slipped and slipped again, and, in 2001, the agencies proposed to devastate farm families, Klamath Project communities, and the en-

vironment without any meaningful or public consideration of impacts or alternatives.

The 2001 Plan Was a Major Federal Action

The decision to adopt the 2001 Plan was a major federal action. It had the potential to dramatically affect the environment. Proper timing of environmental review is one of NEPA's central themes. The purpose of such early review, of course, is to prevent the proposal from gaining such momentum that the government loses the ability to avoid or minimize significant environmental effects, and so that delayed environmental review becomes a post-hoc rationalization for the project.

On April 6, the day of issuance of the 2001 Operations Plan, Reclamation did not release any NEPA documentation. Reclamation first produced an Environmental Assessment ("EA") only after water users filed a lawsuit.

Unfortunately, the preparation of an EA does not necessarily constitute NEPA compliance. For actions that cause significant adverse effects, an EIS must be prepared, analyzing impacts, mitigation, and alternatives. If the agency concludes there are no significant impacts, it must prepare a Finding of No Significant Impacts ("FONSI"). In 2001, there was no doubt whatever that the impacts from change in operation of the Project would be monumentally significant.

The federal government admitted that they failed to complete the required NEPA review before issuing the 2001 Plan. They further claimed that the 2001 Plan represented an annual operations plan for a continuously operating reclamation project, and so they should not have to complete NEPA review for the Plan. The 2001 Plan represented a complete abandonment of the authorized purpose of the Project and a major change in historical operations as recognized by the court previously. Thus, the 2001 Plan was a "major federal action" requiring an EIS under NEPA.

Reclamation's concession that the issuance of the 2001 Plan was subject to NEPA appears to suggest that Project operations may be subject to NEPA". but only a little bit of NEPA.

Finding of the Court

The Committee should be aware that when a lawsuit was filed by water users claiming violations of NEPA and seeking immediate water deliveries, the court in its preliminary injunction ruling found there was likely not a violation of NEPA because the ESA would trump NEPA. That preliminary ruling was effectively the end of that case because it was our only hope for obtaining historic water deliveries in 2001.

In effect, the multi-year delay in evaluating potential impacts to agricultural communities and wildlife led to a situation where such impacts did not have to be evaluated at all. We were told that impacts to our environment, our communities, our wildlife, do not count.

The further irony, of course, is that the National Academy of Sciences later confirmed that the water allocations to ESA-listed fish in the Klamath River and Upper Klamath Lake were not scientifically justified, meaning the severe impacts to our community which did not count and were not considered, were not necessary.

Summary

In summary, the issuance of the Biological Opinions and the adoption of the 2001 Klamath Project Operations Plan were subject to full NEPA compliance, which Reclamation admitted it did not undertake, much less complete. Even thought the EA prepared by Reclamation "disclosed potential environmental effects from Project operations...that could prove significant," Reclamation did not issue a FONSI. Additionally, Reclamation admitted that it "did not prepare an EIS prior to the issuance of the 2001 Plan either."

Federal agencies cannot pick and choose when they will comply with NEPA, and do so in a way that will destroy family farms, social structures, communities, and the environment. A massive change in historical operations requires NEPA compliance.

Klamath water users believe Reclamation had an obligation to consider and protect the contractual rights of water users. Indeed, Reclamation admitted that in its aborted NEPA process, it intended to look at its contractual obligations to water users, and would have evaluated, as potential alternatives, means by which those rights could have been protected. However, when it abandoned NEPA, it also abandoned even a superficial effort to consider its contractual obligation and the rights of Project water users. And it did this without any analysis or justification whatsoever.

Recommendations

It is difficult for me to come away from the events of 2001 and offer up meaningful lessons learned. For the purposes of today's hearing, I believe the example I have just laid out demonstrates that NEPA "like so many federal laws and regulations—can be applied to any situation in a manner that is largely dependent on the demeanor of the agency staff that has jurisdiction in the manner. It is clear that NEPA can be applied in an arbitrary fashion. On the one hand, an advocacy group points out that NEPA has not been adequately addressed and the court shuts down intended actions. In another case, a judge agrees with a plaintiff that NEPA has not been implemented, and still allows for the action in question to continue.

So, the best advice we have to offer in these situations is to stress the importance of developing sound, working relationships with the federal agencies in your neighborhood.

While the 2001 Klamath NEPA issue is personally frustrating, I can tell you that the Family Farm Alliance is very concerned with this issue from a broader policy standpoint, especially as it relates to the development of new water supply enhancement proposals. We have a few specific recommendations that we hope the Task Force will consider as it deliberates this matter:

1. NEPA analyses should require that value be assigned to continued agricultural production in a project area.
2. Impacts of drought and continuing water demands must be assessed and built into the NEPA process.
3. Anything that can be done to streamline the overall permitting process (NEPA, ESA, Clean Water Act, etc.) should be encouraged. The federal government should consider developing a binding "pre-application" meeting, where the project proponents and all applicable federal agency representatives are present to provide a realistic, initial assessment of whether or not "stopper" issues or other regulatory-related fatal flaws will make permitting a prolonged and expensive endeavor.
4. Agency work on biological opinions should be required to keep pace with development of NEPA compliance documents. This could lead to improved regulatory streamlining and minimization of big surprises at the "end" of long and expensive regulatory processes.
5. Congress should consider legislation that would allow the state's legislative and planning process to be considered in establishing purpose and need for construction of dam and reservoir projects.
6. If Congress is unwilling to expand the state's role in establishing the purpose or need for a project, the project sponsor and the state must work within existing guidelines to maximize opportunities. Working within either existing or expanded federal guidelines would facilitate the NEPA analysis, from which all other permitting processes will tier. The challenge will be to convince regulators, during the permitting process, that the benefits of constructing a proposed future project outweigh the adversities; consequently, there is a justifiable "purpose and need" for the project.
7. Developing a reasonable range of alternatives is also very important in project planning and the NEPA process. Alternatives must meet the need and purpose for the project and must be capable of being implemented. It is important to use the NEPA process to help determine the most appropriate alternative from the set of reasonable alternatives.
8. Cooperative efforts are important for moving projects through the NEPA and permitting processes. State and local sponsors should become cooperating agencies in the NEPA process if possible and if not, should be allowed to serve on the project EIS interdisciplinary team.

Dam and reservoir projects are complex and often controversial. A dedicated local sponsor or project proponent and a documented "purpose and need" are minimum requirements for success.

Conclusions

I do not expect that the events of 2001 in the Klamath Basin will be resurrected. I believe that the 2001 crisis opened the eyes of many policy makers and agency managers. We are seeing improved coordination and cooperation in the Klamath Basin, particularly from local officials employed by the Bureau of Reclamation and the U.S. Fish and Wildlife Service. Cooperative efforts are important for moving projects through NEPA and permitting processes. Establishing working relationships with the agencies involved in the NEPA process and permitting is critical. Good cooperation and communications between agencies and groups, with an understanding of each participant's expectations, will help in future problem resolution.

Thank you.

Miss MCMORRIS. Thank you very much. Mr. Urness.

STATEMENT OF CRAIG URNESS, GENERAL COUNSEL, PACIFIC SEAFOOD GROUP

Mr. URNESS. Thank you. Members of the Task Force, my name is Craig Urness. What I will testify to today will have a familiar ring but will relate to our ocean off the West Coast here.

I'm the General Counsel for subsidiaries of Pacific Seafood Group, one of the larger processors and distributors and fresh and frozen seafood on the West Coast. Our group is headquartered in Oregon and has companies in that state, as well as in Alaska, Washington, California, Nevada, Texas, Utah and British Columbia. We employ over 1700 full-time workers, including seven here in Spokane at our distribution facility and over 100 up in Mukilteo, Washington, as well.

Our premise here is very simple. And while we look at it with regard to the Act that governs our fishery's management, it would seem to have broader policy implications and that is, simply put, that if an Act itself provides substantially or completely for the requirements and policy objectives of NEPA, then NEPA should not be required in addition to.

At Pacific Seafood, because we rely heavily on the availability of wild-harvested seafood to meet our customers' needs and to keep our coastal processing plants busy, fisheries conservation and management issues are, of course, very important to us. We need to ensure that the species we process and sell are available both now and into the future. At the same time, fisheries managers must provide timely and efficient regulations based on the best scientific information available. We therefore work with the Pacific Fishery Management Council, one of the eight Federal bodies established in 1976 under the Magnuson-Stevens Fishery Conservation and Management Act. And it is here at the heart of fisheries conservation management that we see the National Environmental Policy Act acting as a roadblock rather than promoting sound decision-making.

In order to be practical and effective, fishery management decisions must be made on a timely basis and with the most up-to-date data possible. You do not want to allow harvest of a fish stock based on old information, as you run the risk of either over-harvesting a stock that has declined or forcing fishermen to discard their catch because fish are far more numerous than had been previously assumed. In some cases, fish species are both migratory and subject to rapid fluctuations in population, size and availability. Pacific whiting, one of our major products, is a good example.

The Magnuson-Stevens Act requires the regional councils to carefully scrutinize the available scientific data, take steps to keep harvest at sustainable levels, consider all socioeconomic environmental impacts, and make all decisions through a very open and public process. Up to about five years ago, the rigorous requirements of the Magnuson-Stevens Act were considered sufficiently analogous to the NEPA process so as to avoid the need for lengthy, expensive EIS statement.

Beginning about the year 2000, the U.S. Department of Commerce, which oversees Federal fisheries management through its National Marine Fisheries Service, found itself defending against several lawsuits on fisheries conservation and management issues. Attorneys routinely began alleging violation of NEPA. And not surprisingly, several of these complaints were granted on that basis. As a result, the regional fishery management councils now produce an EIS for every fishery regulation.

There are many, many fisheries on our west coast and in our nation. And these decisions must be made quickly to be effective both environmental purposes and for a rational use of our resource.

Let me give you some examples of how the NEPA requirements are affecting our fisheries conservation and management.

The timeframe for decisionmaking has become so long that we are operating on outdated scientific information. Before NEPA requirements, we could use catch data and scientific information from 2004 to prepare a stock assessment in 2005 that could be used to set harvest levels beginning in January of 2006. Today, after NEPA, that same 2004 data sets harvest levels in 2007. In other words, we're using three-year-old data for most species to determine how much fish we can catch. This is no way to currently manage fisheries.

This is another example. Pacific Council has been grappling with a complex restructuring of the groundfish fishery. The effort started two years ago and is not expected to produce results until at least 2009. Now, I'm a part of that process. And that is the best case scenario. This assumes that the Council will be able to afford the complex NEPA analysis requirements. In frustration a number of fisherman and processors are now considering legislative relief. While we'd rather support the process, an industry-developed approach to rationalizing the fishery with strong conservation controls seems to be the only quick way to sustain economic viability.

Even the most inconsequential regulatory changes are delayed. One of our fishermen wanted to change some gear.

The Council advised the fishermen simply that you better wait until next year because the cost and time to do this would be too great.

Last, but not least, as a result of an expired NEPA analysis that didn't consider that there would be more fish in the ocean of a particular species, last year 130,000 metric tons of Pacific whiting were set off limits. A negative impact on our coastal communities of over $25 million, with no additional environmental benefit. In fact, it is much more likely that it had a negative environmental impact because of the nature of the species that was left in the ocean.

When the Task Force makes its final recommendations, I hope it will consider the provisions of section 3 of H.R. 3645, introduced by Congressman Young of Alaska in the 108th Congress. The bill offered a rational approach by deeming the fisheries management decisions made following the strict provisions of the Magnuson-Stevens Act are in compliance with NEPA. And whether enacted as separate legislation, part of a package of NEPA reforms, or through the reauthorization of Magnuson-Stevens, this legislative approach

will restore the ability of our fisheries managers to timely conserve and manage our fish stocks.

Thank you very much.

[The prepared statement of Mr. Urness follows:]

Statement of Craig Urness, General Counsel, Pacific Seafood Group

Mr. Chairman, Members of the Task Force, my name is Craig Urness. I am the General Counsel for subsidiaries of Pacific Seafood Group, one of the larger processors and distributors of fresh and frozen seafood on the west coast. Our group is headquartered in Oregon and has companies in that state, as well as in Alaska, Washington, California, Nevada, Texas, Utah and British Columbia. We employ over 1700 full-time workers, including seven at our sales and distribution facility here in Spokane.

Because we rely heavily on the availability of wild-harvested seafood to meet our customers' needs and to keep our coastal processing plants busy, fisheries conservation and management issues are very important to us. We want to ensure that the species we process and sell are available both now and in the future. At the same time, we need fisheries managers to provide timely and efficient regulations, based on the best scientific information available. We therefore work—both directly and through the West Coast Seafood Processors Association—with the Pacific Fishery Management Council, one of the eight federal bodies established in 1976 under the Magnuson-Stevens Fishery Conservation and Management Act to manage our nation's marine fisheries. And it is here, at the heart of the fisheries conservation and management process, that we see the National Environmental Policy Act—NEPA—acting as a roadblock rather than promoting sound decision-making.

In order to be practical and effective, fishery management decisions must be made on a timely basis and with the most up-to-date data possible. You don't want to allow harvest of a fish stock based on old information, as you run the risk of either over-harvesting a stock that has declined, or forcing fishermen to discard their catch because fish are far more numerous than assumed. In some cases, fish species are both migratory and subject to rapid fluctuations in population size and availability; Pacific whiting, one of our major products, is a good example.

The Magnuson-Stevens Act requires the regional councils to carefully scrutinize the available scientific data, take steps to keep harvest at sustainable levels, and make all decisions through a very open and public process. Until about five years ago, the rigorous requirements of the Magnuson-Stevens Act were considered sufficiently analogous to the NEPA process so as to avoid the need for lengthy, expensive, environmental impact statements. Beginning about the year 2000, the U.S. Department of Commerce—which oversees federal fisheries management through its National Marine Fisheries Service—found itself defending against several lawsuits on fisheries conservation and management issues. As a matter of course, the plaintiffs' attorneys routinely alleged violation of NEPA, a charge with which many judges are sympathetic. And, not surprisingly, several of these complaints were granted. As a result, the regional fishery management councils now have to produce an environmental impact statement—EIS—for every fishery regulation.

As a practical matter, most fisheries harvest decisions offer two extremes: no fishing, and the maximum amount that scientists say you can catch and still allow relative population stability. As a fisheries manager, you pick a point someplace in between that recognizes scientific uncertainty and maximizes economic and social benefits. But that's not good enough for NEPA; instead, you have to have an identifiable range of alternatives, analysis of the good and bad of each alternative, and a rationale for rejecting all the alternatives that you didn't include, no matter how unrealistic they are. And if you have an annual fishing season, you have to do this each and every year.

Let me give you some examples of how the NEPA requirements are affecting fisheries conservation and management on the west coast:

Example 1: The time frame for decision-making has become so long that we are operating on outdated information. Prior to the imposition of NEPA requirements, we could use catch data and scientific information from 2004 to prepare a stock assessment in 2005 that would then be used to set harvest levels beginning January, 2006. Now, after NEPA, that same 2004 catch data and 2005 stock assessment are used to set harvest levels for 2007; in other words, we are using 3 year old data for most species to determine how much fish we can catch. This is no way to manage fisheries. While NEPA is not entirely to blame, it adds considerably to the length of time needed without adding to the knowledge base.

Example 2: The mind-numbing paper-work requirements erode support for fisheries management. The Pacific Council has been grappling with a complex restructuring of the groundfish fishery. The effort started two years ago and is not expected to produce results until at least 2009. This assumes that the Council will be able to afford the complex NEPA analysis requirements. In frustration, a group of fishermen and processors is now considering specific legislative relief to cut through the Gordian knot of NEPA compliance. While they would rather support the Council process, they see an industry-developed approach to rationalizing their fishery with strong conservation controls as the only hope to sustain economic viability.

