WildLaw

A Non-profit Environmental Law Firm

November 28th, 2006

NEPA Modernization (CE)
Attn: Associate Director for NEPA Oversight
722 Jackson Place NW
Washington, DC 20503

Sir or Madam:

Please find **WildLaw's** comments on behalf of itself, **Wild South**, **Virginia Forest Watch**, **Southern Appalachian Biodiversity Project**, and the **Southern Appalachian Forest Coalition**. We appreciate the opportunity to comment on the Council on Environmental Quality's (CEQ's) proposed Guidance on Categorical Exclusions. Much of the controversy surrounding Categorical Exclusions has arisen from agencies proposing to use them for actions where there is concern and debate about the impacts. Categorical Exclusions should not be used to avoid the necessary analysis required by NEPA, nor should it be used to push controversial projects into a forum where the public is largely excluded, or limit citizens' ability to participate meaningfully in the operation of their government. WildLaw also incorporates by reference their congressional testimony produced for the recent effort to "streamline" the NEPA process, dated February 6th, 2006, and attached via a CD-ROM to this set of comments.

Categorical Exclusions Must be Reserved for Non-Contentious Actions; NEPA Must Be Respected.

As a preliminary matter, Congress did not provide for Categorical Exclusions (CEs) in the National Environmental Policy Act (NEPA). NEPA's mandate is to investigate environmental impacts "to the fullest extent possible."[1] WildLaw and its various clients, not to mention many other groups, have acknowledged a valid role for Categorical Exclusions. CEs can save agency time and resources when limited to minor day-to-day actions which by their nature do not significantly affect the environment. Problems have arisen, however, when agencies improperly attempt to extend the use of CEs from minor day-to-day actions to projects that are much more significant - such as logging, drilling, off road vehicle use or grazing - which often can and do have significant environmental impacts. When there are questions about whether an action's

[1] 42 U.S.C. § 4332

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impacts are significant, the public deserves the opportunity to be part of the process for evaluating potential impacts. In such cases, a Categorical Exclusion typically does not call for (or allow) the necessary level of analysis and information gathering. Accordingly, in most cases where controversy or these issues present themselves, a CE should not be used.

WildLaw submits that the proposed guidance should include a presumption that an Environmental Assessment (EA) or Environmental Impact Statement (EIS) is required for all actions other than the simple, day-to-day actions referenced above. A Categorical Exclusion should be an exception reserved for situations where no concern over the proposed action exists. The goal of NEPA is to inform government decisions and to give those affected by them (or interested in the affected area) a voice and opportunity for input in the decision-making process.

CEQ was created by NEPA.[2] It is CEQ's responsibility "to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation."[3] CEQ should add language to its guidance articulating the benefits of doing the analysis required by NEPA. As WildLaw has noted in other forums and in congressional testimony, NPEA works quite well when agencies do not attempt to circumvent it. Further, federal agencies who desire to do the right thing have been able to adapt their NEPA procedures to allow for relatively quick use of the EA process, sometimes even quicker than what would have been achieved through the use of a controversial CE.

WildLaw also submits that agencies should avoid establishing a new Categorical Exclusion for types of activities likely to generate substantial public opposition or controversy. Even after a Categorical Exclusion is established, CEQ's guidance should encourage agencies to use simple and straight-forward EAs, rather than try to squeeze a contentious action into a Categorical Exclusion. WildLaw also submits that agencies should be required to include public opposition/concern as an extraordinary circumstance, making a CE inappropriate. The guidance should make it clear that if controversial circumstances are present, a Categorical Exclusion cannot be used. An agency cannot simply conduct its own in-house analysis to determine whether the environment could significantly be affected without the public being able to be part of that process and provide meaningful input. Again, the EA process does not have to be lengthy, and need only address the issues specific to the project, a process which some units of some federal agencies have been able to master effectively, while others fight against. The fight against environmental analysis and public involvement often seems to cost more in staff time, dollars, project delays, and public enmity than actually doing the analysis and involving the public in the first place.

"The CEQ has operated in conjunction with agencies such as the Forest Service to undermine two of NEPA's legislative and common law purposes: public participation

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[2] 42 U.S.C. § 4342.
[3] 42 U.S.C. § 4344(4).

and the creation of an administrative record. . . . In addition, NEPA's role in encouraging public participation in the regulatory process was incorporated in the text of the statute itself. The end-products of the NEPA process manifest the legislation's dual purposes: The environmental impact statement (EIS) and the environmental assessment (EA), documentation central to NEPA, both require public comment and create an extensive administrative record. Public participation and the creation of an administrative record are central elements of sunshine laws because they promote government accountability and create a basis for subsequent litigation." Kevin H. Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U.L. Rev. 2312, 2316-2317 (2004) (footnotes omitted) (visited March 7, 2005) <http://www.law.nyu.edu/journals/lawreview/issues/vol79/no6/NYU605.pdf> (concluding that, "in order to realize any benefits from categorical exclusions, excluded actions must be limited to 'easy' cases. . . . promot[ing] efficiency by insulating these actions from litigation based on allegations of categorical exclusion abuse.")

Any New CE Must Be Developed In Conjunction With The Public At Large.

If CEQ determines that, notwithstanding the persuasive arguments made by WildLaw and others, to create a new Categorical Exclusion, the guidance for said category must be explicit and must ensure a meaningful public process and generate a "record" for creating said Exclusion. In order to create a new CE, an agency must first identify it as part of the agency's procedures to implement NEPA.[4] This addition to existing NEPA procedures (addition of new CE or CEs) requires public notice in the Federal Register and an opportunity for the public to comment.[5] In order for this public input to have any meaning, an agency must provide the public the record, or what the agency relied upon in making that decision, that supports the proposed Categorical Exclusion during the comment period. Rather than simply encouraging agencies to provide this information, CEQ's guidance must direct that agencies "must" make information supporting the categorical exclusion available to the public. Failure to provide this information in advance will inevitably result in a series of Freedom of Information Act (FOIA) requests. The public should not have to depend on FOIA requests to obtain information supporting the establishment of a new categorical exclusion. This is a waste of time and energy for both the public and the agency involved.

Potential Cumulative Impacts Must be Explicitly Addressed When Establishing a New Categorical Exclusion.

The guidance should discuss the issue of cumulative impacts. CEQ's regulations define a "categorical exclusion" as "a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . ." 40 C.F.R. § 1508.4 (emphasis added). CEQ's guidance should include admonitions that any potential Categorical Exclusion created for activities that may or do have cumulatively significant

[4] 40 C.F.R. § 1507.3(b)(2)(ii).
[5] 40 C.F.R. § 1507.3(a).

effects on the environment are violative of NEPA, and must be discouraged. Agencies must not establish a Categorical Exclusion for a type of activity such as logging, drilling, off road vehicle use, grazing, or any other activity that has the potential for significant cumulative impacts.

While we have many issues (see above) with the proposal for new Categorical Exclusions, we do, however, support the proposed guidance regarding the importance of documentation of agency decisions related to Categorical Exclusions. The decision whether to create or apply a Categorical Exclusion does not lie exclusively with the agency in question. Both actions are subject to judicial review under the Administrative Procedure Act (APA).[6] In any event, the public must be maintained as a central focus and player in the NEPA process. To do otherwise would constitute and end-run around NEPA and run afoul of the very principles upon which it was enacted.

Conclusion

We appreciate CEQ's efforts to make the use of Categorical Exclusions as simple as possible and consistent across agencies. There are many federal actions, such as cutting the grass at a ranger station, that everyone can agree do not significantly impact the environment. We agree that there is no need to waste agency resources on analyzing these types of day-to-day actions. The use of Categorical Exclusions, however, has become complicated by agency attempts to use it for actions not well-suited to the minimal analysis generally required under a CE, or for which there is ample public concern or controversy. We urge the CEQ to avoid increasing this process, and the attendant hostility to traditional public involvement in agency decision-making, by creating additional CEs to thwart the public's right to participate meaningfully. Please keep WildLaw informed of any further decisions or developments in this process.

Sincerely,

Stephen H. Novak
Senior Staff Attorney
WildLaw So. Appalachian Office

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[6] *See*, e.g., *Heartwood, Inc. v. U.S. Forest Service*, 73 F.Supp.2d 962, 975-76 (S.D. Ill. 1999), aff'd 230 F.3d 947 (7th Cir. 2000) ("the [Forest Service] must explain its decision adequately so that the Court can determine that it was not arbitrary. In doing so, the Court may not rely merely on the agency's expertise.")(*citing Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989)); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004). Documentation for both creating and applying a CE is necessary to demonstrate to a court that an agency's action is not arbitrary and capricious. 5 U.S.C. § 706(2)(a). *See also, California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002) ("It is difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision."); *Wilderness Watch and Public Employees for Environmental Responsibility v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004) (struck down use of CE to permit vans to transport tourist through wilderness areas to access historical site); *Center For Food Safety v. Johanns*, ___ F.Supp.2d ___, 2006 WL 2568023 (D.Hawaii Sept. 1, 2006) (struck down use of CE for open air testing of genetically engineered plants).

WildLaw
A Non-profit Environmental Law Firm

Alabama Office
8116 Old Federal Road, Suite C
Montgomery, AL 36117
334/396-4729, 334/396-9076 (fax)
www.wildlaw.org

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I. Introduction

These are comments on the U.S. House of Representatives' Committee on Resources *Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act, Initial Findings and Draft Recommendations* (Dec. 21, 2005) (hereinafter "DRAFT"), provided on behalf of WildLaw, Wild South, Save Our Big Scrub, and Virginia Forest Watch.

WildLaw appreciates the opportunity and invitation extended to us to be one of the presenters at one of the Task Force's hearings. As we stated in our testimony there, we wish to emphasize once again that NEPA is not broken and does not need fixing. There is not one single problem raised during the Task Force's proceedings that cannot be addressed adequately through better training for agency personnel and better guidance on how to address NEPA processes from CEQ and the various agencies.

More than anything, more public participation, not less, is key to making NEPA work better through cooperative conservation principles. As Edward Abbey said, "The best cure for the ills of democracy is more democracy." Similarly, the best cure for the ills of public participation in government is MORE public participation.

II. Process

First, the directions indicate that "the recommendations set forth in this report are a 'floor' and it is appropriate for anyone submitting comments to proffer any additional recommendations that are supported by the findings, testimony or comments provided during the hearing process (e.g., from April 6, 2005 through November 30, 2005)." However, the hearings were not open public forums, and many people did not know they were going on. As such, it could well be that essential information was not before the staff and the committee should not be limited to a substantively insufficient record.

In addition, the DRAFT asserts that "The goal of the NEPA Task Force was to study NEPA related issues, discuss possible improvements and to make recommendations to the Chairman and Ranking Member. The method to reach this goal was to conduct field hearings in key areas of the United States as well as provide means for any interested party to provide comments or recommendations." DRAFT, p. 5. This statement begs the question, how were

these "key areas" decided upon?1

The Task Force was overwhelmingly dominated by western members of Congress. See DRAFT, p. 6. Also, although the membership may represent a "bipartisan collection of Committee members whose viewpoints span the ideological spectrum," we know that some were not able to fully participate because of the disorganization (whether intentional or not) in planning the public hearings.

III. Executive Summary

The report begins by isolating "environmental groups:"

> The testimony and comments revealed that there are two distinct views of the NEPA process. The first is that the status quo is adequate. This view was expressed by a majority of environmental groups and their members. The other perspective is that NEPA is a landmark law, but could use some improvements. This was the opinion of Federal agencies, tribal representatives, state and local representatives, NEPA practitioners, applicants and some citizen groups.