Example 3: The most inconsequential regulatory changes are delayed. At Council meeting held earlier this month, one fisherman who delivers fish to our company sought a minor regulatory change in the description of fishing gear. The current regulations were promulgated in the 1980's; since that time, advances in technology and the desire to reduce bycatch and deploy environmentally friendly nets have led to significant modifications in how fishing gear is built and used. The request was to change the gear definitions in regulations to match what is commonly used so fishermen would not be cited for using illegal gear. The advice received from federal regulatory staff was to make the request next year because the time and effort required under NEPA to address this minor regulatory change was so great that it might not get done if handled separately, rather than as part of a larger regulatory package.

Example 4: Complying with NEPA costs us real dollars. We manage our commercial and recreational groundfish fishery with a complicated set of science-based regulations involving harvest limits and closed areas bounded by water depths in order to protect sensitive species of fish. Last year, our harvest of Pacific whiting was capped at numbers below biologically acceptable levels because the NEPA analysis done the previous year did not anticipate an increase in fish numbers. As a result, over 130,000 metric tons of fish were set off limits to U.S. fishermen—a negative impact on our coastal communities of over $25 million, with no additional environmental benefit. On other occasions, closed areas could not be modified because scientifically calculated boundary lines had not been analyzed under NEPA in the previous year.

In sum, we have an already complex fisheries management system that bases its conservation measures on science but that is collapsing under the weight of NEPA's administrative paperwork burden. NEPA does not lead to better, or even different, fisheries conservation decisions; these are based on science. It does lead to costs, to delays, to extra work, and to decreased revenue for coastal communities.

When the Task Force makes its final recommendations, I hope it will consider the provisions of section 3 of H.R. 3645, introduced by Congressman Young of Alaska in the 108th Congress. That bill offered a rational approach by deeming that fisheries management decisions made following the strict provisions of the Magnuson-Stevens Act are in compliance with NEPA. Whether enacted as separate legislation, part of a package of NEPA reforms, or through the re-authorization of the Magnuson-Stevens Act, this legislative approach will restore the ability of our fisheries managers to conserve and manage fish stocks without drowning in paperwork.

Thank you for inviting me to testify today. I would be happy to answer any questions.

Miss MCMORRIS. Thank you. Thank you for being here.

Ms. Blaeloch.

STATEMENT OF JANINE BLAELOCH, DIRECTOR, WESTERN LAND EXCHANGE PROJECT

Ms. BLAELOCH. Madam Chairwoman, thank you for inviting me to testify on the role of the National Environmental Policy Act. My name is Janine Blaeloch. I'm Director of the Western Land Exchange Project, the Seattle based, non-profit organization that monitors Federal land exchanges, sales, and conveyances across the West. My organization works with NEPA every day, mainly helping local citizens learn how to use NEPA to participate in decisions regarding their public lands.

NEPA is primarily a tool of democracy and disclosure.

The statute and its regulations provide a clear, consistent structure for citizens to participate in decisions affecting the environment and to understand the possible impact of a project. Under NEPA one not only can advocate in favor of or against a project, but is invited to provide substantive knowledge that can help the agency make a better decision.

Our group sees this occur every day, literally, where local citizens offer unique knowledge that informs land exchange and other public land decisions.

Our group scrutinizes scores of projects every year, but we challenge very few of them. Indeed, as currently interpreted, NEPA does not allow us to dispute a project just because we think it is harmful but only if the process itself has not been properly followed. When the public is given good information, fair alternatives, and the opportunity to give input, challenges are not necessary nor will they, unfortunately, be successful.

But if implementation is poor, controversy and opposition will arise. One such case was the Huckleberry Land Exchange of the late 1990s here in Washington state, between the Forest Service and the Weyerhaeuser Timber Company. The Muckleshoot Indian Tribe, an environmental group, and a community group challenged the EIS for this land exchange because the significance of the traded lands was totally obscured in the environmental analysis. Not only was old-growth forest being exchanged for Weyerhaeuser clearcuts, but so was an ancient trail that the ancestors of the Muckleshoot Indians had used for thousands of years. The outcome of the challenge was an improved analysis, the exclusion of the Indian trail and important ecological areas, including virtually all of the old-growth forest, and a slightly smaller land exchange.

More important than the specific outcomes have been the longer-term improvements in the Forest Service's land exchange proposals, environmental studies and decisions that we have witnessed. Because NEPA has made room for citizen involvement and knowledge, land exchange proposals and decisions have visibly improved since our challenge of the Huckleberry Land Exchange eight years ago. In this way, NEPA is unquestionably fulfilling its purpose.

Most of the people our organization works with do not necessarily identify themselves as environmentalists. But we found that when a favorite place is about to be traded or sold, citizens of all persuasions are inspired to mobilize. They soon learn that the most dependable tool they have at their disposal is the National Environmental Policy Act.

An example from outside this region illustrates the eagerness with which people engage in these decisions. In the Arizona's Verde Valley, a congressional land trade has failed to pass for several years in a row. The developer proposing the exchange had gone to Congress because he did not want to wait the two to three years it would take to get through the NEPA process for the exchange. More than five years later no one was happy.

Verde Valley citizens there have wanted a NEPA process, including an analysis of alternatives that could forestall adverse impacts on groundwater in their area. Citizen interest has been so intense that in 2003 Senator McCain, the bill's sponsor, was compelled to

call a meeting in the small town of Camp Verde and an astonishing 600 people showed up. The Senator had to ask the fire marshal to suspend the fire code as people filled the aisles of the high school gym.

The phrase that most stands out for me in Title I of NEPA is section C, in which Congress recognizes that each person should enjoy a healthful environment and has a responsibility to contribute to its preservation and enhancement. This part of NEPA is fulfilled in citizen action. Citizens may end up disappointed in a result, but our organization has yet to encounter anyone who regretted participating or who did not feel empowered by NEPA.

Americans want to be part of our government's decisions. To alter this cornerstone of civic engagement would betray those who have already given of their time and energy and those who have yet to discover this priceless tool of democracy.

Thank you again for allowing me to testify.

[The prepared statement of Ms. Blaeloch follows:]

Statement of Janine Blaeloch, Director, Western Land Exchange Project

Madame Chairwoman, thank you for inviting me to testify on the role of the National Environmental Policy Act. My name is Janine Blaeloch. I am Director of the Western Land Exchange Project, a non-profit public-interest organization that monitors federal land exchanges, sales, and conveyances across the West. My organization works with NEPA every day, mainly through helping local citizens learn how to use NEPA responsibly and effectively to participate in decisions regarding their public lands.

NEPA is primarily a tool of democracy and disclosure. The statute and its regulations provide a clear, consistent structure for citizens to participate in decisions affecting the environment and to understand the possible impacts of a project. Under NEPA, one can not only advocate in favor of or against a proposal or an alternative, but is invited to provide substantive knowledge that could help the agency make a better decision. We see examples of this every day, where local citizens offer unique knowledge that informs land exchange decisions.

Our organization scrutinizes scores of projects every year, but we challenge very few of them. Indeed, NEPA does not allow us to dispute a project just because we think it is harmful, but only if the process itself has not been followed properly. When the public is given good information, fair alternatives, and the opportunity to give input, challenges are not necessary (nor will they be successful).

On the other hand, if implementation is poor, controversy and opposition will arise. One such example was the Huckleberry Land Exchange of the late 1990s, here in Washington State, between the Forest Service and Weyerhaeuser Timber Company. The Muckleshoot Indian Tribe, an environmental group, and a community group challenged the EIS for this land exchange because the significance of the traded lands was totally obscured in the environmental analysis. Not only was old-growth forest being exchanged for Weyerhaeuser clearcuts, but so was an ancient trail that the ancestors of the Muckleshoot Indians had used for thousands of years. The outcome of the challenge was an improved analysis, the exclusion of the Indian trail and important ecological areas—including virtually all of the old-growth forest—and a slightly smaller land exchange.

In a trade that followed in 1998, between Plum Creek Timber and the Forest Service, a "streamlining" of the NEPA process had dire results. Because the government had agreed to complete an expedited EIS for the I-90 Land Exchange, several errors and oversights occurred that in fact ended up delaying the project significantly. Chief among those errors was to shortcut the wildlife surveys on the federal trade lands—and after the deeds had been exchanged, Plum Creek biologists discovered that the Forest Service had traded to the company a nesting area of the Marbled Murrelet, a listed threatened species. Also overlooked in the sped-up process were the concerns of citizens in Randle, Washington, a distressed former logging community whose watershed was being traded to the company. More such obstacles resulted in the trade being largely reversed. Had an adequate NEPA process been implemented in the first place, bad decisions and small disasters could have been avoided.

In our experience, NEPA rarely stops a project altogether, but it can substantially improve the outcome. When we challenged the Crown Pacific Land Exchange in central Oregon, a quick settlement resulted in the preservation of 3,000 acres of rare eastside old growth. Again, the exchange ended up being only slightly smaller, but citizen participation in the decision vastly improved the outcome for the environment.

More important than the specific outcomes in these exchanges have been the longer-term improvements in the Forest Service's land exchange proposals, environmental studies, and decisions. Because NEPA has made room for citizen involvement and knowledge, land exchange proposals and decisions have visibly improved since our challenge of the Huckleberry Land Exchange 8 years ago. In this way, NEPA is unquestionably fulfilling its purpose.

Most of the people our organization works with do not identify themselves as environmentalists, but when a favorite place is about to be traded away, citizens of all persuasions are inspired to mobilize. They soon learn that the only dependable tool they have at their disposal is the National Environmental Policy Act.

I would like to add two examples from outside this region that illustrate the eagerness with which Americans engage in these decisions. Citizens of Mayer, Cordes Junction, and Dewey, Arizona had to school themselves in the NEPA process when the Bureau of Land Management announced a plan to dispose of 17,000 acres in their area for subdivision development. The nearby Agua Fria River has already run dry for seven years, and the impacts to groundwater could be disastrous. Through the public involvement mechanisms of NEPA—no appeals, no litigation—the communities have compelled the BLM to back up and take a more prudent approach.

Just 35 miles away, in Arizona's Verde Valley, a congressional land trade has failed to pass for several years in a row. The developer proposing the exchange had gone to Congress because he did not want to wait the two to three years it would take to get through the NEPA process for the exchange. More than five years later, no one is happy.

Verde Valley citizens want a NEPA process, including an analysis of alternatives that could forestall adverse impacts on groundwater in their area. Citizen interest has been so intense that in 2003 Senator McCain, the bill's sponsor, was compelled to call a meeting in the small town of Camp Verde and an astonishing 600 people showed up. The Senator had to ask the Fire Marshall to suspend the fire code as people filled the aisles of the high school gym.

On its website, the Task Force seems to imply that one purpose of NEPA was to avoid litigation, but in searching the preambles and purposes statements in the statute, I see no such idea. Instead, there are references to "restoring and maintaining environmental quality," "man and nature...exist[ing] in productive harmony," and other positive, forward-looking goals. I am afraid that the leaders of the Task Force may be less interested in following NEPA's intent than in freely re-interpreting it to its detriment.

The phrase that most stands out for me in Title I of NEPA is section (c), in which Congress recognizes that each person should enjoy a healthful environment and has a responsibility to contribute to its preservation and enhancement. This is the part of NEPA is fulfilled in citizen action. Citizens may end up disappointed in a result, but our organization has yet to encounter anyone who regretted participating or who did not feel empowered by NEPA. Americans want to be part of our government's decisions. To alter this cornerstone of civic engagement would betray those who have already given of their time and energy and those who have yet to discover this priceless tool of democracy.

Thank you for your consideration.

Miss MCMORRIS. Thank you for coming.

[Applause.]

Miss MCMORRIS. Mr. Fish.

STATEMENT OF PAUL FISH, PRESIDENT, MOUNTAIN GEAR, INC.

Mr. FISH. Madam Chair and distinguished members of the Task Force. My name is Paul Fish. I'm the President of Mountain Gear, a retailer of outdoor gear based here in Spokane. For the record, I'd like to register my opposition to any amendments to the National Environmental Policy Act.

I started my business in 1983 as a way to get more people out to enjoy our region. I have a passion for adventure, and selling outdoor gear seemed like a great way to make a living. Mountain Gear is a growing company. We employ over 80 people, and we're part of the $18 billion per year outdoor recreation industry.

As a business person, I'm here to talk about the importance of NEPA in protecting the region's natural places. The lakes, rivers, mountains and forests of the Northwest serve as important habitat, provide recreational opportunities and jobs for the people in the area. As such they are an invaluable resource, and decisions regarding them should be made with care and a critical eye for their long-term viability as provided for currently under NEPA.

While I make my living helping people recreate on our public lands, I believe that everyone should leave the land so that others can use it and enjoy it later. An understanding of potential impacts of actions is key to ensuring that we do not damage the land. This is the key element of NEPA, ensuring the government and the public understand the impacts of Federal actions on our environment.

Our economy depends upon a healthy environment.

Recently Spokane adopted the fitting slogan, ''Near nature, near perfect.'' This is the reflection of the importance of the Spokane River and the nearby mountains, to our quality of life and the economy of this region. Not only do we explore these places during our free time, they are compelling reasons to bring new businesses and visitors to the area.

I recently held a dinner for outdoor businesses and economic development interests to discuss the possibility of creating a recreation business cluster here. We discussed goals and methods to grow our businesses and bring new like businesses to the region. It was clear the business leaders in our community understand the intrinsic link between a healthy environment and a healthy economy.

NEPA's good for our communities, our environment and good for business. NEPA helps ensure that we manage our natural resources for the benefit of everyone by requiring that the government is accountable for its decisions. The heart of NEPA is its requirements for public participation and that a wide range of alternatives be considered, including those that will minimize possible damage to our health, environmental and our quality of life.

NEPA is currently being implemented in the re-licensing of Avista's dams on the Spokane River. The NEPA analysis ensures that considerations such as water quality, flows for kayakers and fish, water for our waterfalls and many other issues are fully analyzed and disclosed to the public for their review and comment. As a result, the public has actively participated in the re-licensing of the Avista dams.

Further, NEPA is one of the only laws that ensures that the Federal agencies fully consider the impacts of their actions on our nation's invaluable historic and cultural resources. For example, NEPA requires that the Forest Service must consider and evaluate how their timber sales might impact the Lewis and Clark Trail. Protecting the Trail benefits everyone and enhances the tourism and recreational economies of rural areas.

As I earlier stated, I oppose any amendments to weaken NEPA. Some businesses cut corners to generate short-term returns. But short-term thinking can have disastrous consequences, especially when it comes to spending taxpayers' money on projects that might harm citizens or their environment. This is not good for our environment or for business.

Over the past few years, there have been several limitations placed on protections that NEPA provides to communities in order to speed up the process, including sidestepping NEPA by creating categorical exclusions. This limits the information available as well as the opportunity to provide public review, essentially cutting the interested public out of the process.

Limiting public involvement, restricting information and weakening environmental review won't avoid controversy and certainly don't improve projects. Likely it will increase divisiveness and risk additional resource damage that's bad not only for my business but for the region in the long haul.

NEPA's promise of review and public involvement must be safeguarded, not sacrificed in the name of expediency. Some would blame NEPA for delaying projects, but examining projects in detail, predicting outcomes and thereby providing good information for decisions is good business sense.

Rather than amending or otherwise circumventing NEPA, I would urge (unintelligible) the Federal agencies responsible for implementing the law get the resources they need to do the job right and in a timely manner.