At least some of the others who commented believed that NEPA is largely fine as is; it was not just "environmental groups."

IV. Findings

A. What does NEPA mean

DRAFT: "However, it was noted that agencies are defaulting to the preparation of an EIS without fully debating whether or not the action is 'major' as currently set forth in regulations." DRAFT, p. 9 See also, DRAFT, p. 11 ("approximately 50,000 EISs filed each year"). Where are these EISs? We know of no agency that is blithely pumping out EIS after EIS. In fact, Council on Environmental Quality noted in a recent report that 'in a typical year, 45,000 EAs are prepared compared to 450 EISs. . . . Given that so many more EAs are prepared than EISs, adequate consideration of cumulative effects requires that EAs address them fully.' Council on Environmental Quality, Considering Cumulative Effects Under the National Environmental Policy Act at 4, Jan. 1997, also available at http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm.

The impact of changing NEPA

DRAFT, p. 10: "the arguably 'myopic, dishonest and dumb government' making decisions in the mid to late 1960's has become significantly more aware of the consequences of its actions. Given the increasing awareness, it is difficult to understand how the government would retract or retreat into pre-NEPA practices if the statute were to be amended." The stated

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1 Hearings were held in Spokane, Washington, Lakeside, Arizona, Nacogdoches, Texas, Rio Rancho, New Mexico, Norfolk, Virginia, and Washington, DC.

premise of the first sentence does not support the conclusion drawn in the second. Since people believed in the policy objectives of NEPA, and believe that the country has benefited substantially from NEPA, it makes no sense to say that removing NEPA would have no effect on how informed agencies keep themselves. This is an insult to those of us who know from personal experience that the agencies are often lacking crucial information until the public provides it. If the statistic on DRAFT, p. 11 that 99.97% of NEPA actions are completed without injunction is accurate, then evidence suggests that NEPA is an efficient way of forcing agencies to consider environmental impacts. Any changes to the law should maintain the improvements in government action and do so with such a low rate of litigation.

DRAFT, p. 10: "Notwithstanding the potential benefits of changing NEPA, certain Task Force members and commentors suggested that a 'burden of proof' must be met before changes are considered . . . It must be pointed out that there were no calls for meeting a "burden of proof" when NEPA was initially debated. Rather, history shows that the events of the time supported the creation of the statute and policymakers responded with all due speed. Consistent with this history, it would be similarly responsive to make necessary changes to address issues raised before the Task Force." The conclusion does not follow from the assertion. Environmental awareness by agencies at the time NEPA was passed was admittedly much less than it is today. Most commentors believed some parts of NEPA was working—it makes no sense to throw these out and risk returning even partially to the pre-NEPA behavior by agencies if any changes are not at least likely to be as effective as what they are replacing.

B. Litigation

One problem that was highlighted by the report is that "the result [of litigation] is that agencies are becoming more cautious – but not necessarily more deliberative - in issuing NEPA documents." DRAFT, pgs 11-12. This is indeed something that we regularly see. Boilerplate EAs do not help the agency or the public. An agency acting merely to avoid litigation and not to truly examine the impacts of a proposed action is not doing a good analysis. However, the spirit and tone of this committee has not been such that making such a concession will likely gain the kind of changes that could foster greater, more meaningful, and more genuine review of proposed federal actions.

"In response one witness stated that the Ninth Circuit has 'repeatedly held that industry parties cannot intervene as a right in NEPA cases, asserting that the government is the only proper defendant.' This is one example of an interested party not being able to participate in NEPA litigation." DRAFT, p. 12.

On page 12 of the report, you state that the Ninth Circuit has not allowed "industry parties to intervene as a right in NEPA cases, asserting that the government is the only proper defendant." This is not correct. Interested private parties are allowed to intervene in the REMEDY portion of a NEPA case -- for example, on a motion for preliminary or permanent injunction -- and do so, routinely.

Courts interpret Rule 24 broadly in favor of intervention, and private parties may intervene AS A MATTER OF RIGHT in the remedial stage of a NEPA compliance action if they meet all the requirements of Fed. R. Civ. P. 24(a). Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1493-97 (9th Cir. 1995).

Furthermore, parties who have a particularized interest in a federal project (such as the applicant for the project), as opposed to an industry trade group with a generalized interest (for example a timber operator's organization), also are almost always allowed to intervene in the merits of NEPA cases under the court's DISCRETIONARY power to grant intervention under Rule 24(b). See, e.g., Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002).

In our experience, the entities which are unsuccessful in attempting to intervene in the merits of NEPA suits are those generalized industry groups. Individual companies that have an interest in the case, such as the timber company that has the winning bid on a National Forest timber sale, have always been allowed to intervene in a NEPA case without problem or difficulty. We had one case where the timber purchaser intervened without an attorney and had no problem being heard by the court.

"But 'reducing' the comments did not suggest excluding any legitimate claim from proceeding in court. To effect a reduction of litigation several legislative options were proposed including the posting of bonds and a requirement to exhaust all administrative remedies before filing suit." DRAFT, p. 12. There is already a requirement in administrative procedure law that all administrative remedies be exhausted before a suit may be filed, and standard rules of federal courts already require the posting of a bond for all temporary restraining orders and preliminary injunctions issued in all NEPA cases, or any other kind of case. Adding these "requirements" to NEPA would be useless redundancy.

C. Federal, tribal, state and local entities and the NEPA process

"NEPA requires Federal agencies to coordinate their efforts." DRAFT, p. 12. Any failure by federal agencies to do so is not an argument for changing the law. Rather, it is an argument for the executive branch to do a better job enforcing the law.

We do not agree that "state agencies should be deemed a 'cooperating agency' when they request it – as opposed to the current practice of allowing the Federal agency to allow it when they feel it is appropriate." DRAFT, p. 14. Federal lands belong to all people of the United States, not just to those in whose state they happen to be located. Therefore, it is not always appropriate to include any state agency with special environmental expertise2 or lawful jurisdiction3 to become "cooperating agencies."4 Cooperating agencies are benefited because:

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2 40 CFR 1508.26 ("'Special expertise' means statutory responsibility, agency mission, or related program experience").
3 40 CFR 1508.15 ("'Jurisdiction by law' means agency authority to approve, veto, or finance all or part of the proposal").
4 40 CFR 1508.5.

1. the lead agency must consider any environmental analysis and proposals made by the cooperating agency to "the fullest extent possible consistent with its responsibility as lead agency."5
2. the lead agency must meet with the cooperating agency upon request.6
3. courts have held that actions made by lead agencies can be overturned if that lead agency fails to allow cooperating agencies to participate in the EIS process in a meaningful fashion.7 In one such case, the lead agency did not inform the cooperating agencies of its decision to change the preferred alternative in a timely fashion.8 By providing essentially a veto to a state agency, federal environmental decisions could be further politicized.

That said, there is already direction to the heads of federal agencies urging that state and local governments be included as cooperating agencies,9 and the Act itself encourages such inclusion, when appropriate.10

D. NEPA's interaction with other substantive laws

The "functional equivalence doctrine" should be applied only to agencies with a clear environmental protection mandate. Since most of the land management agencies fall under the Multiple Use Sustained Yield Act, the doctrine should not be applied to their decisions. Even the Park Service is moving toward a multiple use mentality as it elevates user enjoyment to equivalent status with resource protection. NEPA provides a framework to focus substantially on environmental impacts.

E. Delays with the NEPA process

"The increasing length of the EIS has led to Federal tomes with little meaning." DRAFT, p. 18. This can often be true, but the fix for this is not changing NEPA. The fix is in better guidance and training for agency personnel who do the NEPA work and for more public cooperation and collaborative processes to enhance the NEPA analysis and project development.

"Further, there was concern that in the current framework of the statute and its regulations that there is no ability for any one entity to be 'in charge' of monitoring the NEPA process. In other words, there is no one governmental body that can take responsibility for agency mismanagement of the NEPA process." DRAFT, p. 18. What about the Council on

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5 40 CFR 1501.6(a)(2) (quoted in Sierra Club v. U.S. Army Corps of Engineers, 295 F.3d 1209, 1215 (11th Cir. 2002)).

6 40 CFR 1501.6(a)(3) ("The lead agency shall...[m]eet with a cooperating agency at the latter's request").

7 International Snowmobile Manufacturers Association v. Norton, 340 F.Supp.2d 1249, 1264 (D. Wyoming 2004) (citing Wyoming, 277 F.Supp.2d at 1219).

8 International Snowmobile, 340 F.Supp.2d at 1262.

9 See Memorandum from George T. Frampton, Jr., Acting Chair of the Council on Environmental Quality to the Heads of Federal Agencies (July 8, 1999). See also 70 FR 32840, 32843 (changing the Department of the Interior manual, at 516 DM 2.5).

10 See 42 U.S.C. § 4331(a).

Environmental Quality? Also, if the executive branch would like to fix the alleged problem, then it can do so through memoranda to agency heads as it has done in the past.

We strongly dispute the following statement and sentiment:

> Finally, a number of citizen groups disputed the fact that there is an attenuated NEPA process. While in some cases indicating that the process indeed takes longer than in past years for similarly complex problems, these commentors claimed the additional time resulted in "good" or "better" decisions. The premise of this argument is that however long is needed to make an environmentally sound decision is time well spent. It should be noted that, unlike an applicant or community that is advocating for a particular project, these groups typically do not incur any costs or bear any consequences connected to the length of the NEPA process.

First, communities are rarely united behind a project. One reason this is so is that there are few projects that are environmentally benign. Where there are environmental costs, often the local community or those other than the project's advocates end up paying to mitigate negative consequences, or externalities. Second, citizen groups do bear costs and consequences of the NEPA process. Often citizen groups are made up of volunteers or employees who could be making more money elsewhere. Persistence in the NEPA process is more often than not a community service. Permit applicants are generally seeking only their own financial gain. Citizen groups are often protecting the larger community from the effects of the short term profit seeking of a few. The authors of DRAFT found that the public at large agrees: "Nearly every witness and comment that mentioned public participation suggested that without it, NEPA would not be successful." p. 22.

F. Cost of compliance

The Task Force would be wise to focus just as much on the cost of NEPA NON-compliance as on compliance. Further, the costs of failing to take a hard look at environmental impacts of proposals prior to acting are obvious for all to see in the former Soviet Union and many other countries that do not have a NEPA-type law. Also, as found by the Bush Administration's Office of Management and Budget, environmental regulations in general provide benefits three to five times the costs of those regulations.11 Thus, the cost of compliance actually pays handsome benefits. Who would not want to invest in something they KNEW would give them 300 to 500% returns? Environmental statutes like NEPA may seem like burdens when looked at in the isolation of a particular project and a particular company wanting that project, but overall, NEPA and our other environmental laws are a big part of why the United States enjoys the highest and richest standard of living in the world.

G. Public participation

We agree heartily with the following statement: "When stakeholders, including project proponents may be excluded from deliberations during the NEPA process, the result is inevitably more appeals and litigation. This has the unfortunate effect of creating an attenuated NEPA

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11 *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (OMB Office of Information and Regulatory Affairs 2003).

process. Again, this highlights the need for meaningful public participation throughout the NEPA process." The Forest Service is eliminating or reducing public participation from its planning process and from individual decisions through increased use of categorical exclusions. It would be nice to have direction from Congress on the appropriate application of categorical exclusions, particularly given that at least this agency is not following CEQ direction.