Business and the environment can and must exist in a sustainable manner. NEPA has proven to be the key to smart sustainable management of our environment. To weaken this protection for short-term gain under the guise of streamlining would be irresponsible to the people and the communities of this great country. Furthermore, as a businessman I firmly believe it would weaken our economy in the long haul. Thank you.

[The prepared statement of Mr. Fish follows:]

Statement of Paul Fish, President, Mountain Gear Inc.

Madame Chair and distinguished members of the Task Force, my name is Paul Fish. I am the founder and President of Mountain Gear Inc., a multi-channel retailer of outdoor recreation equipment based in Spokane. For the record, I would like to register my opposition to any amendments of the National Environmental Policy Act (NEPA).

I started this business in 1983 as a way to get more people out to enjoy the spectacular places in our region. I have a passion for adventure, and selling outdoor gear seemed like a great way to make a living. Mountain Gear is a growing company, we employ over 80 people and it is part of the Eighteen billion per year recreation industry that relies on our Nation's public lands and waters.

As a business person, I'm here to talk about the importance of NEPA in protecting this region's natural places. The lakes, rivers, mountains, and forests of the Northwest serve as important habitat for fish and wildlife, provide recreational opportunities and jobs for citizens. As such they are an invaluable resource and decisions regarding them should be made with care and with a critical eye for their long term viability as provided for currently under NEPA.

While I make my living helping people recreate on our public lands, I believe that everyone should leave the land so that others, including our children, can use it and enjoy it later. Knowledge and an understanding of potential impacts of actions is key to ensuring that we do not damage the land—this is one of the key elements of NEPA—ensuring that the government and its citizens understand the impacts of federal actions on this Nation's natural resources.

The economy of the Inland Northwest depends upon a healthy environment. Recently, Spokane adopted the fitting slogan "Near nature, near perfect." This is a reflection of the importance of the Spokane River, the nearby mountains, and the sagebrush steppe to our quality of life and the economy of this region. Not only do we explore these places during our free time, they are compelling reason to bring new businesses and visitors to the area. I recently held a dinner at my home for regional outdoor businesses and economic development interests to discuss the possibility of creating an outdoor recreation business cluster. We discussed goals and methods to grow our businesses and bring new like businesses to the Spokane area. It was clear that business leaders in this community understand the intrinsic link between a healthy environment and a healthy economy.

NEPA is good for our communities, our environment and good for business. EPA helps ensure that we manage our natural resources for the benefit of everyone by requiring that the government is accountable in its decision making process and allowing the public a voice in that decision making process. The heart of NEPA is its requirements of public participation and that a wide range of alternatives be considered—including those that will minimize possible damage to our health, environment or quality of life.

NEPA is currently being implemented in the relicensing of Avista's dams on the Spokane River. The NEPA analysis ensures that considerations such as water quality, flows for kayakers and fish, water for our waterfalls and many other issues are fully analyzed and disclosed to the public for their review and comment. The public has actively participated in the relicensing of the Avista dams. Without NEPA and the public input it requires, the low flows that dry up our famous falls every summer might have continued.

Further, NEPA is one of the only laws that ensure that federal agencies fully consider the impacts of their actions on our Nation's invaluable historic and cultural resources. For example, NEPA requires that the Forest Service must consider and evaluate how their timber sales impact the Lewis and Clark Trail. Protecting the Trail benefits everyone and, frankly, benefits the tourism and recreational economies of many rural areas.

As I stated earlier, I oppose any amendments to weaken NEPA. In business, it is not uncommon to cut corners to generate short term returns. But short term thinking can have disastrous consequences, especially when it comes to spending taxpayer money on projects that might harm citizens or their environment. This is not good for our environment or for business. Over the past few years, there have been several significant limitations placed on the protections that NEPA provides to communities in order to speed up the NEPA process, including side stepping NEPA by creating categorical exclusions for certain types of projects. This severely limits the information available, as well as the opportunities to provide public review for my customers and interested businessman like myself; essentially cutting us out of the process. Limiting public involvement, restricting information, and weakening environmental review won't avoid controversy or improve projects, it will increase divisiveness and risks and additional resource damage that is bad not only for my business but for the region over the long haul.

NEPA's promise of project review and public involvement must be safeguarded, not sacrificed in the name of expediency. Some would blame NEPA for delaying projects, but examining projects in detail and predicting outcomes and thereby providing good information for decisions is good business sense. Rather than amending or otherwise circumventing NEPA, I would urge you to ensure that the federal agencies responsible for implementing the law get the resources they need to do the job right and in a timely manner.

Business and the environment can and must coexist in a sustainable manner. NEPA has proven to be the key to smart sustainable management of our environment. To weaken this protection for short term gain under the guise of streamlining would be irresponsible to the people, communities of this great country. Furthermore, as a businessman I firmly believe it would weaken our economy in the long haul.

Thank you

Miss MCMORRIS. Thank you, Mr. Fish.

[Applause.]

Miss MCMORRIS. OK. We're going to move onto questions now. Mr. Vaagen, you referenced, I think, this presentation—Whose job is it? Would you like that included in the record?

Mr. VAAGEN. Please.

Miss MCMORRIS. OK. Without objection, so ordered.

[NOTE: The information submitted for the record has been retained in the Committee's official files.]

Miss MCMORRIS. Then I wanted to go back to you, Duane.

I commend the efforts that you're undertaking right now to work with the environmental groups and industry in northeast Washington to really take a look at what's going on in the Colville National Forest. And I wanted you to just comment on what do you believe is really preventing you from moving to treat and protect the national forest.

Mr. VAAGEN. Candidly——

Mr. GOHMERT. We prefer that. Candid.

Mr. VAAGEN. The agency does have their hands tied behind their backs. I believe in the public involvement and people. And it's been that way for years and years. And we've gotten better mostly every year. The problem is this paralysis and going in circles. Whose job is it? Whose risk is it?

I probably won't be around before this gets solved. It's been going on for 35 years. We've been at this a long time. The agency cannot move quick enough with NEPA analysis. If you have forest that die in an instant in a fire and it's destroyed within a year of any commercial value, a year-and-a-half to two-year analysis is not going to work. It's a waste of time so don't go there. Just let us designate it something else, barren, dead and that's it.

I just think—we're trying to restore a healthy forest, and it's getting unhealthier by the year. You drive around in this area and you see it whether you know the difference between forest species and types and stands and elevation, you just see an orange tree. What's worse than an orange tree is a complete black tree, and not burned. One after it loses its needle it's down to 10 percent moisture content, and that's great fuel.

British Columbia has a beetle problem that's as big as the State of Washington. That's where we see a fire in five years. Washington state is the only state in this area that hasn't had a major fire in the last seven years. Our time is coming, unfortunately. And we need to prevent them instead of reward them.

I just think it's a constrain in the analysis. And other people—is it their responsibility? And what's the output? Who has the pride and compassion? It's all the people. But who lives here? It's the people in the community who have been here for generations. They're going to admire and protect that environment and that forest.

Others come in and they leave.

Miss MCMORRIS. Do you think that there's a better process or a simpler process that could replace the environmental assessment.

Mr. VAAGEN. Well, I think it worked before. I think as long as it's tailored and used for its intended purpose, it works. If it's used as a tool or a ploy to stop something, then we need to call it something else.

Miss MCMORRIS. OK. Mr. Russell, under Federal law Federal agencies are responsible for completing the NEPA analysis. Is it your impression that agencies are shifting the cost to the applicant, or how are they funding those costs.

Mr. RUSSELL. Well, our experience has been that (inaudible) start the process with (inaudible) understanding you pay for the NEPA analysis, which is in principle fine. It's when we go onto ad nauseam analysis on alternatives that are unviable on issues that are not significant to the human environment may reflect some biases of agency individuals that may be against the particular project. Very difficult to nail down what those costs may be to chase those types of issues through the NEPA analysis.

So, certainly the cost is escalating to the applicant.

But there is a burden on the agencies as well. Because they bring in all their resource (unintelligible) to the NEPA process. But if we had definitive timeframes and scopes, then that process is manageable and it's not a huge diversion from their other duties. And they do have other duties in their Federal roles.

Miss MCMORRIS. OK. Thank you. Are you ready to go next.

Mr. INSLEE. I'm always ready.

Miss MCMORRIS. OK.

Mr. INSLEE. Madam Chair, I'd like to submit for the record. I have this CD here with a copy of (unintelligible) CQ regulations. And (unintelligible) also letters and friends of the Clearwater, I'd like to (unintelligible).

Miss MCMORRIS. Absolutely. Without objection so ordered.

[NOTE: The information submitted for the record has been retained in the Committee's official files.]

Mr. INSLEE. Mr. Vaagen, this is not a question. I just want to say I'm heartsick about the situation of the forests in our state. And I think they're very dire and will become more dire. And I think one of the reasons is that our climate is changing dramatically. And I just want to let you know that that's something I care about deeply. And I really believe that the Federal government is not doing its job at really assessing the depth of that problem, number one, and number two, really doing anything meaningful to respond to it.

And I can tell you I have (unintelligible) those in Congress, and they have done nothing to respond to this local issue which is effecting our forests with trees right here in the county. That's a statement more than anything else.

Mr. Russell, I wanted to ask you for your expertise and if you could help us maybe on this issue with—issue of Hauser, Idaho, where there was this railroad sighting facility or fuel loading facility. And the railroad (unintelligible) apparently (unintelligible) without any NEPA compliance is my understanding.

Can you share any guidance as to how that happened, if you know at all. And this may be outside your area.

Mr. RUSSELL. It is. And on the risk of being out of bounds, I am not that directly involved with that. Because there is the Federal Transportation Act. The question is a major Federal decision and that would trigger NEPA. From the state level where they were seeking authorization, there is no NEPA requirement at the county level. That issue for permits and approvals.

I personally believe the county did a pretty darn good job of the process of reviewing that and stipulating, I think, to some 33 conditions before it failed. Was in the construction quality assurance and quality control which is mind boggling to me personally and has

given a concern raised by the community and the local county commission. I think it was a construction implementation problem.

Mr. INSLEE. Yeah, I don't know the circumstances. I am concerned about that where you cite something in the state that might not have (unintelligible) environmental protections. It gets in the aquifer. My citizens in my state.

This is one reason to have some Federal (unintelligible). And I have to assume there is some Federal committee. And I'm going to try to get to the bottom of this and share that information with the panel as to how this happened. Because it could be a very significant issue.

[Applause.]

Mr. INSLEE. Mr. Urness, could you give us any guidance. I'm sensitive to this issue of information kind of stale.

Just to let you know. I have been bragging about the Pacific decisionmaking, and I think our goal is to get to the rest of the oceans to come up to our level of decisionmaking for its biological compliance.

So, we'd like to do anything that would remove something that would encourage the other fisheries to come up to our level of compliance of biological issues. I'm sensitive to your—what you're telling us is that decisions are made on stale information.

What would you suggest to try to accelerate the decisionmaking (unintelligible), one, public input and, two, requirement of fair assessment alternatives by these agencies.

Mr. URNESS. Magnuson-Stevens lists sort of the premise again of our whole position. This particular regulatory scheme, Magnuson-Stevens provides for significant public involvement. And, again, up until 1980, Magnuson-Stevens and the Fisheries Management Councils did not go through the additional NEPA process. It was felt that their process in and of itself was public enough and it was able to involve the entire range of decisions.

By definition, in a fishery you have two ranges of decisions. You don't fish a stock or you fish it to its optimum yield. And it's all based on best scientific information available.

Where NEPA creates the issue in our setting, not dissimilar to a burned down forest, where not quite as severe because you can still assess and catch fish, but you're doing it on three-year-old data. The ocean conditions, as we know—look at this year's salmon run versus last year.

Those salmon are out there somewhere. They didn't just disappear. But the ocean conditions change drastically and quickly. And three-year-old data may cause us to overfish the same species that was said to be healthy three years ago.

Under the previous Magnuson-Stevens we were under a two-year window. That's still not fast enough really. But you are right. The Pacific Fisheries Management Council is among the leaders of the eight regional councils. I would agree with that.

Mr. INSLEE. Do you think this is—could we—if we had more resources for these fishery agencies, would that help accelerate this decisionmaking or not? Do you think that's an issue or not.

Mr. URNESS. Certainly you could throw more resources at the agency and more support. But I don't think that that will increase

the timeline. I think it would—my opinion is it would simply add to the bureaucracy.

Mr. INSLEE. So, what you're suggesting is maybe it needs both, some type of a timeline and maybe resources.

Mr. URNESS. Possibly. The timeline, again—I'm not against NEPA. The position that I have with respect to fisheries management is if NEPA can be fully utilized or if NEPA—all of the policies of NEPA are incorporated in them—and if this was subsequently enacted law, of course. And so it does have arguably everything that NEPA requires within it in and of itself. And at NEPA additional regulations on top is what's causing the delay. That's my problem. I don't know if I'm answering your question.

Mr. INSLEE. Yeah. With this detail we'll talk about this in depth in the next couple months.

Mr. Fish, I just wanted to thank you for coming and to find out where all my kids' tuition money went. I appreciate that.

Mr. FISH. Appreciate that.

Miss MCMORRIS. Mr. Gohmert.

Mr. GOHMERT. Thank you, Madam Chairman. Again we appreciate your time in coming out. And this is important, I think, that we hear from folks.

First of all, is Julie Gelasso (phonetic), is she—yes. OK. Do you mind if I make this part of the record?

Ms. GELASSO. I'd appreciate it since you were asking for public input.

Mr. GOHMERT. Yeah. And that's what I'd like. I wasn't going to do it unless you said it was OK. But I'd like to and I appreciate the input.

Miss MCMORRIS. OK. So, without objection, so ordered.

[NOTE: The information submitted for the record has been retained in the Committee's official files.]

Mr. GOHMERT. Thank you. That has to do with a project at the head of the Spokane River. And I haven't been to Coeur d'Alene since '69 at the Boy Scout jamboree up there.

It was beautiful.

Ms. GELASSO. Farragut.

Mr. GOHMERT. At Farragut, right. It was a beautiful area. I really enjoyed that. The hospitality there was wonderful as well.

Let me go back Mr. Urness and follow up on Congressman Inslee's question. What specifically would you say we should do to improve that? Because obviously if—you know, if they've got data from 2004 and by 2007 there is an extreme shortage in one type of fish, well, we don't need to be having an order that says go by 2004.

How do we improve that? I mean specifically. Not in generalities. Not just put resources or let's—do you think just putting a timeline on is adequate.

Mr. URNESS. The specific fix I believe is for either if—if in the NEPA reform process is, one, to recognize that certain acts conform to the NEPA standards and policies. Recognize that.

Now, there may be fisheries management decisions within the fisheries management councils that may involve a broader spectrum where NEPA may be appropriate. But for the vast majority of the fisheries management decisions that are made, the process

that is very public and very scientific base and considers a range of alternatives, by the Act's definition and its own words, to add this additional layer of analysis, which is effectively how Department of Commerce has initiated it—and it's out of fear of lawsuits because of these activities that really didn't occur until 2000 that they may be over-cautious in pursuing the additional NEPA analysis. When in fact prior to that fisheries management—and, again, I would agree with Congressman Inslee, the Pacific Regional Council is a leader that said even two years, which is what we were under before, that's a long time in managing fisheries that we have out here, or anywhere for that matter.

Mr. GOHMERT. Well, and you mentioned the range of alternatives. And that's been used by other witnesses as well. Some saying fair alternative. Some saying wide range of alternatives. But what the statute 1502.14 says itself is vigorously explore and objectively evaluate all reasonable alternatives. And for alternatives which were eliminated from detailed study then you've got to give reasons why they were eliminated.

So, a wide range, it seems to me, if that's what people adopt, it's just going to take a whole lot more time.

Whereas it's what's reasonable. And if there is something that is reasonable that's excluded, you got reasons and that can be questioned in public.

Mr. Kennedy, let me go back to you and talking about litigation. We just heard—well, we heard a lot about that. But there was—in the Klamath litigation you mentioned a judge was finding that ESA would trump NEPA. I realize you're not an attorney, but what was the basis for finding that? Do you recall.

Mr. KENNEDY. The good news is I'm not an attorney, and the bad news is that I'm not an attorney.

But in regards to that specific situation it was the most frustrating scenario. We were in a year—it was not the driest year on record. Yet the (unintelligible) and a lot of our adversaries were claiming that it was because of the drought that we weren't getting the water that we had stored in our reservoir. A judge said, yeah, you're right. NEPA wasn't applied correctly. Don't worry about it. The ESA will take care of it anyway.

And that was really, really frustrating. Because we spent hundreds of thousands of dollars (unintelligible) where we were trying to use NEPA the way it was, what I believe, intended to be used as, to consider involvement from—from the communities large—I think if you look at all of the suggestions that have been talked about today, no one is advocating for dismantling NEPA or the ESA. And the Family Farm Alliance certainly advocates for strengthening and modernizing both the Endangered Species Act and NEPA, and also very soon the Clean Water Act.

[Applause.]

Miss MCMORRIS. Going back just a follow-up, Mr. Kennedy. So then, how did the Bureau of Reclamation justify their decision to not undertake, much less complete, the NEPA review.

Mr. KENNEDY. To be quite honest, I don't think they had an excuse. They said they didn't do it. And they didn't. They didn't comply with it. They didn't enforce it.

The local Reclamation office, the management office in Klamath Falls is under the mid-pacific region. And the mid-pacific region is that of Sacramento. They were handed a mandate prior to January 19th of the year 2001 that sort of sent this bomb off. The bomb was handed to the new administration. And the environmental assessment that was done on the Klamath project operation for that year is what initiated the dismantling of our irrigation deliveries, which was the purpose of our project that was built in 1905.

Miss MCMORRIS. Would you talk just a little bit further about your idea of this binding pre-application meeting and how you envision that working and how that might help.

Mr. KENNEDY. That's a concept that several people have talked about. I think that something similar was mentioned here earlier in the first panel that there be an obsmen—can't say it—obsmen.

Miss MCMORRIS. Ombudsmen.

Mr. KENNEDY. Anyway, you have a process that is very considerate and very deliberate and complete. Doesn't take eons to go through. And it's binding. It's something contrary or as an alternative to running through a court where you're going to have a judge sitting on the bench making the decision on a natural resource issue that he doesn't really have a clue about. That's what that is all about.

Miss MCMORRIS. In your experience, were the local water agencies considered cooperating agencies.

Mr. KENNEDY. We've for years and years requested what is called intervener status in the process. And we have yet to be formally recognized as having that status in any of the processes including this.

Miss MCMORRIS. OK. I wanted to go to Ms. Blaeloch and just ask—you stated in your testimony that NEPA rarely stops a project altogether. And I recognize that the law doesn't. But it's the challenges to the process that do stop projects. And I just wondered if you agreed or—and if you think that litigation is the best way for us to really think through how we're going to best protect the environment in—within—when we're thinking about these projects.

Ms. BLAELOCH. I think it does delay projects sometimes. But it tends not to stop them. And it will, in our experience, might alter a project after litigation. But normally the way that the courts—I'm not an attorney—but the way that the courts have interpreted NEPA so far is that it's a procedural law rather than a substantive law.

And so they will not normally make a judgment against a decision but only the way the decision was arrived at, whether or not procedures were followed.

And I don't think anyone would prefer to go through litigation. But the problem is not, as someone mentioned earlier, the law. It's noncompliance with the law. So, the reason that people sue is because other people have broken the law. And so I think that goes back to the inconsistencies of the implementation of NEPA. And need of education among agency staff in how to responsibly, efficiently and in compliance with the law implement it.

If we really had that, we'd have a lot less litigation. But as long as people are not complying, then citizens will find it necessary to challenge the agencies to comply.

Miss MCMORRIS. What has started out, in my opinion, as very well intended has now resulted basically in most projects either agencies not taking action for fear of a lawsuit or the projects being ended up in court.

And part of my goal is to just figure out is there a better way than doing so much of this through the court action.

Ms. BLAELOCH. And I agree. I would love to see really consistent, faithful NEPA implementation. And one of the things that—speaking in the arena of my—of the projects that we look at, which are land exchanges, sales, conveyances over the 11 western states, which encompasses usually about 70 projects that we're monitoring at one time, and about 300 projects that are proposed every year.

As I remarked in my testimony, largely as a result of the Huckleberry litigation, which was a real shock to the Forest Service, you know, instead of just standing back on their heels, the Forest Service, which is an agency that I regularly criticize, decided, you know what; we're going to do something about this. Because we don't want to have to come to a standstill on land exchanges. And they were receiving a huge amount of grief over this issue.

And so what they did in response to that litigation was they went through a major two-year process that rewrote their implementation guidelines for land exchange analysis. They started talking to the public about land trades, which they had previously treated as sort of complex, secret real estate transactions. And they just stepped up and said we're going to try to do this right.

And so our experience has been normally there are not very many EISs that come out, maybe one a year on a land trade, maybe two. Mainly they're environmental assessments. And there are very few legal challenges.

And in my opinion, it's largely—and I'm talking about the Forest Service here, not the other land management agencies. It's because the Forest Service really decided that they wanted to get their act together. And they started writing consistent guidelines for their staff on how to implement NEPA for land trades.

Who knew? You know. I didn't expect it to happen. But it was a really positive outcome of what happened to be unexpected litigation.

Miss MCMORRIS. Mr. Urness wanted to make a comment, I think. And then——

Mr. URNESS. I do have a comment. I'll be very brief because I want to make sure I—within the context of Magnuson-Stevens and NEPA, what—the point I want to just make sure I'm getting home clearly is it is having the unintended effect of worsening a process and worsening the ability of decisionmakers to apply good environmental decisions and socioeconomic decisions.

Because the Act itself provides that decisionmakers and the public need to make their decisions on the best available science. This gets back to this—we're now doing it on a two-year delay. But NEPA has created a three-year delay.

If the Act itself provides that the process is public, (unintelligible) anything because that's not what we want to do. The intent is to have a timely use of the information that we have. Otherwise

our policies are not as effective as they could be. I just want to make sure I got that across.

Miss MCMORRIS. Very good. Mr. Inslee.

Mr. INSLEE. Thank you. Mr. Russell, you were telling us about this mine—you were telling a story about a particular mine. I think you said in Alaska, I think. And you had about $1.6 million costs of (unintelligible). Is that what you said.

Mr. RUSSELL. Correct.

Mr. INSLEE. What mine was that.

Mr. RUSSELL. It's called the Kensington Mine.

Mr. INSLEE. Kensington.

Mr. RUSSELL. Kensington.

Mr. INSLEE. So, give us—assuming that that project went through, what would be the value of minerals taken out of that over the lifetime of the mine, if you're—I'm trying to get some sense of the scope of the project.

Mr. RUSSELL. The proposal was that the mine would mine a million ounces over ten years; 100,000 ounces a year. That would depend on the price of gold and the cost to produce.

Mr. INSLEE. So with today's prices, what's the gross value of that.

Mr. RUSSELL. The gross value would be somewhere at $4-and-a-half million. That's the gross value. That doesn't account for the cost to permit, the cost to construct it or the cost to operate. Those would all be subtracted from that.

Mr. INSLEE. So would the gross value be 4-and-a-half million and you said 1.6 million in the permitting process.

Is that what you're saying?

Mr. RUSSELL. I'm sorry. I think I misspoke if I said $4-and-a-half million. It would be considerably more than that. It would be $450 an ounce times a million ounces.

Mr. INSLEE. So, it's 450 million.

Mr. RUSSELL. Correct.

Mr. INSLEE. So, you'd be taking about $450 million of the gold out, and you have an investment of $1.6 million in the permitting process.

Mr. RUSSELL. Well, no.

Mr. INSLEE. Is that right or not.

Mr. RUSSELL. No. That was just the EIS piece. Then we spent 10.8 million on the environmental studies and engineering the first time, the first EIS. And that is just to get to the point that you could get authorization from the Forest Service to construct the project. That doesn't include your capital costs or your operating costs.

Mr. INSLEE. So, that would be about 7-and-a-half percent of the value of the minerals you take out of the mine; is that about right? I'm doing quick math.

Mr. RUSSELL. Well, that's—again, that's gross value. It doesn't account for the cost—you know, the capital costs of that original project was about 200 million. And the cost to operate was about $350 an ounce that first (unintelligible).

Mr. INSLEE. But in any event, you're spending about 7-and-a-half percent. That doesn't make the project uneconomical then; is that a fair statement? Because I assume that's the case that you're pursuing it.

Mr. RUSSELL. Oh, we're pursuing it. But certainly the difficulty we saw was not only the cost but the time that it took to get through the process, where we lost a window of opportunity when gold was $500 an ounce.

Mr. INSLEE. But let me ask you kind of a hard question. Mr. Russell, you made a comment about needing to reform the mining laws in this country. And I share this view in at least one respect. I have always found it very troublesome that everybody in this room pay their taxes on April 15, I think—I'm going to check on that actually. And yet this one industry takes our gold out of our mountains and doesn't pay any meaningful royalty to the—back to the taxpayers for their asset.

Now we have a representative of the industry suggesting that we in some sense make it easier to take our gold out of our mountains and not pay us anything for the ore because we haven't brought up to speed this 1872 archaic Act that was really (unintelligible).

How are we to take that? How should we feel about that, while the industry still refuses to pay the taxpayers the royalty for their asset.

Mr. RUSSELL. Provided that the subject is germane to NEPA—the mining industry——

Mr. INSLEE. Well, let me explain to you, sir, just so you know the nature of my question. And I think that's an important comment you made. It's germane to NEPA because industry is here and asking the panel to make it easier to take our ore out of our mountains and not pay us anything for it. So, that's sort of——

[Applause.]

Mr. INSLEE. That's how I think it's relevant.

Mr. RUSSELL. Well, the industry has been over the last several years supportive of mining law reform, not to abolish the mining law. And there's been quite a bit of debate on this issue of royalty, taxes or fees.

The controversy, in my view—and I'm not a mining law expert—is that it's not how it would be assessed on the gross value. As you try to make this analogy of a very profitable mine without considering the cost of capital, the volatility in the mineral price during the 10-year mine life, versus a net proceeds type of system where you truly do have a, quote, unquote, profit that you pay some royalty or fee back to the Federal government.

That is the mining—the National Mining Association's been proposing that for quite a while. But the issue is where do you—when do you assess that particular (unintelligible).

Mr. INSLEE. I think it would be helpful to resolve this issue to—and where we can move onto some of these other issues. And I say that very sincerely because we answer to the public. And when I go to the public and say the industry wants relief from some of these issues to help in the NEPA process, the response is not warmly received frequently because of this issue.

And I hope that in some sense you could help find a resolution of this to get some royalty pay at a reasonable basis. That's just a—kind of a hope.

Do I have any time left?

Miss MCMORRIS. We'll go around again.

But, Mr. Russell, I wanted just to follow up. Thinking of the mining industry and I guess from my perspective the fact that you are mining metals that are very important to our country in a variety of perspectives and important to our industry.

I wanted to ask if you could—can you quantify or do you have numbers on, just in general, how much you spend on permitting in this country and give us a comparison as—if you can, as to the cost compared in this country versus other countries and the time lines. And—and I guess it concerns me when you think about metals, and many of these are so important to us, individually and to our industries, again, we see mining companies more and more going overseas.

Mr. RUSSELL. We certainly see it in overseas. They have laws——

Miss MCMORRIS. Excuse me, real quick. One other item I'd like you to address is environmental standards in our country versus in other countries too.

Mr. RUSSELL. I guess I'll start there. The countries that we do business in have laws that are very similar to NEPA, where a statement on the environmental effect of the proposed project, alternatives to that are assessed. Those countries that we operate in have mandatory timeframes, where that process needs to be complete.

So, our view is that the environmental standards and requirements are not much different country to country versus the U.S. It's the way they get applied and it's the process.

So, for example, in Chile, which has environmental impact statute, has all the same requirements under Clean Air and Clean Water. But you can get through that process by statute by the number of days that that particular law allows. But you don't get tied up then into numerous appeals and litigation. And so you can't get the—so the cost of doing the baseline work and environmental work is less because the agencies are not concerned about the threat of being appealed. So, not all I's are dotted and T's crossed.

I mean there's significant issues which is what NEPA was intended are addressed. And we find that those operations are done in a way that does not adversely effect the environment and does provide very important minerals, tax base and employment opportunities.

An earlier speaker said the (unintelligible) environment is poverty. And we would certainly agree with that. The mineral involvement is one of the only industries that creates wealth and creates good-paying jobs in our economy.

Miss MCMORRIS. Thank you. I apologize, Mr. Gohmert. I took your time. So——

Mr. GOHMERT. You didn't take my time. I hope I'm still going to get it.

Miss MCMORRIS. Yes. I—what I'm going to do is give you the next—I'll switch five minutes with you. Right? OK. It's your turn.

Mr. GOHMERT. Thanks. I'm glad we get to follow up on some of these things.

You know, Mr. Fish, you made a comment early in your presentation, something to the effect that you wanted to register your opposition to any change in NEPA. And if I understood you correctly

when you said that, that caused me great concern. And then later you said you opposed any change that would weaken NEPA. I can go along with you there. But if it's opposition to any change at all, then I have some serious concerns about your objectivity.

Mr. FISH. I believe we should have the NEPA document up on the board because I—looking at it, it's—looking at the purpose, it's really sound law. I would say I'm against any change that—any amendment to it that would weaken it. And I would be against any change to the core paragraph——

Mr. GOHMERT. To that policy. Sure. I think we're in agreement on it. OK.

I mean, it reminded me—you know, the true story about the lady that wanted to cook her ham just like her mother did. She had a great recipe. And, you know, you all recall the story. The first thing the recipe called for is to cutoff the first two inches of the small end.

And then some lady years later wanted a copy of that recipe. And she called over and said, Why do you cutoff those two inches on the small end? And she said, I don't know. That's my mother's recipe. So, she called her mother and said, Why did you—why does the recipe call for cutting off those two inches? And she said, Because when we were growing up, we never had a pan big enough to put the ham in there.

And so, I mean, we need to go back time to time see what the reason was for some of the laws and see if we need to fix them.

Mr. FISH. We can also—without changing I guess I'd say there is a purpose to the law there. And that's what's important here. And what I hear is a lot of industry people that are saying, hey, I see—I see exclusions to the law.

I want mining industries out. I think that guts the law if we let an industry out from under it.

Mr. GOHMERT. Well, and I can see why you might feel that. But like, for example, with fishing, I think it's ridiculous to be making decisions based on three-year-old data. That needs to be streamlined. We could be hurting the environment more than helping.

But my time is pretty limited. Let me just hit a couple things I was hoping to. In the——

Miss MCMORRIS. I think I had two minutes that—of your time originally that I could actually give to you right now.

Mr. GOHMERT. But, you know, litigation is something that I—I've dealt a great deal with, and in having been an attorney and then a judge and a chief justice.