For the reasons discussed in the previous paragraph, we disagree that agencies are currently interpreting NEPA to say that "Under current law there is no occasion where an agency can choose (or "opt out") of the NEPA process." CEs are allowing agencies to do just that. Categorical *exclusion* means *excluded* from the majority of requirements of NEPA.

We agree that "the increasing length and complexity of NEPA documents is having a negative impact on public participation." DRAFT, p. 23. This is particularly true when the NEPA documents are merely long, but are lacking in substance. Groups like the ones WildLaw represents are seeking substance and a genuine comparison of alternatives. We would not protest shorter **but better** EAs or EISs for many of the projects we look at. In fact, we would welcome this approach.

H. Adequacy of agency resources

"The empirical data paints a picture of few actual lawsuits but it does not address the perception or threat of litigation and the impact it has had on the NEPA process." DRAFT, p. 3.

The DRAFT states that "the Forest Service suggested that one problem with resources is that they are being shifted to litigation support and away from Forest management. The Task Force was told that the danger of this 'resource shifting' is that forests, watersheds, wildlife habitats and rural communities are less likely to be protected." Many of the Forest Service's proposals are themselves a threat to forests, watersheds, wildlife habitats and rural communities. Forest Service NEPA documents in support of large timber projects are sometimes appallingly inadequate, even to other agencies. For example, in North Carolina on the Nantahala National Forest, the National Park Service recently commented on a project that would affect the Appalachian Trail:

> if we understand the document correctly, the proposed action is clearly not consistent with the USDA Forest Service's own *Land and Resource Management Plan for the Pisgah and Nantahala National Forest (1994)*. In fact, the document admits as much in the sixth paragraph on page 149: *"numerous aspects of this alternative (the Forest Service's proposed action) would not meet LRMP visual standards—including harvest areas proposed within the Appalachian Trail Foreground Management Area (emphasis added)."* . . .
>
> It is unclear to us why the Forest Service would even propose actions that fail to meet the agency's own policy and planning guidelines, or how they could do so without proposing an amendment to the *Forest Plan*. However the proposed action and the proposed alternatives as currently described don't simply fail to meet the Service's own policy and planning objectives. Selection of any of these alternatives would breach long-standing management understandings between the

> USDA Forest Service, the National Park Service, and the Appalachian Trail Conservancy and its affiliated Appalachian Trail-maintaining clubs.12

The Park Service described the *Preliminary Analysis of Environmental Effects for the Proposed Stecoah Project* as "lack[ing in] clarity and consistency," and proposed merely correcting mistakes between the comment and decision would not be enough, suggesting instead that:

> the Preliminary Analysis be re-drafted, so that reviewers, members of the public, and the decision-makers are fully apprised of the impacts associated with each alternative. The re-drafted document should include and analyze alternatives that are consistent with the direction provided in the *USDA Forest Service Land and Resource Management Plan for the Pisgah and Nantahala National Forests*.13

V. Draft Recommendations

A. Group 1 - Addressing Delays in the process

Recommendation 1.1: Amend NEPA to define "major federal action." The problem with this recommendation is the likelihood that many actions which have cumulative impacts would never be reviewed. For example, the Forest Service is currently asserting that it has no obligation to do NEPA for Land and Resource Management Plans. If many of the actions that fall under these plans were also not considered major federal actions, then millions of acres of land could be logged in various ways with no environmental review.

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents. It would be useful to everyone involved if NEPA did not take so long, however the problem with this suggestion is the incentive it creates. Agencies by and large do not like NEPA analysis work. It can be tedious. This provision would reward the worst behavior by allowing agencies to avoid the requirements of NEPA. A better suggestion would be to have consequences the agency does not like if time limits are not met—such as an assumption that environmental effects will be severe, or a multiplier for mitigation costs.

This recommendation violates the basic tenant of NEPA which requires agencies to consider the environmental impact of their actions "to the fullest extent possible." Calvert Cliffs v. United States Atomic Energy Commission, 449 F.2d 1109, 1118 (D.C. Cir. 1971). Under the staff's recommendation, an agency would only be expected to consider the environmental impacts to the fullest extent *that time permits*. This is hardly the "hard look" analysis Congress envisioned when it enacted the statute some 35 years ago. See Kleppe v. Sierra Club, 427 U.S.

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12 Letter from Pamela Underhill, Park Manager, to Joseph Bonnette, District Ranger for the Cheoah Ranger District in response to the *Preliminary Analysis of Environmental Effects for the Proposed Stecoah Project* (Sept. 29, 2005)(emphasis added).

13 Id. It is worth noting that the document to which the Park Service makes reference is representative of the less detailed documents that the Forest Service is now sharing with the public in lieu of draft environmental assessments. This approach allows the agency to superficially meet the public's concerns without having to vigorously consider them in an alternatives analysis. The agency simply responds to comments by inserting reference to the issues raised by the public in the final environmental assessment or environmental impact statement.

390, 410 n. 21 (1976).

In addition, what makes the staff's recommendation even more nonsensical is that the staff is admittedly troubled by the government's emphasis on quantity over quality in its environmental reviews. (DRAFT at 18). Yet, the staff's position that all EISs are "complete" after 18 months (regardless of their content) suggests that the staff is more concerned with expediting the review process than it is with improving the quality of that process.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS). We see no problem with clarifying these definitions, provided that the clarifications meet the purpose of NEPA. Done wrong, this would be "turning NEPA on its head." NEPA now says to prepare an EIS unless compelling evidence indicates otherwise. This makes logical sense because the NEPA process is where the information about the extent of the impact is developed and made available for review. One cannot know whether a project has minimal impacts unless and until the proposal is studied. The recommendation would result in the need for some project analysis and decision-making that would happen before even initiating any formal NEPA process, and therefore out of the public view.

We suggest that to start, all categorical exclusions created before the CEQ's recent direction regarding supporting empirical evidence for categorical exclusions be revisited. We do not believe that NEPA should be amended to state that temporary activities or other activities where the environmental impacts are clearly minimal are to be evaluated under a CE unless the agency has compelling evidence to utilize another process. Compelling evidence is too onerous a test. Often agencies are not aware of all impacts until the public becomes involved as a result of the NEPA process. To require the public to prove that impacts from a temporary activity are not minimal is to push the agencies' responsibilities off on the public. **Recommendation:** Establish unambiguous criteria for agencies to create their own CE categories. Right now, the process for creating categories of CEs is anything but clear, which may prevent agencies from developing new CEs that are truly reasonable and proper.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents. We do not understand how codifying the law as it exists in the CEQ regulations will change anything.

B. Group 2 - Enhancing Public Participation

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments. While we understand the sentiment, this creates an enormous equal protection problem. Further, as this applies to federal public lands, a resident of Florida has just as much right to the lands in Washington as a Washingtonian. Public lands belong to all Americans. We all pay for their upkeep, and they provide benefits even to those who never visit them—look at the interest in the Alaska National Wildlife Refuge, a place few of us will ever visit. The interests of local communities are not always consistent with the good of the citizenry as a whole. For example, in the Enoree District of the Sumter National Forest in South Carolina, there is a locally-driven

proposal to build a lake on federal land. The reason this site has been chosen is because "then no one's land will have to be taken." Another example is the push by a very few people in Swain County North Carolina (not including the elected County Commission) to build a road through the Great Smoky Mountains National Park. Despite the acknowledged facts that this road is not in the management plan for the Park, would serve no transportation purpose, and would cause significant harm to natural and recreational resources in the Park, millions of dollars have already been spent studying this proposal. If anything, local groups often have too much control over actions taken on land that is supposed to be held in trust for all of us.

Finally, direct effects cannot be measured by geography alone. For example, permit seekers often live far from where they propose actions. Hikers and downstream users of water often do not live in close proximity to the place where activities will take place. The proposed test would result in arbitrary inflation of the desires of some over those of others who have an equally legitimate interest in how agencies behave.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. This is not a bad idea as long as the EIS meets the substantive and procedural requirements of the Act. Less boilerplate language would benefit public participation and would make agency employees' work more meaningful. But, the emphasis should be on improving the quality of information, not limiting numbers of pages. Changed wording could include page limits that do not count data listed in appendices and clarifies when each page limit applies. These limits seem reasonable, for the text part of the documents.

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

Recommendation 3.1: Amend NEPA to grant tribal, state and local stakeholders cooperating agency status. See above, p. 4. We should agree that if cooperating status is added, to the extent it is possible, "[s]uch status would neither enlarge nor diminish the decision making authority for either federal or non-federal entities." DRAFT, p. 26. To improve state, local and tribal participation in the NEPA process, there would need to be some procedure that requires all relevant agencies to participate and information should be available from any participating agency. However, a legislative solution is not necessary to achieve this goal as this language already included in the Act is sufficient to meet these needs. **Recommendation:** Create a new category for any tribal, state, local, or other political subdivision that requests special status. Direct that these non-federal political subdivisions shall have access to draft NEPA documents at any time.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. As long as state environmental reviews are indeed functionally equivalent to NEPA requirements, then this seems like an efficient use of public funds. There must be, however, a process to formally determine that state NEPA-equivalents are truly equivalent, including public participation in the decision. But in many states, this will never happen. For example, Alabama has no state law equivalent of NEPA and no state agency

is EVER required to consider the environmental impacts of a proposal or alternative to it. Thus, adding this section would change nothing in states like Alabama. Also, functional equivalence should be reviewed frequently to determine that this is indeed the case and that state forum shopping does not develop. This should only be implemented if there is a clear process for withdrawing state programs as well.

It appears that under the staff's recommendation, CEQ would be directed to include the "functional equivalence doctrine" in its regulations. Thus, terms must be properly and carefully defined. The functional equivalence doctrine exempts federal agencies from complying with NEPA requirements provided the agencies utilize other "substantive and procedural standards [that] ensure full and adequate consideration of environmental issues." Environmental Defense Fund v. EPA, 489 F. 2d 1247, 1257 (D.C. Cir. 1973).

However, the majority of courts view the functional equivalence doctrine as a "narrow exemption" which applies only when "the purposes and policies behind NEPA will necessarily be fulfilled by otherwise required agency procedures." Jonathan Cosco, Note, NEPA For The Gander: NEPA's Application to Critical Habitat Designations and Other Benevolent Federal Action, 8 Duke Env L & Pol'y F 345, 358 (1998)(citing Wyoming v. Hathaway, 525 F.2d 66, 71-72 (10th Cir. 1975); Environmental Defense Fund v. EPA, 489 F. 2d at 1257; James v. Gordon, 621 F. Supp. 7, 13 (D. Ak. 1985)(emphasis added)).

NEPA instructs the Federal government to consider environmental values in its decision-making process. 42 U.S.C. § 4331(a) (emphasis added). If not defined properly, the staff's recommendation would allow the federal government to invoke the functional equivalence doctrine and rely on state environmental reviews in lieu of NEPA's procedural requirements. This delegates the government's statutory responsibilities to the states and frustrates the very purpose of the Act.

Furthermore, once the government starts relying on the doctrine to justify its use of alternative environmental review procedures, it will become increasingly difficult to determine when it must analyze its actions under NEPA. We must respect the NEPA process and not recognize this rarely invoked doctrine in regulations or the statute.

D. Group 4 - Addressing Litigation Issues

Recommendation 4.1: Amend NEPA to create a citizen suit provision. If the citizen suit provision did not in fact reduce citizens' rights to participate, then this would facilitate public participation by clarifying that there is a right to sue based on NEPA violations. As long as the goal to "clarify the standards and procedures for judicial review of NEPA actions" does not really mean "make it much harder for the public to gain standing," this might be an acceptable addition to the Act.