And we just went through the budget process in Congress. And, of course, that doesn't allocate money, it just gives a framework. But that's—it's a tough issue to decide what kind of costs litigation is going to have on your budget whether you're a business or you're not for profit.

And I was curious, Ms. Blaeloch, you mentioned the—the effects that you felt like were good things that arose out of litigation. How do you all go about budgeting? Do you budget for litigation? Do you litigate and then, you know, raise money to take care of it? How do you go about doing that?

Ms. BLAELOCH. Well, in the Huckleberry case, we had a public interest attorney who did that case for us. And he did not charge us any money.

Mr. GOHMERT. Super. See, now there's evidence that not all attorneys are bad people. They did it without charge.

But, I mean, let's face it. There's an awful lot of charge—awful lot of costs to litigation. There just is. And I didn't know how you all went about handling that.

I was going to ask the same thing with some of the other folks.

Ms. BLAELOCH. We don't have a budget for litigation.

We have filed—our group itself has filed two cases. We just got a staff attorney three years ago. We have only three staff. We have a less than $200,000 budget.

It's staff time. It's staff salary that goes to litigation. There's only one staff person who does litigation.

I think a lot of the costs associated with litigation that people complain about are costs to the government. And, again, I would say if the government didn't break the law, they wouldn't be sued. And that's—they would not have to sustain the costs of litigation.

Mr. GOHMERT. Of course that presupposes you win every case, which doesn't normally happen for anybody.

But I'm curious, Mr. Russell, what about you all's situation on litigation? How do you budget for litigation that occurs.

Mr. RUSSELL. That's a good question. We—in our particular company, we know that these decisions will be either appealed or litigated. It's difficult to budget for that under SEC rules that do you know for sure you're going to be litigated. No, we don't. So, we expect it (unintelligible). Put it into our hours in the budget and our cost of the project. Once the appeal is—the litigation is filed, then we have to go back to our board and ask for some more money to participate.

Mr. GOHMERT. And pardon my ignorance. One of my greatest strengths is also the greatest weakness. I'm not afraid of embarrassing myself in front of people. But is there no—whether it's a royalty fee, something paid to the Federal government for the use of mining Federal land.

Pardon my ignorance, but I don't know. Is there nothing paid for that.

Mr. RUSSELL. Under the current mining law, there is not a royalty for mining (unintelligible) and hard rock minerals. There are certainly taxes paid to local economies as a result of a mining project. A project that may be several hundred million capital costs, several hundred jobs, the tax base from those is all a benefit to the local economy. But under the current mining law, there is not a——

Mr. GOHMERT. I mean, is there—like in oil and gas, we have oil and gas in east Texas. There are lease payments, things like that. Is there any lease payment or anything like that.

Mr. RUSSELL. There can be depending on a specific project, yes.

Mr. GOHMERT. OK. I'm just curious. Thank you. I know I've past my time.

Miss MCMORRIS. Thank you.

Mr. INSLEE. Can I ask a couple more.

Miss MCMORRIS. Absolutely.

Mr. INSLEE. Thank you very much. I wanted to express some congressional fallibility. I earlier said that 10 million was 7-and-a-half percent of 450 million. It's closer to 2 percent. My apologies for failing law school.

[Unintelligible]. There was a GSA study that looked at compliance and related issues particular to salvage sales and thinning projects, particularly thinning projects. And they concluded, as I recall, that they felt that one of the major problems where—where there was—when litigation did ensue or there were citizen complaints was a lack of training of the Forest Service personnel and a lack of consistency of standards that the Forest Service gave their managers to make decisions.

And, in fact, (unintelligible) GSA—GAO which is the investigatory arm for the Congress, they felt that they were—there was a certain upper management failure to give decisionmakers standards by which to make decisions. And that was leading to chaos and having—and citizens being very upset.

And my perception is that the Service is doing a little better job trying to get now standardized decisionmaking protocols for their decisionmakers in the field. That's improving. That was a problem and it is improving.

What's your—do you have any comment on that or not?

Mr. VAAGEN. I think you hit part of the nail, maybe on the edge here. I think they're playing defense because they're given so many tasks to accomplish for all these people.

We pay stumpage for timber no matter what the diameter is. And we hear that the small thinnings don't pay. That's not true. We've been through a generation or two of people. And you ask me where technology is and are we finding solutions and answers and making progress. And we are.

So, what I'm saying is they don't know what the latest is and what works. We're for a healthy forest and a good habitat, clean water and clean air and all those things. The answers are out there. We've got to find those. I hope that's what your Committee does.

And one of the things with the Forest Service, every year everything changes. The model changes. Everything everybody wants me to do changes. So, we never finish anything because NEPA is a year-and-a-half to two-year compliance on a project.

I'm wondering about the tribe. They go through NEPA too. Our good neighbors to the west, the Colville Tribe. (Unintelligible) NEPA coordinator but they have committees. And they went through a two-year EIS on the whole reservation, the same size as the Colville National Forest. They treat or harvest 75 million feet; the Colville Forest is 25. And I think it's going to go to under 10. I don't think we're going to improve until we hit bottom. And I don't think we hit bottom yet. I just want to survive until we hit bottom.

But this healthy forest and thinning thing has arrived.

I really hope you dig deep and find solutions for that. I think they're here right now.

Mr. INSLEE. Well, I got to tell you, I—I mean, I (unintelligible) about this. I really do believe this has—there have been significant

management failures in the Forest Service. It's a difficult challenge. I understand that.

But there has been a lack of executive standardization in decisionmaking. And I think that is improving. That's my perception.

Just a quick question of Mr. Urness. Have you given any thought to programmatic EIS's? Is that one approach that would help or not, as far as this timing in the decisionmaking.

Mr. URNESS. Again, I'm not a member of the Fisheries Council. I am part of the public participation. I do know that certain of the decisionmaking processes do use programmatic EIS. I do know that they currently do that. I can't answer much beyond that.

Mr. INSLEE. Great. Thank you.

Miss MCMORRIS. Mr. Gohmert, do you have any further questions?

Mr. GOHMERT. Our time is at an end.

But I would like to thank everybody for your participation and being here. And a lot of times we see groups and their eyes are glazed over. And, you know, you feel like you're wasting time. But everybody has been alert. And—and, again, if you have something you would like for us to consider, please submit it in writing. The Chair has indicated that would be appropriate. The (unintelligible) can be included. Because we do want to hear from you. And I don't think any of us want to, like Mr. Fish, weaken the reason for NEPA. But we got to take a look at some of these things and see if the circumstances like a (unintelligible) is changed and it's time to change the law in order to better effectuate the purpose for it.

So, thank you all for being here. Thank you for your participation. Thank you, Madam Chairman.

Miss MCMORRIS. Thank you. Thank you for coming.

Do you want to say anything before we wrap up?

Mr. INSLEE. I just want to thank the panel. Very interesting. Thanks for folks who were interested enough to come out on a beautiful day.

I just want to echo my colleague's thoughts that if you have any opinions about this and share them with us, we will make sure they were distributed. I think it is important that you do that for this Task Force to be successful, to get a full flavor of the public insight. It is very important to know what the public thinks. We could only handle 12 witnesses today. And I know we've got a lot more people here. So, let us know what you think about all this. Thank you.

Miss MCMORRIS. Very good. And I want to thank my colleagues who traveled to my neck of the woods to be here today. Really appreciate you staying here and staying for three long hours.

The hearing record on this one will remain open for ten days. There's a website that has been set up. You can access it through the House Resources Committee. We encourage you to offer your thoughts, your comments regarding NEPA.

And to the panelists, thank you again. As with the first panelists, we may have additional questions for you that we'll submit in writing. And we would just ask for you to answer in writing.

You know, today we've heard from small business owners, public sector entities, NEPA experts, those representing the environmental community. Although, you know, I always hesitate to give

you that because I consider myself a very—I'm—I consider myself an environmentalist. And what I am doing is trying to do what is best for the environment too.

It concerns me. And I—I support—I think we—we look—we look up here today and we see division of NEPA.

But—and that NEPA law. And we talked about, you know, who here wants—Mr. Cannon asked the question: Who wants to change the NEPA law.

But when you consider that every—nearly every word in that NEPA law has been litigated. And then every step now, as a result of those, that litigation is being litigated. I only offer that we shouldn't close the door. We should be willing to at least consider is there a better way to protect the environment, to make these decisions in such a way that do take into account the environment but do also recognize that we want to make—that—that these projects are done in such a way that protect the environment but also can move forward. So, that's not just a delay after delay, which adds cost.

So, with that we're going to close for today. This Task Force will be operating for six months. We're going to go around the country. Really appreciate everyone being here. You've been a great audience. And the meeting is adjourned.

[Whereupon, at 1:30 p.m., the Committee Task Force was adjourned.]

[Additional information submitted for the record follows:]

[A statement submitted for the record by Michael Anderson, Senior Resource Analyst, The Wilderness Society, follows:]

Statement submitted for the record by Michael Anderson, Senior Resource Analyst, The Wilderness Society

The Wilderness Society is a national environmental organization founded in 1935, with its headquarters in Washington, D.C. and with approximately 200,000 members. The Society is dedicated to protecting a national network of wild lands and fostering an American land ethic. It fulfills its mission through education, analysis, and advocacy. The Society works to ensure the wise management and protection of America's public lands, including our national forests, grasslands, parks, refuges, and lands administered by the Bureau of Land Management. This testimony focuses primarily on national forest policy.

The National Environmental Policy Act (NEPA) is the primary legal basis for public involvement and consideration of environmental issues in federal public land management. Known as the "Magna Carta" of environmental laws, NEPA guarantees that Americans affected by a federal action will get the best information about its impacts, a choice of good alternatives, and the right to have their voice heard before the government makes a final decision.

In the Pacific Northwest, NEPA has played a key role in protecting the quality of life that is vitally important to the region's economic future. The federal government owns and manages 28 percent of all lands in the State of Washington and 53 percent of Oregon. As federal agencies with "multiple-use" mandates, the U.S. Forest Service and Bureau of Land Management undertake myriad activities on their lands that, cumulatively, have far-reaching consequences for the region's environmental, social, and economic well-being.

During the 1970s and "80s, for example, the Forest Service and BLM systematically clearcut the ancient forests of western Oregon and Washington under a logging policy aimed at liquidating the forests and replacing them with even-aged tree plantations. As new information became available about the unique ecological characteristics and values of ancient forests, federal land managers were required by NEPA to re-examine their understanding of the environmental consequences of logging. The end-product of the NEPA process was the Northwest Forest Plan, which established a regional network of Late Successional Reserves and Riparian Reserves to

sustain the northern spotted owl, coho salmon, and thousands of other species that rely on ancient forests.

Our experience in the Northwest has demonstrated that NEPA saves time and money in the long run by reducing controversy, building consensus, and ensuring that a project is done right the first time. For the past six years, The Wilderness Society has been actively involved in the Lakeview Stewardship Group, a collaborative effort in southern Oregon aimed at restoring a portion of the Fremont National Forest and providing socio-economic benefits to communities in Lake County. Working with its partners in the Lakeview collaboration, the Forest Service has successfully implemented numerous projects, including salvage timber sales, with minimal controversy or delay. The NEPA process has provided much useful information to those involved in the Lakeview Stewardship Group, as well as providing the opportunity for participation by organizations and individuals that are not part of the collaboration.

Unfortunately, through a series of regulatory actions that drastically curtail NEPA implementation, the Bush Administration has greatly diminished public participation and environmental consideration in federal land management. The anti-NEPA regulatory actions affecting Forest Service management of national forests include:

- Categorical exclusion from NEPA documentation of hazardous fuel reduction projects up to 1,000 acres in size;
- Categorical exclusion of salvage timber sales up to 250 acres;
- Categorical exclusion of green timber sales up to 70 acres;
- Categorical exclusion of land and resource management plans.

The categorical exclusion of Forest Service management plans from NEPA documentation is the most recent—and perhaps the most devastating—administrative attack on the role of NEPA in national forest management. On January 5, 2005, the Department of Agriculture issued regulations overhauling the national forest planning process required by the National Forest Management Act of 1976. The regulations allow the Forest Service, for the first time, not to prepare an environmental impact statement or assessment when it revises or amends its forest plans. Consequently, the public will not be able to comment on any alternatives to the agency's proposed plan or be informed by any analysis of the plan's potential environmental effects. Instead, the regulations require every national forest to adopt an "Environmental Management System"—a way of auditing an organization's environmental performance that evidently provides no opportunity for public involvement.

The Administration claims that getting rid of NEPA will reduce the amount of time and government expense devoted to forest planning and will allow the Forest Service to accomplish more and better land management. However, the reality is that successful public land management requires public trust and support, or at least acceptance, of the land managers' plans and proposals. Limiting public involvement and weakening environmental review do not foster trust, avoid controversy, or improve projects. Furthermore, circumventing NEPA is likely to cost more time and money in the long-run to fix ill-considered projects or repair resources damaged by hastily and poorly planned government actions. NEPA helps ensure that federal agency plans and projects are done right the first time.

Past congressional efforts to carve out exemptions or create special rules for reduced NEPA compliance, such as those contained in the Salvage Rider of 1995 and the Healthy Forests Restoration Act of 2003, have never achieved their intended results on public lands. That is because the American people do not want to sacrifice environmental quality or jeopardize the well-being of future generations for the short-term economic gains resulting from "streamlined" review of environmentally damaging activities on public lands.

In conclusion, The Wilderness Society urges the Resources Committee and Congress not to tinker with NEPA. It has proven to be an effective law in protecting the environment and continues to play an essential role in fostering informed public participation in the Pacific Northwest and across the nation. Rather than looking for more ways to change NEPA, Congress should provide adequate funding for NEPA implementation and exercise its oversight responsibilities by taking a hard look at the ways in which the Bush Administration is dismantling NEPA.

[A letter submitted for the record by Richard Artley, Grangeville, Idaho, follows:]

APRIL 30, 2005

Dear NEPA Task Force,

Thank you for allowing me to submit my written testimony for the Congressional record on the NEPA.

I recently retired from the U.S. Forest Service. I spent 16 years as the NEPA coordinator and NEPA advisor for the Nez Perce National Forest. I reviewed each NEPA document (either EA/DN or EIS/ROD) before it was signed and finalized by the responsible official. If during my review, I saw a NEPA document that would not stand up in court and had probable adverse environmental effects, I sent it back to the District Ranger for rework. This happened many times during my reviews.

You see, the NEPA is a law that forces a government agency to look before it leaps. This is only common sense. I am quite proud that the Nez Perce National Forest is in much better ecological health due to my reviews. I saw some project proposals that were so bad, that if they had been implemented, the environmental damage clearly would have been major and long-lasting. In fact, the damage would have been so major and long-lasting that it would have been impossible for man to fix. The only possible fix would have been nature working by herself for several hundred years. Had there not been a strong NEPA, this ecological damage would have happened again and again and again and again....

The motivating factor for people to destroy the environment was (and is) big money extracting natural resources. Timber, minerals and grass for grazing were the big three. The problem is, the corporations doing the extraction did not own the land or the natural resources on the land. This land and resources are owned by the public. Corporations should consider it a right to trash public resources for their own private financial gain. Corporations are only allowed access to these public resources because of backroom meetings between senior Forest Service managers and politicians. If the corporations are happy, the politicians are happy also.

Since this land and natural resources are owned by 293 million Americans, NEPA dictates that the public has a say in what happens to their lands. It just makes sense that the owner of an asset has a say in what happens to the asset. If the NEPA were changed to take the public owners out of the process, it would be tragic.