The DRAFT proposed the following:

• Require appellants to demonstrate that the evaluation was not conducted using the best available information and science. This is an additional burden to the public with little meaningful substantive benefit given the considerable deference given federal agencies to determine what the best information and science is. This appears to be nothing more than an additional hurdle to discourage litigation. Court already defer to agencies in NEPA cases when there is ANY difference in opinion about the quality of the science used in the decision.

Courts have routinely held that the agency (not the court or the plaintiff) is responsible for investigating the environmental effects of a proposed action. See, e.g., City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975). However, the staff's recommendation would require just the opposite. In order for plaintiffs to demonstrate that an agency's evaluation was not conducted using the best available information and science, plaintiffs would be compelled to conduct their own studies on the environmental impacts of a proposed project. This recommendation effectively places the government's responsibilities under the Act on the public.

Once this occurs, the agency has no incentive to conduct a thorough and comprehensive analysis. Under the APA, the court would be required to defer to the agency's expertise and uphold almost any evaluation unless plaintiffs conducted their own study and proved at trial that there was no scientific support for the government's conclusions. This would be an almost impossible burden for plaintiffs to overcome.

• Clarify that parties must be involved throughout the process in order to have standing in an appeal. This is already required, so there is no problem with making it more clear, other than doing so would be a waste of Congress' time. In particular, however, this might address the whining by some industries about not being allowed to intervene as of right after having not participated in the administrative process.

• Prohibit a federal agency – or the Department of Justice acting on its behalf – to enter into lawsuit settlement agreements that forbid or severely limit activities for businesses that were not part of the initial lawsuit. Additionally, any lawsuit settlement discussions involving NEPA review between a plaintiff and defendant federal agency should include the business and individuals that are affected by the settlement is sustained. This provision seems contrary to the immediately previous provision. If business is concerned, it can be already involved from the start. If this late entry provision is allowed for some members of the public, then it should be allowed for others—such as those who hike, paddle, or bird watch in an effected area. Further, we have doubts that Congress can constitutionally do this. The proper defendant to a NEPA suit is the federal agency proposing the action. If someone else involved thinks they might be harmed by the results of the litigation, it is their duty to intervene or otherwise insure their interests are being represented. No other body of law has this type of crazy limitation on who and how a case is managed. Where do you draw the line of business and individuals that are "affected by the settlement"? This is often be impossible to do, and it places a weird burden on both the plaintiff and the agency.

• Establish clear guidelines on who has standing to challenge an agency decision. These

guidelines should take into account factors such as the challenger's relationship to the proposed federal action, the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge; These look like a whole series of reasons to bar access to courts through standing challenges. The courts already have a detailed set of standing requirements for all NEPA and other environmental statute cases; this would add nothing to that existing law.

• Establish a reasonable time period for filing the challenge. Challenges should be allowed to be filed within 180 days of notice of a final decision on the federal action; As a practical matter, this would prevent combination of a number of projects, which is very useful for educating a court and is more efficient than challenging each separately. Indeed, this may lead to more litigation. Instead of one lawsuit over 79 related projects that were all decided within two years of each other, plaintiffs might have to file 79 lawsuits, thus making the government's job in defending then harder. Also, agencies often makes decisions, of which the implications are not immediately obvious. The standard six-year statute of limitations already applies to all NEPA lawsuits; we see no reason to change that. On top of that six-year statute of limitations, a court is free to apply the equitable doctrine of laches, such that a NEPA case can be dismissed, even if filed prior to six years, if the permitted action has already progressed to a point where judicial interference would now be unreasonable.

The doctrine of laches and the general six-year statute of limitations for claims against the government applies to NEPA cases. See Davis Mts. Trans-Pecos Heritage Ass'n v. FAA, 116 Fed. Appx. 3, 36 (5th Cir. 2004) ("although NEPA and the APA do not contain limitations periods, this court has held that claims under the APA are subject to the general six-year statute of limitations for claims against the government"). However, as a policy matter, the imposition of a filing deadline should be discouraged for the same reasons laches is rarely applied in NEPA cases.

Courts have long recognized that the plaintiff is not the only party to suffer harm by alleged environmental damage. See Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1241 (9th Cir.1989); see also City of Rochester v. United States Postal Service, 541 F.2d 967 (2d. Cir. 1976). Therefore, [courts] "have repeatedly cautioned against application of the equitable doctrine of laches to public interest environmental litigation.... This approach has found unanimous support in the other circuits." Id. (citations omitted). "A less grudging application of the doctrine might defeat Congress' environmental policy." Preservation Coalition, 667 F.2d at 854.

Furthermore, "citizens have a right to assume that federal officials will comply with applicable law and to rely on that assumption." Id. "To make faithful execution of this duty contingent upon the vigilance and diligence of particular environmental plaintiffs would encourage attempts by agencies to evade their important responsibilities. It is up to the agency, not the public, to ensure compliance with NEPA in the first instance." City of Davis v. Coleman, 521 F.2d at 678.

Recommendation 4.2: Amend NEPA to add a requirement that agencies "pre clear" projects. CEQ would become a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ should be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability. We are not sure what this pre clear requirement means. If each project requiring an EA (and even a CE) had to go through CEQ, then CEQ will need to grow considerably. CEQ does not have the expertise that the lead NEPA agency has, so if CEQ is doing a substantive review ala OMB, then this could negatively impact the decisions implementing agencies make. We think that a CEQ review of judicial and agency administrative decisions is a very good idea to promote a uniform understanding of NEPA across the country. Interestingly, this could have a highest common denominator effect since otherwise the CEQ would have to advise action contrary to judicial direction.