There is no need to improve or streamline the NEPA. It's working quite well right now. Limiting public involvement and weakening environmental analysis would only make our wonderful public forests look like they had been used for air force bombing practice. It would also result in much more money being spent by the government to fight loosing court battles...when the money could be spent in a more effective way elsewhere.

Lastly, the major criticism of NEPA is that it takes to long. This is true, a good environmental analysis with the necessary fieldwork and inventory takes time. What the detractors of NEPA do not understand is that this is time very well spent.

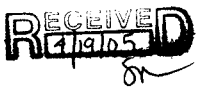
I am very strongly in favor of keeping the NEPA exactly as it is now.

Again, it all comes down to money. If this were put to a vote of the American citizens, most would vote in favor of healthy public forestlands unmarred by the hand of man, when their other choice is increasing the corporate bottom line.

SINCERELY,

RICHARD ARTLEY, 415 EAST NORTH 2ND, GRANGEVILLE, IDAHO 83530

[A letter submitted for the record by Barbara Coyner, Princeton, Idaho, follows:]



April 18, 2005

Cathy McMorris, Representative
District Office
10 North Post, 6th Floor
Spokane, WA 99201

Re; upcoming NEPA hearings in Spokane

Dear Cathy,

It is exciting that you are holding hearings about the efficiency of NEPA. I have direct knowledge on this subject, both as the wife of a 30-year veteran Forest Service employee (soil scientist, retired now), and as an agricultural reporter for **Capital Press** and **Timber West** for over 10 years. It is my beat to see what is happening with federal timber and NEPA processes, and as such, I was invited by then-supervisor of the Clearwater National Forest, Jim Caswell, to head up a collaboration group in 1997-98.

Watching NEPA at work shows that the process is tilted automatically in favor of special interest groups capable of putting someone on a payroll to regularly attend all related meetings, write letters and gather groups of the public to keep momentum going. Those who might have knowledge of a different nature often need to stay at a job and thus, not weigh in as heavily on a NEPA issue. In other words, it is paid advocacy groups against common working people in many instances.

Such advocacy groups, in my opinion, should be thoroughly audited for pertinent credentials, pay, hours spent on political causes, etc. As paid workers, do they really represent a public constituency, or a well-funded group with a bias? NEPA was a good idea at the time, but it has evolved into a jobs program for lawyers, activists and others, many who recruit further activism on college campuses.

The gridlock factor is high on federal forests, infrastructure for handling overstocked forests is now gone, and the US is starting to look foreign dependent for its timber supply (think "oil"), while the forests risk wildfire. This is common knowledge.

To break the cycle, start by thoroughly auditing special interests. The system at present predisposes certain outcomes. It is that simple.

Thank you,

Barbara Coyner
PO Box 52, Princeton ID 83857
(208) 875-2399
bcoyner@potlatch.com

[A statement submitted for the record by Doug Heiken follows:]

Statement submitted for the record by Doug Heiken, Oregon Natural Resources Council, P.O. Box 11648, Eugene OR 97440, 541-344-0675

Please accept the following comments from Oregon Natural Resources Council (ONRC) on the proposed changes to NEPA. Please make sure these comments are included in the official record. ONRC uses NEPA on a daily basis to represent the interests of approximately 6,000 members and tens of thousands of like-minded people who share our mission to protect and restore Oregon's wildlands, wildlife, and water as an enduring legacy. In our view, NEPA is not broken and does not need "fixing." In fact, NEPA is the embodiment of Democracy as it applies to important decisions affecting our common natural heritage. NEPA allows us to become informed of decisions affecting the environment and allows us to provide meaningful and well-informed public comment on projects that directly affect our health, welfare, and quality of life.

ONRC's primary goals are to protect and restore healthy ecosystems on federal forest lands in Oregon. The long record of past agency management clearly shows that prior to the passage of NEPA the Forest Service and BLM failed to protect public values such as clean water and air, fertile soil, and abundant wildlife, and the evidence shows that after NEPA was adopted this situation slowly but surely changed to the betterment of our nation and its people. While it is hard to prove the causation behind this correlation, it only makes sense that public involvement helps achieve public values and public objectives.

The vast majority of Oregonians drink surface water that flows from federal forest lands. Public involvement is therefore sensible from the most fundamental level of public health. Virtually every Oregonian has had formative experiences on public forest lands, whether it was camping on the Oregon Coast with family, rafting the whitewater of the magnificent Rogue River, hiking the Pacific Crest Trail with a church group, or climbing Mt Hood with friends, Oregonians are connected with the public lands and they have every right to fully participate in decisions affecting their cherished public lands.

NEPA is the guarantee that Americans affected by a federal action will get the best information about its impacts, a choice of sound stewardship alternatives, and the right to have their voice heard before the government makes a final decision. NEPA ensures balance, common sense and openness in federal decision-making, it is an effective tool to keep 'Big Government' in check. NEPA is an effective means of ensuring accountability by federal managers, whether they are distant bureaucrats or potentially corrupt local managers.

At the heart of NEPA is its requirement that alternatives must be considered—including alternatives that will minimize possible damage to our health, environment quality of life, or to protect human life from a wildfire. Comparing the relative merits of several alternatives is a core requirement of rational decision-making. Absent this requirement, the decision-maker might propose a "good" alternative, but might miss the opportunity to consider a "great" alternative suggested by the public, a cooperating agency, or a scientific reviewer.

By making sure that the public is informed and that alternatives are considered, NEPA has stopped some harmful projects and made countless projects better. Cutting corners on NEPA review can have serious adverse consequences, especially when it comes to spending taxpayer money on projects that might harm citizens or their environment. The value of our common air and water cannot be under-estimated. The value of "ecosystem services" is in the trillions. We must not diminish these services without fully and consciously considering the consequences.

NEPA conserves public resources. Less waste is likely when federal decision-makers operate in the daylight where the public can see what they do. NEPA also saves time and money in the long run by reducing controversy, building consensus, and ensuring that a project is done right the first time. Limiting public involvement and weakening environmental review won't avoid controversy or improve projects.

NEPA requires federal agencies to use accurate scientific analysis and respond to opposing viewpoints, which ensures that federal managers use modern standards and ensures that they don't put blinders on and ignore relevant information that has a bearing on the decision. NEPA requires consideration of cumulative effects, which simply means that federal managers should make decisions within the context of what happened before and what might happen later, and that the left hand should know what the right is doing.

There is no need to improve NEPA...because it works. A recent example might help. Several years ago, the Umpqua National Forest's Diamond Lake Ranger District proposed to log thousands of acres of mature and old-growth forest (some even in inventoried roadless areas) around Lemolo Reservoir in the High Cascades. In the course of all stages of NEPA participation (scoping, public meetings and site tours,

Draft EIS, Supplemental Draft EIS, Final EIS, ROD) the public was able to convince the Forest Service to modify the project so that it could eventually move forward with a modified design. The project was administratively appealed, but appellants agreed to withdraw the appeal in exchange for some changes to the design of temporary roads to be constructed and assurances about protecting some large trees. If not for NEPA, this project would certainly have ended up in a contentious lawsuit.

Another example relates to the government's keen interest in wildland/urban fuel reduction. NEPA ensures that the trade-offs between fuel reduction and wildlife habitat and water quality are fully disclosed carefully considered. NEPA also helps ensure that fuel reduction efforts are effective in terms of reducing fire hazards. It is well known that thinning forests can reduce fire hazard by reducing surface fuels and ladder fuels, but it is much less well known that thinning can also make fire hazard worse by moving fuels form the canopy to the ground where they are relatively more available for combustion during a fire, and by increasing sunlight at ground level which reduces fuel moisture and stimulates the growth of future ladder fuels. When properly used, NEPA helps the decision-maker design fuel reduction efforts to optimize the competing values (e.g. reducing fire hazard vs. increasing fire hazard, degrading water quality, degrading wildlife habitat, compacting soil, etc.) (NOTE: The recent changes to HFRA that allow consideration of fewer NEPA alternatives run counter to this important function of NEPA.)

Please carefully review the following highly relevant press release from the period when Chief Bosworth tried to address these issues.

http://www.onrc.org/press/040.bushattack.html

For Immediate Release: June 12th, 2002

For More Information Contact:
Doug Heiken, Oregon Natural Resources, Council p. 541-344-0675
James Johnston, Cascadia Wildlands Project, cell. 541-554-1151
Jasmine Minbashian, NW Old-Growth Campaign, cell. 360-319-3111
Mitch Friedman, Northwest Ecosystem Alliance, p. 360-671-9950 x13

ENVIRONMENTAL SAFEGUARDS UNDER ATTACK BY THE BUSH ADMINISTRATION
CONSERVATIONISTS DEFEND THE "ENVIRONMENTAL BILL-OF-RIGHTS"

Eugene, OR—Conservationists responded to a report issued by Dale Bosworth, Chief of the U.S. Forest Service, who will testify before the House Resources Committee Wednesday, June 12th about environmental laws that seem to prevent the Forest Service from achieving its resource extraction goals (i.e logging targets). Bosworth released a report titled "Process Predicament" which amounts to a long list of examples of Forest Service ineptitude, but the report includes not a single recommendation to fix the problem.

"Today's hearing is a set-up for the Bush administration to cook up a "solution" to the problem that will undoubtedly be a timber industry 'wish list' to weaken our environmental safeguards," said Doug Heiken of Oregon Natural Resources Council. "The bottom line is that the Bush administration is doing industry's bidding by attacking environmental safeguards to make it easier for the timber industry to destroy our public land legacy."

"The real problem is that the Forest Service continues to propose destructive projects in sensitive areas like roadless areas, old-growth and watersheds that supply clean drinking water,—said Jasmine Minbashian of the Northwest Old-Growth Campaign "The real solution is to stop logging in these sensitive areas and begin to restore the damage from logging excesses of the past. Restoration is something that everyone can get behind, so it won't get bogged down in analysis."

The solution to gridlock, according to conservationists, is to continue to uphold the core principles of informed decision-making and accountability and expect federal forest managers to decide not to log mature and old-growth forests and instead begin helping rural communities restore public forests and watersheds. Good decisions that restore the forest will be approved quickly without controversy and lawsuits, while bad decisions that destroy old-growth, should be stopped and held accountable.

"Before we irreversibly destroy an old-growth forest or a blue-ribbon trout stream, it is perfectly reasonable to expect an open and honest decision-making process," said Doug Heiken of Oregon Natural Resources Council. "Even if it takes a little more time, requirements for informed and accountable decisions are a small price to pay to protect our children's public land heritage. We must not relax environmental safeguards for the convenience of the timber industry or the bureaucrats."

"Environmental review shines a bright light on the dark truth of forest destruction, species extinction, and impaired water quality," said Mitch Freidman of Northwest Ecosystem Alliance. "The Bush administration wants to pull the wool over the eyes of the public and ignore the serious consequences of forest destruction. Clean air, clean water and healthy forests are too important to sacrifice for the convenience of the timber industry."

James Johnston of Cascadia Wildlands Project points to the Northwest Forest Plan, which requires logging some of the last ten percent of old-growth forests in Oregon and Washington: "'Analysis paralysis' is a Forest Service term for public input. The problem isn't the process, it's the product. The public doesn't support an old-growth product. We need to focus on restoring forest health, not logging dwindling old-growth forests."

"Millions of American's get their drinking water from rivers and streams that flow from the National Forests. Do we want to weaken our environmental laws to make it easier for the timber industry to pollute our drinking water?" rhetorically asked Regna Merritt of Oregon Natural Resources Council.

BACKGROUND INFORMATION ON PROCEDURAL SAFEGUARDS FOR THE ENVIRONMENT

The real source of gridlock

Agency "gridlock" is primarily the result of two things: (1) well-founded public opposition to controversial projects in sensitive areas such as old growth, roadless areas, drinking watersheds, and important habitat areas, and (2) the agencies' own bureaucratic incompetence. The federal courts have found the Forest Service to be in violation of environmental laws on numerous occasions.

Environmental safeguards are mostly procedural

Dale Bosworth recently said that the accumulation of congressional mandates, laws and regulations has led to "analysis paralysis" within the agency. To understand this criticism one has to understand the nature of our environmental laws. Our environmental laws rarely if ever say, "thou shall not pollute and destroy..." Our nation's principle environmental safeguards are processes and procedures intended to achieve decisions that are fully informed and accountable. The most basic premise of federal environmental law is that a federal decision-maker must "look before they leap."

The U.S. Constitution does not protect the environment. Congressional acts like the National Environmental Policy Act are like a "due process clause" for the environment. It's the closest thing we have to a Bill-of-Rights for the environment. These processes and procedures are the main way for the public to hold the government accountable for protecting our public land, air, and water. To suggest that we weaken our environmental Bill-of-Rights shows just how extreme the Bush administration is.

Table of federal environmental processes, their sources in the law, and their reasonable purposes.

PROCESS	LEGAL SOURCE	PURPOSE
Before making decisions affecting the environment, consider a range of alternatives	National Environmental Policy Act	Rational and informed decision-making
Before making decisions, disclose the possible environmental consequences of the proposal	National Environmental Policy Act	Inform the decision-maker and the public
Before making decisions, provide public notice and consider and respond to public comments	National Environmental Policy Act	Transparency, informed decision-making, and accountability
Before making decisions, survey for rare and sensitive species	National Forest Management Act	Informed decision-making, and permit the proposal to be adjusted to protect wildlife
Before making decisions, consult with wildlife experts	Endangered Species Act	Involve experts and protect imperiled species
After making decisions, allow the public to appeal and allow judicial review	1992 Act of Congress	Hold bureaucrats accountable
make government documents available to the public	Freedom of Information Act	Promote open government; hold bureaucrats accountable

Note: These laws are primarily directed to federal decisions affecting public land, not private decisions affecting private lands.

Conservationists have a solution.

The obvious solution to the "process predicament" is to avoid logging in sensitive areas. Last month conservation groups presented the Bush Administration with a blueprint for increasing planning efficiencies. On May 2, 2002 Doug Heiken of Oregon Natural Resources Council gave a presentation to the Intergovernmental Advisory Committee (chartered under the Northwest Forest Plan) in which he said:

Focusing on less controversial thinning projects in young managed stands instead of logging mature and old-growth forests will automatically streamline project planning processes without weakening federal environmental laws:

a) Fewer wildlife surveys will be required because the old-growth species generally do not occur in the young tree plantations, so surveys will be triggered much less often. All species associated with young forests were taken off the Northwest Forest Plan survey list in 2001;

b) The agencies can typically prepare concise Environmental Assessments for restoration projects, instead of more lengthy Environmental Impact Statements that are required under the National Environmental Policy Act for projects with significant impacts such as logging in roadless areas or old growth;

c) Consultation under the Endangered Species Act will go more smoothly because restoration-oriented thinning projects generally have long-term benefits that outweigh potential short-term negative impacts. If thinning is part of a comprehensive restoration effort including roads, streams, and uplands, then "What's good for the forest, should be good for the fish & wildlife;" and

d) Appeals and litigation will be minimized or eliminated if the agencies focus on non-controversial projects.

[The complete statement is available on request from Doug Heiken dh@onrc.org]

The timber industry is cashing in their chips.

The northwest timber industry donated more than one million dollars to Republicans in one 48 hour period during the last presidential campaign and expects favors from the Bush administration.

PORTLAND, Oregon, May 22, 2000 (ENS)—Texas Governor George W. Bush, a Republican candidate for president, raised $1.7 million last week from timber executives and other major donors in Oregon. A dozen executives from the timber industry contributed $100,000 each to the Republican Party in exchange for a 45 minute meeting with Bush. The executives aired grievances about federal policies toward their industry, including the Northwest Forest Plan crafted in 1993 by President Bill Clinton. U.S. Senator Gordon Smith, an Oregon Republican, set up the fundraising meeting so that Bush could "see their faces, hear their plea and understand better the plight of rural Oregon." The executives reportedly wanted reassurance that, as president, Bush would listen to Senator Smith, a timber supporter and chair of Bush's campaign in Oregon.

> Among the participants in the meeting were Howard Sohn, owner of Sun Studs, Don Johnson of D. R. Johnson Lumber and John Hampton of Hampton Affiliates. The meeting was held hours before a fund raising gala with donors offering $15,000 to $20,000 for the Republican Party and a chance to meet Bush. The Portland "Oregonian" reported that the $1.7 million raised sets a record for any Oregon campaign event.

http://ens.lycos.com/ens/may2000/2000L-05-22-09.html

"The timber industry, on the other hand, is encouraged. During the presidential campaign, industry executives got the Republican Party's attention with a $1.5 million fund-raiser in Portland, Ore. About a dozen timber company executives and industry lobbyists met in December with some of Bush's key natural resources officials to discuss land management policies."

Katherine Pfleger, Associated Press, December 29, 2001

Since Bush entered office, industry has repeatedly filed lawsuits against various environmental laws and sought to negotiate with "friends" in the Bush administration to undo environmental requirements. In one case the Bush administration, in response to a lawsuit filed by the suburban sprawl industry (a.k.a. the Homebuilders Association), agreed to rescind critical habitat designations for 19 stocks of threatened and endangered salmon. The Bush administration agreed to this even before the court had a chance to rule on the merits of the case and even though conservation groups were denied their request to intervene in the lawsuit. See: http://www.earthjustice.org/news/display.html?ID=338

The timber industry currently has suits pending to remove both the Spotted Owl and Marbled murrelet from the threatened species list, and to get rid of requirements to survey and protect wildlife on federal forests.

Oregon Natural Resources Council
5825 North Greeley, Portland, OR 97217-4145
Telephone: (503) 283-6343 (voice); (503) 283-0756 (FAX)

[A statement submitted for the record by David Kliegman follows:]

Statement submitted for the record by David Kliegman, Executive Director, Okanogan Highlands Alliance

The Okanogan Highlands Alliance (OHA) is a locally based public interest organization in Washington State, that has been following resource issues since the early 1990's, and has put a great deal of effort into understanding projects the impact people and the environment. We hope you will carefully consider and enter the following testimony submitted on behalf of OHA and incorporate it into your review the role of NEPA in the States of Washington, Oregon, Idaho, Montana and Alaska.

The public relies on NEPA so that Americans affected by a federal action will get the best information about its impacts, a choice of good alternatives, and the right to have their voice heard before the government makes a final decision.

NEPA is an important check to helps balance, common sense and openness in federal decision-making, it is an effective tool to keep 'Big Government' in check.

At the heart of NEPA is its requirement that alternatives must be considered—including those that will minimize possible damage to our health, environment or quality of life. NEPA also lets Americans have a say before the government makes its final decision about a project.

By making sure that the public is informed and that alternatives are considered, NEPA has stopped some damaging projects or made them better.

NEPA provides a "look before you leap" opportunity to federal decision makers. Cutting corners in this process would have disastrous consequences, especially when it comes to spending taxpayer money on projects that might harm citizens or their environment.

NEPA works as it is, there is no need to improve it at this time.

Limiting public involvement and weakening environmental review won't avoid controversy or improve projects.

NEPA saves time and money in the long run by reducing controversy, building consensus, and ensuring that a project is done right the first time.

NEPA's promise of project review and public involvement should be protected, not sacrificed in the name of speed.

"[I]t is the continuing policy of the Federal government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures...in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

—*The National Environmental Policy Act, Section 101(a), 42 U.S.C., 4331(a)*

Thank you for the opportunity to submit testimony. Please enter this testimony into the record of the role of NEPA.

Sincerely,

David Kliegman, Executive Director, Okanogan Highlands Alliance
PO Box 163, Tonasket, WA 98855
phone/fax 509/485-3361
email: kliegoha@televar.com
website: http://www.okanoganhighlandsalliance.org

"Pure water is more precious than gold!"

[A letter submitted for the record by Penny Lind, Executive Director, Umpqua Watersheds, follows:]

UMPQUA WATERSHEDS
UMPQUA WATERSHEDS, INC., PO BOX 101, 539 SE MAIN ST., ROSEBURG, OR 97470
PHONE: 541-672-7065 / FAX: 541-672-7652
UW@UMPQUA-WATERSHEDS.ORG / WWW.UMPQUA-WATERSHEDS.ORG

MAY 2, 2005

Representative Peter DeFazio
151 W 7th Ave. #400
Eugene, Oregon 97401

Dear Representative DeFazio,

The National Environmental Policy Act (NEPA) is under attack by the Bush administration. As you know, NEPA is one of America's bedrock environmental laws. Thirty-five years ago President Nixon signed this Act into law and today it is considered the most important environmental law that includes the public in decision-making.

At the heart of NEPA is its requirement that alternatives must be considered, administrative appeals must be answered and courthouse doors must remain open. The results of NEPA outcomes secure our natural treasures by giving representation with public involvement.

NEPA also saves time and money in the long run by reducing controversy, building consensus, and ensuring that a project is done right the first time. Cutting corners would have disastrous consequences, especially when it comes to spending taxpayer money on projects that might harm citizens or their environment.

Umpqua Watersheds has been involved in NEPA processes for the last 10 years. At each point in the process of the Act we have experienced diverse positive and challenging outcomes for our forests, rivers and communities. Most recently, we came to agreement with the Umpqua National Forest at the administrative appeal stage to settle on the Lemolo Project. The results will be restoration, some protections and jobs as opposed to controversy and environmental injustice.

Please support a strong, democratic NEPA and do not allow limits to public involvement, or environmental review.

SINCERE THANKS,
PENNY LIND, EXECUTIVE DIRECTOR

Submitted into testimony to the NEPA Task Force at: nepataskforce@mail.house.gov

cc: Representative Cathy McMorris, NEPA Task Force member

Umpqua Watersheds is dedicated to the protection and restoration of the watersheds in the Umpqua River basin and beyond.

[A letter submitted for the record by Mary O'Brien (Ph.D., Botany), Eugene, Oregon, follows:]

April 28, 2005

Re: NEPA Task Force hearing on the Role of NEPA in the States of Washington, Oregon, Idaho, Montana, and Alaska.

Thank you for participating in the NEPA Task Force and spending Saturday, April 23, 2005 in Spokane, WA. I traveled to the hearing from Eugene, Oregon. As a staff scientist with various non-governmental organizations for the past 23 years, I have worked with the National Environmental Policy Act (NEPA) almost every day. Its regulations are essential to our nation, which has the technological capability, money, and population size capable of causing irreparable environmental destruction. NEPA regulations are the embodiment of democracy, foresight, and a commitment to long-term local, national, and global quality of life.

Please enter these comments into the NEPA Task Force record on the hearing on the Role of NEPA in the States of Washington, Oregon, Idaho, Montana, and Alaska.

I wish to later (page 5) comment on a theme raised by essentially all presenters, but first comment on a concern raised by the following presenters:

- Abigail Kimbell (Regional Forester, Region 1 U.S. Forest Service)
- Duane Vaagen (President, Vaagen Brothers Lumber)
- Luke Russell (Director, Environmental Affairs, Coeur d' Alene Mines Corp.)
- Craig Urness (General Counsel, Pacific Seafood Group)

The common complaint these presenters made regarding NEPA is the time (and thus also money) that is spent on preparing NEPA documents and reaching decisions.

There are (1) inherent (good) reasons and (2) unnecessary (not good) reasons NEPA processes take time. I urge the NEPA Task Force to clearly separate these reasons and to address only the unnecessary reasons some NEPA processes take time.

A. Good Reasons for NEPA Processes Taking Time

1. Looking before you leap takes time. NEPA was DESIGNED to be a "look before you leap" process. We face countless ecological problems nationally and globally because we plunged ahead with new enterprises and technologies. Look at eastern Europe, where industrialization took place with extraordinary energy and speed. Today, in some Russian cities, the life expectancy of males is 45 because of the resulting, persistent pollution. Here in the Pacific Northwest at Hanford Nuclear Reservation, we plunged into nuclear weapons creation, and are today essentially incapable of stanching the radioactive and toxic pollution (e.g., chromium) leaking into the Columbia River from hastily-dumped wastes. One could debate whether the haste at bomb-making and willy-nilly waste disposal was justified by extraordinary WW II concerns, but the reality is that the haste made waste that so far eludes containment, let alone clean-up. Haste in ordinary circumstances generally has the same results.
2. Assessing alternatives takes time. Alternatives assessment is the heart of the NEPA process. It takes time to truly consider alternatives, analyze them, and make changes to old agency habits when new alternatives seem a wiser course of action. Assessing alternatives for energy use and production; transportation; drought; climate change; invasive species; mining; fisheries; urban sprawl; goods movement—- all deserve the full play of American creativity, innovation, and foresight at both the local and national level. To shortcut alternatives assessment (including reasonable alternatives brought to the NEPA process by communities, coalitions, or individuals) is to shortcut thinking.

   As a member of various coalitions throughout the past 23 years, I have participated in the preparation of NEPA alternatives for vegetation management, comprehensive management planning, gypsy moth treatments, transportation projects, forest health projects, livestock grazing permits, and forest planning. In every case, the alternatives we have developed have positively affected the outcome of the decisionmaking, and have ultimately resulted in expressed appreciation by the agencies. I would be glad to describe each of these experiences in more detail if you request.
3. Public participation (democracy) takes time. Allowing the public to help define the issues at hand in a particular decisionmaking process that affects their communities, nation, and/or future generations; contribute to alternatives that will be analyzed; and join in the debate on alternatives is the essence of democracy. Democracy means government by the public. Obviously the lead agencies for any given project or undertaking need to make the final decision, but the question is whether the agencies will do this with democratic creativity or bureaucratic authoritarianism.
4. Examining relevant scientific information takes time. NEPA provides for the examination of complex ecological effects—not only immediate, direct effects, but also indirect and cumulative effects. As a society and in the Pacific Northwest, we have, during the past century, been learning about some of the indirect and cumulative environmental, cultural, and economic effects of building dams without fish ladders; removing keystone predators and engineers from watersheds; building nuclear power plants without nuclear waste storage; combining storm runoff and domestic sewage in one set of pipes; dumping PCB-filled electrical transformers on the ground; building roads on coast range slopes that will fail in rain-on-snow events; straightening channels that don't allow rivers to rejuvenate watersheds; dumping mining tailings in rivers; and building urban transportation systems around single-occupancy vehicles and oil.
5. Public access to courts takes time. Under NEPA and the Administrative Procedures Act, American citizens do not have to stand by while agencies make inaccurate claims, fail to consider reasonable alternatives that have been brought to them, or ignore uncomfortable scientific information.

   Luke Russell of Coeur d'Alene Mines Corporation reported to the NEPA Task Force that in Chile, a NEPA-equivalent system allows mining decisions to be

made quickly because agencies don't have to "worry about being appealed." He urged mandatory time frames as in Chile.

I asked Environmental Law Alliance Worldwide about the realities of mining environmental assessment and mandatory timelines in Chile. Pamela Meunier, attorney with FIMA (Fiscalia del Medio Ambiente) in Chile quickly responded by email (27 April 2005) with the following note on environmental assessment and a World Bank reference to mandatory timelines:

A recent World Bank report notes that, while the recently passed "Basic Law" on the environment looks good in theory, the government agencies "do not have the capacity to adequately meet the responsibilities assigned to them by the law."

The report goes on to note the absence of regulations, the administrative obstacles for proper environmental assessment and the lack of systematic analysis or availability of environmental information necessary to assess or enforce environmental standards. In some cases, the Bank warns that timelines imposed on Environmental Assessments may "allow environmentally harmful projects to proceed that previously would have been stopped..." Chile: Managing Environmental Problems: Economic Analysis of Selected Issues, Dec. 1994, World Bank

More specifically, regulation of arsenic has recently been rolled back under heavy pressure from the mining industry. Environmental assessment, despite years of promised implementation, is still only carried out on a voluntary basis, with little or no substantive participation from key stakeholders. Basic water quality and quantity rights are severely restricted, affecting native and commercial fisheries, as well as human health in many communities. [Emphases added]

6. It takes time to change unwise habits. When NEPA is working, then agencies seriously consider new management options to unnecessarily destructive practices, policies, or projects; and devise new approaches. But agencies, like individual people, do not easily change habits, even if the habits are abusive or self-defeating. The only kind of decisions that happen rapidly are those on auto-pilot. If auto-pilot is environmentally and socially sound, then that's fine. But auto-pilot is not wise if it is having unnecessary, significant, adverse environmental or public impacts. It takes time to change entrenched, bad habits.

It is to be expected that Mr. Russell of Coeur d'Alene Mines wants to get his mining permits quickly. But look at the long-term human and environmental degradation that has been caused by heap leach gold mining; Butte mine tailings in Montana streams; mesothelioma deaths from asbestos production in Libby, Montana..

It is to be expected that Mr. Vaagen wants to get access to logs on public lands as quickly as he can. But look at the long-term forest health degradation we are facing throughout the Pacific Northwest due often in large degree to massive clearcutting, single-aged tree plantations, steep-slope logging roads, fire suppression in support of logging, and/or introduction of invasive species and root pathogens.

It is to be expected that Mr. Urness of Pacific Seafood Group wants rapid access to ocean fish, but look at the global collapse of fisheries and the diseases being spread to native fish by fish farm wastes.

It is to be expected that Ms. Kimball of Region 1 Forest Service wants to act rapidly in the face of drought and insect outbreaks in the forests she manages. She is convinced that rapid logging and spraying are the actions to take, but many scientists provide evidence that this type of management will not necessarily lead to or support long-term health of diverse forest types that depend on diverse fire regimes, Old Growth, native fish and wildlife; or that it will help forests resist invasive species.

Clearly, NEPA law, policies, and regulations are designed to have agency and project proponents pause before undertaking harvesting, logging, mining, spraying, straightening, damming, constructing, selling off public lands, and other such significant extractive, corrective, and/or development activities. NEPA declares we are not doomed, as a species, to endlessly repeat or add to global degradation. NEPA regulations are our agreement, as a society, to be thoughtful and democratic. That takes time.

B. Bad Reasons for NEPA Processes Taking Time

Whenever a presenter raises concerns to the NEPA Task Force about the length of time or money that has been involved in a "NEPA" process or in getting to a Final EIS and Record of Decision, it is important to ask follow-up questions to find out why the process has taken so long. In my 23 years of experience with NEPA,

some processes have taken years because of reasons not attributable to NEPA or its regulations.

For instance, I was involved in a 9.5 year (1994-2003) process with the Wallowa-Whitman NF regarding a new Hells Canyon Comprehensive Management Plan EIS. The Forest Service initially ignored the reasonable Native Ecosystems Alternative that had been submitted by a coalition of individuals, organizations, and tribes during scoping. The Forest then developed a Final EIS without considering the Native Ecosystems Alternative. Six days before sending the FEIS to the printer, the Forest was finally convinced they would not survive a legal challenge, and agreed to issue a new DEIS with the Alternative in it. Neither the Final EIS nor ROD, which were substantially improved over the first DEIS, were litigated. The process would have been at least 50% shorter had the Forest followed NEPA process and included the reasonable Native Ecosystem Alternative in the first DEIS.

However, when Gail Kimbell (Regional Forester, U.S. Forest Service Region 1) showed the NEPA Task Force a poster of a woman standing by two stacks of NEPA documents developed over a period of 10 years for 1.88 miles of road to access private lands, no one on the Task Force panel asked her about the nature of concerns that led to that lengthy process e.g., had the Forest Service tried to shortcut the NEPA process? What were the contested issues in relation to the road? Who raised them, and why?

Two other presenters reported that it was the failure to implement NEPA and alternatives assessment, not NEPA, that has caused decisionmaking delays:

1. Bob Geddes (Pend Oreille PUD) explained that the 7-year, $10.5 million Box Canyon NEPA process has been lengthened by lack of proper NEPA compliance by agencies. The U.S. Forest Service, he reports, isn't doing its own NEPA process but is not accepting conditions that FERC developed without NEPA.
2. William Kennedy (The Family Farm Alliance) testified that the Bureau of Reclamation has never conducted a NEPA review in relation to decisionmaking in the Klamath River, although the Family Farm Alliance had encouraged it to do so.

Both of these presenters have been involved in decisionmaking that has been protracted because NEPA was not followed. Thus, when a presenter complains about the time and money spent on a given decisionmaking process that is subject to NEPA, it is important for the NEPA Task Force to research such questions as:

1. Had the agency initially failed to implement good NEPA process and was then legitimately challenged? For instance, did the agency fail to consider reasonable alternatives that had been submitted or requested during scoping process?
2. Had the agency failed to actively consider valid issues of key interested parties?
3. Did the agency try to avoid airing legitimate scientific controversy?
4. Did the agency present inaccurate ecological, economic, or social information that was then challenged?
5. If litigation was involved, what were the key issues raised, and how did the Courts rule?
6. Did the agency throw elements into the EIS or process that are not required by NEPA?
7. Did the agency fail to consult with Council of Environmental Quality when concerns were raised?

When Craig Urness (Pacific Seafood Group) complained that the NEPA process prevents using real-time fish resource data, Jay Inslee wisely asked whether Programmatic EIS processes have been pursued. Mr. Urness answered no. Questions such as Rep. Inslee's get to the issue of whether a long decisionmaking process is due to NEPA or to lack of inter-agency coordination, sloppy implementation, avoidance of key issues or information, failure to use a variety of NEPA processes, lack of transparency, failure to seek Council of Environmental Quality advice, etc.

It is inappropriate to assume that when a decisionmaking process takes a long time, this is due to NEPA law or regulations.

Local Decisionmaking for Non-Local Impacts?

Nearly all presenters advocated for local input, which is extremely important. Environmental impacts, however, are rarely local. Rep. Inslee, for instance, noted that a hydropower siting decision can have widespread impacts. Likewise, impacts that are largely experienced locally can cumulatively have regional, national, or global impacts in light of similar localized impacts elsewhere.

Further, NEPA decisions often affect national public lands and/or public trust resources (e.g., water), and/or global commons (e.g., air). Every member of the nation's public is a legitimate participant in NEPA processes.

It is crucial that NEPA processes be open to both local and national (and often even global) information and experience; local and federal governance; and local, regional, and national citizen., scientist and other expert input.

Thank you again for your participation in the NEPA Task Force. I sincerely urge the Task Force to leave NEPA regulations intact. NEPA regulations serve our nation well.

SINCERELY,

MARY O'BRIEN (PH.D., BOTANY), PO BOX 12056, EUGENE, OR 97440
MOB@DARKWING.UOREGON.EDU

[A letter submitted for the record by The Honorable Denny Rehberg, a Representative in Congress from the State of Montana, follows:]

Denny Rehberg
State of Montana

Appropriations Committee
Energy and Water
Foreign Operations
Military Quality of Life

Congress of the United States
House of Representatives
Washington, DC 20515

April 29, 2005

The Honorable Cathy McMorris
Chairwoman
Task Force on Improving the
National Environmental Policy Act
1708 Longworth House Office Building
Washington DC 20515

Dear Chairwoman McMorris:

Thank you for Chairing the Task Force on Improving the National Environmental Policy Act. Unfortunately I could not attend the hearing in Spokane, however I am submitting this letter for the official hearing record to illustrate my support for the Task Force and my commitment to finding common sense changes to NEPA.

Over the past several years, and especially in the past 5 years I have served in Congress, I have repeatedly seen too many good projects obstructed by outrageous NEPA-related objections. Unfortunately, the law and regulations, as they are written, allow for this. There is no accountability on the part of the objecting entity and oftentimes, good projects are stalled to the degree that they become moot points. Clearly the system is not working. Therefore, we need to develop a basis for changing the law to ensure that the system balances practical projects with appropriate conservation.

A situation that occurred in Montana is particularly egregious. Several groups filed suit against the Forest Service's decision to sell burned logs from the 2000 Beaverhead-Deer Lodge Mussigbrod fire. About 77,000 acres burned in those fires. It took the Forest Service until April 2003 to issue a Record of Decision for the sale and then the environmental obstructionists used NEPA to appeal.

Within a few months, the Forest Supervisor decided to drop the sale. By that time, the material was so decayed that it became worthless. However, the suit continued until late 2004, when the Judge ruled for the Forest Service. But by then it was too late. By using NEPA, the environmental obstructionists were able to stall until the sale was worthless. In that scenario, everyone loses – the Forest Service, the timber community, the taxpayers, and the common sense land managers.

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Unfortunately, this situation is not an isolated incident. This type of obstruction occurs across my state and the rest of the country. We can't sit back and watch a well-intended law become fodder for the environmental obstructionists.

I appreciate your commitment to finding practical solutions to the NEPA crisis. Thank you for heading the Task Force and opening up the discussion on change by holding this hearing in Spokane. Please let me know if I can be of assistance as you develop ideas for a legislative solution to the NEPA crisis.

Sincerely,

Denny Rehberg
Member of Congress

cc: Chairman Richard Pombo

[A letter and Spokesman-Review article submitted for the record by Charles A. Thomas, Spokane, Washington, follow:]

APRIL 26, 2005

Dear Congresswoman McMorris:

Please keep this article in mind at your conference n Saturday. Think about who makes and pushes at these rules.

SINCERELY,

CHARLES A. THOMAS, 1212 W. WHITE ROAD, SPOKANE, WA 99224

Attachment

Bans on building send prices up, so average buyers looking elsewhere, Thomas Sowell says.

Open space laws leave many out in cold

Thomas Sowell, Creators Syndicate

April 20, 2005

Where can you make $2,000 a day, with no real effort? In San Mateo County, California.

Before you start packing your bags to head there, you should know that the average homeowner in San Mateo County saw the value of his property increase by $2,000 a day over the past month. The median price of a single-family home in the county reached $896,000. But, if you don't already own a home in San Mateo County, you don't get the two grand a day.

Someone from outside California might think that people must be building a lot of new mansions in San Mateo County. But, in fact, there is very little building going on there because most of the county is off-limits to building. These bans on building are known by the more politically appealing name of "open space" laws.

These housing bans are the reason for rising home prices.

As for mansions, there are very few of those in San Mateo County. There are some nice homes there and many very modest homes. They just cost the kind of money that people pay for mansions elsewhere across the country.

Who can afford to live in such a place? Fewer people apparently. The population of the county declined by about 9,000 people over the past four years.

Who's leaving—and who is coming in? By and large, young adults who have not yet reached their peak earnings years are finding it harder to afford housing in San Mateo County and in other such counties up and down the peninsula from San Francisco to San Jose. So, they are leaving.

Schools have had to be closed because there are not enough children. The number of children is declining because people young enough to have schoolchildren are increasingly unable to afford the sky-high housing prices in communities that ban the building of housing.

People who are sufficiently affluent can afford to move into places with severe restrictions on building. Those who bought their homes years ago, before these housing restrictions were enacted, are able to stay while the value of their homes rise.

Among other things, this means that many young adults cannot afford to live near their parents, unless they actually live in their parents' homes. This isolates the elderly from their children, which can be a growing problem as the infirmities of age set in and their contemporary friends die off.

None of this just happened. Nor is it a result of market forces. What has happened essentially is that those already inside the castle have pulled up the drawbridge, so that outsiders can't get in. Politically, this selfishness poses as idealism.

Much of this exclusionary agenda is pushed by people who inherited great wealth and are using it to buy a sense of importance as deep thinkers and moral leaders protecting the environment. The foundations and movements they spearhead are driving working people out of areas dominated by limousine liberals, who are constantly proclaiming their concern for the poor, the children and minorities.

Meanwhile the poor, the children and minorities are being increasingly forced out of the vast area of the San Francisco peninsula by astronomical housing prices and are moving out into California's interior valleys. But they are not safe there either.

The same wealthy busybodies who have made it an ordeal for less affluent people to try to live on the San Francisco peninsula are now pursuing them out into the interior valleys, where the environmentalist foundations and movements are trying to get the same housing restrictions imposed.

This is not sadism—at least not in intent. These are green activists buying an artificial significance for themselves that they would never have had as mere inheritors of fortunes earned by others.

This is ultimately not about the environment but about egos. As T.S. Eliot said more than 50 years ago: "Half the harm that is done in this world is due to people who want to feel important. They don't mean to do harm—but the harm does not interest them. Or they do not see it, or they justify it because they are absorbed in the endless struggle to think well of themselves."

[A letter submitted for the record by Hon. Mike Simpson and Hon. C.L. "Butch" Otter, Representatives in Congress from the State of Idaho, follows:]

Congress of the United States
Washington, DC 20515

April 20, 2005

The Honorable Representative Cathy McMorris
Chairwoman
Task Force on Improving the National Environmental Policy Act
1708 Longworth House Office Building
Washington, DC 20515

Dear Representative McMorris:

Please accept our sincere thanks for your leadership on this important task force. As you know, the National Environmental Policy Act (NEPA) has helped protect our environment. However, it also has proved to be unnecessarily burdensome, time consuming and frustrating to stake holders. The inability of agencies to collaborate during the permitting process required under NEPA has been very troubling to a number of industries throughout Idaho, and unfortunately has hurt public confidence in the law.

Decisions made as a result of NEPA analyses have significant impacts at the local level—both on local governments and on the individual citizens. This is particularly true in Idaho and other states in the West where the federal government owns such a high percentage of the land. State and local governments often are the best representatives of the social and economic fabric of the community. State and local governments should be given the opportunity to participate more fully in the NEPA process. They should be provided the opportunity to participate as "cooperating agencies" for any NEPA analyses conducted within their jurisdiction.

Inconsistencies in process and implementation between agencies and departments cause unnecessary confusion, delay, and bureaucratic wrangling, especially on projects with multiple jurisdictions. There has been an effort to reform these problems, at least within the US Forest Service and Bureau of Land Management, but more can and must be done. Some of the specific issues we would like to see streamlined or standardized, include:

- Better use of categorical exclusions for ongoing activities, including those activities that stem from a project that was developed before the passage of NEPA. It's not uncommon for the Forest Service to require projects to go through the environmental assessment process for a maintenance project. We do not think that was the intent of NEPA.

- Often the agencies force projects to go through an unnecessarily burdensome process as a protection against lawsuits. It's clear to us that much of the agency policies regarding the implementation of NEPA are designed around protecting the agency from litigation rather than the original intent of NEPA. This creates a burdensome regulatory process for the proponents of projects (including the agencies themselves.)

- NEPA needs to be better integrated with other regulatory requirements, such as consultation under the Endangered Species Act, and Section 106 of the National Historic Preservation Act. It is common for projects to write four or more documents to meet the regulatory requirements of a project. This could be integrated into one document if agencies coordinated better.

- Lead agency status needs to be clarified regarding which implementation policies will be used in each NEPA review process. If a cooperating agency's policies differ from that of the lead agency, they often will require that the document meet both agencies' requirements. This creates a drawn out negotiation, documents with inconsistent direction, excessive content, and often multiple decision documents.

NEPA Compliance has become the "weapon of choice" for those who wish to disrupt or stall current or future projects funded, conducted on, or approved by federal agencies. The initiative led by your task force is long overdue. We commend you on your foresight in seeking ways to improve and modernize NEPA analyses and documentation as well as to foster improved coordination among all levels of government and the public.

Sincerely,

Mike Simpson
Member of Congress

C.L. "Butch" Otter
Member of Congress

cc: Representative Pombo
Chairman, Resources Committee

[A letter submitted for the record by The Honorable Don Young, a Representative in Congress from the State of Alaska, follows:]

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Congress of the United States
House of Representatives
Washington, DC 20515

CHAIRMAN
COMMITTEE ON TRANSPORTATION
COMMITTEE ON RESOURCES
COMMITTEE ON HOMELAND SECURITY

MAY 05 2005

May 3, 2005

The Honorable Cathy McMorris,
Chairwoman, Task Force on Improving the National Environmental Policy Act.
Committee on Resources
1320 Longworth HOB
U.S. House of Representatives

Congresswoman McMorris:

Thank you for providing this opportunity to address the needs of my state of Alaska in regards to improving the National Environmental Policy Act. This is an important and pressing goal, and I wish you luck.

In Alaska, land management agency actions are uniquely directed by statutes, in particular the Alaska National Interest Lands Conservation Act (ANILCA) of 1980. ANILCA contains numerous directions to federal agencies such as guarantees for inholder access, development of transportation infrastructure, motorized access for subsistence, and facilities and motorized equipment for state management of fish and wildlife. The NEPA-directed process to assess impacts and alternatives of those actions can play an important and useful role in evaluating options to implement the Congressional direction. However, a number of potential problems need to be addressed.

For example, current NEPA process requires consideration of the "no action" alternative even where there is no statutory option for "no action". Including this alternative in NEPA analysis for such actions has the perceived potential to administratively defeat statutory intent. The NEPA process needs to be modified so that it can be used to identify a range of alternatives regarding "how" a mandated activity will take place, but may not say "no" where Congress essentially said "yes". In such situations, one option is to insure the NEPA documentation for assessing the No Action alternative is clearly presented for comparison purposes only and is not a viable selection for the final decision in the "Finding of No Significant Impact" or "Record of Decision".

Congress also needs to broaden the applicability of Categorical Exclusions to include more statutorily protected activities, such as state fish and game management, including state

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administration and research activities. Procedures are already in place to implement the statutory provisions, such as in regulations, cooperative agreements, and policies.

In some cases, NEPA is effectively preventing the federal land management agencies and state fish, game, and water management agencies from conducting on-the-ground projects. This stems, in part, from legal uncertainties among federal administrators about state responsibilities qualifying for categorical exclusions. It also on occasion may be due to how funding priorities are set within these agencies or NEPA appeals and lawsuits sometimes result in inconsistent application within the respective federal agencies – another illustration of the need to provide statutory clarification. Without clearly establishing the broader Categorical Exclusions for states to conduct fish and wildlife projects on federal lands, needed fish and game management that is a statutorily recognized state authority becomes mired in the bureaucracies. While we have been relatively successful at minimizing this impact of NEPA in Alaska, we observe these problems occurring nationwide involving statutorily authorized state projects.

Some stymied projects around the country even include those that do not have a federal nexus for application of NEPA, such as state conduct of wildlife transplants. Congress could provide clarity or direct the federal agencies to re-evaluate what constitutes a "federal action" under CEQ regulations. State wildlife agencies conduct routine fish and wildlife-related activities (e.g., transplants, augmentations and re-establishments of existing and native fish and wildlife species) that are not true "federal actions". These state projects and activities occurring on federal lands trigger questions by federal agencies about the preparation of NEPA documentation. Statutory direction from CEQ clarifying actual federal actions would prove useful in this area for both state and federal agencies and could potentially reduce NEPA analyses and litigation.

Thank you again for your consideration. I appreciate your time and attention.

Sincerely,

Don Young
Congressman for All Alaska

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