E. Group 5- Clarifying Alternatives Analysis

Recommendation 5.1: Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible. A provision would be created to state that alternatives would not have to be considered unless it was supported by feasibility and engineering studies, and be capable of being implemented after taking into account: a) cost, b) existing technologies, and (c) socioeconomic consequences (e.g., loss of jobs and overall impact on a community). The problem with this approach is that by the time feasibility studies are completed, considerable resources have already been invested. CEQ's NEPA regulations currently require that "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."14 Public scrutiny is "essential to implementing NEPA."15 The public can also provide information at the scoping stage which will influence the alternatives that should be considered in detail. Public participation should not be a mere formality. And case law already limits the required alternatives analysis to those "reasonable" alternatives that do, in fact, meet the purpose and need of the proposal; only feasible ones are "reasonable." No case has ever required an agency to consider fanciful or unrealistic alternatives to meeting the purpose and need of the proposal.

Further, this also demonstrates a lack of understanding of the purpose of NEPA. NEPA is supposed to lead to *informed* decision-making, which is why the range of alternatives analyzed is so important. Analyzing an alternative that may not be economically feasible still gives the decision-makers and the public something against which to evaluate the impacts of the preferred alternative. In some situations this might be terribly important even though implementation of unfeasible proposals would not be expected. Further, this could easily lead to situations where only the proposed alternative is analyzed, cutting the heart out of the EIS. Also, analysis of

14 40 C.F.R. § 1500.1 (emphasis added).
15 40 C.F.R. § 1500.1(b).

technically feasible bur economically unfeasible alternative can often BOLSTER the case for selecting the proposed alternative.

Recommendation 5.2: Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project. A provision would be created that require an extensive discussion of the "no action alternative" as opposed the current directive in 40 CFR 1502.14 which suggests this alternative merely be included in the list of alternatives. An agency would be required to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision. We agree with this recommendation completely with the exception of the final sentence—NEPA does not require that the least damaging alternative be chosen. The current lack of such a requirement results in more honest NEPA analysis. If instead the analysis will dictate a particular outcome, then the analysis will be manipulated. Finally, if a no-action alternative cannot be chosen if it will result in more impact than an action alternative, then does the same logic carry over for choosing between action alternatives? This would be a significant change as NEPA has never required that the least damaging alternative be chosen.

This proposal would work only if: (1) the same provision also requires the extensive discussion of each and every alternative; and (2) it requires the action agency to select the no action alternative if on balance the impacts of executing the project would outweigh the impacts of not executing the project or decision.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory. Sounds good to us so long as mitigation is properly defined and understood. The public and the decision-makers need to be reminded that we have mitigated ourselves into the global warming crisis we are in. New Orleans is a mitigation disaster. Adverse impacts should always be mitigated when they can be, but the agency must also be free to reject an alternative, even with full mandatory mitigation, if the alternative still has too much of an adverse impact to the environment.

F. Group 6 – Better Federal Agency Coordination

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders. As pointed out in testimony, the existence of a constructive dialogue among the stakeholders in the NEPA process and ensuring the validity of data or to acquire new information is crucial to an improved NEPA process. To that end, CEQ will draft regulations that require agencies to periodically consult in a formal sense with interested parties throughout the NEPA process. This is a great idea as long as the agency actually does meet and consult with stakeholders and work openly and honestly to find common ground and incorporate the information and ideas of the stakeholders. In North Carolina, the Forest Service proposed a stewardship project. The community conservation and environmental groups that WildLaw represents were not notified until after the project planning phase was nearly over *despite* clear

Forest Service regulations requiring that they be included.16 There needs to be some penalty for not including interested parties at the appropriate early stages of project development.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies. . . Additional concepts would be added such as charging the lead agency with the responsibility to develop a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions. This sounds like a good idea, if implemented properly. Consolidating the record for NEPA reviews is a good idea unless it is used to cleanse the record of documents from other agencies requiring interested persons to be vigilant in monitoring the records in other agencies in order to spot selective record-making. This possibility exists regardless of any record-consolidating authority, but in the case of the agency with the authority to consolidate, it makes one more agency-deference hurdle to straddle. Consolidation must not lead to a reduction in public participation or agency consideration of information.

G. Group 7 - Additional Authority for the Council on Environmental Quality

Recommendation 7.1: Amend NEPA to create a "NEPA Ombudsman" within the Council on Environmental Quality. This is rather vague. The ombudsman, as a generalist, would not be familiar with the resource issues, and so might make bad suggestions. On the other hand, the ombudsman would be an expert on NEPA process and such a centralized decision maker would at least provide a target when trying to change NEPA rather than having to go agency by agency, circuit by circuit. Given a clear mission on resolving NEPA process issues and not delving into the substantive issues involved in proposals, such an ombudsman might be a good idea. The ombudsman should be a resource for helping making the process run more smoothly by educating those in the agencies who are responsible for carrying out NEPA. Part of this could be resolving conflicts but that would be as more of negotiator, because ultimately the agency would have to make any changes that would happen.

Recommendation 7.2: Direct CEQ to control NEPA related costs. Cost ceilings, like limits on damage recovery will not eliminate the frivolous cases, but will cause the cases where significant resource investment is really justified to be considered on the cheap. The ombudsman solution is better than an arbitrary cost ceiling.

H. Group 8 - Clarify meaning of "cumulative impacts"

Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts. A provision would be added to NEPA that would establish that an agency's assessment of existing environmental conditions will serve as the

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16 "Projects are to be developed collaboratively with cooperating Federal, state, and local government agencies; tribal governments; non-governmental organizations; and any interested groups or individuals, including resource advisory committees, fire safe councils, resource conservation districts, and watershed councils. Project proposals can be initiated from external sources as well as from within the agency." FSH 2409.19, Ch. 60, 61

methodology to account for past actions. While we would welcome better cumulative impact analysis, we are not sure we understand what is being suggested here. If you are suggesting that the baseline and that the past actions that caused the existing conditions not be examined, then you are basically arguing against adaptive management, common sense, and ensuring that the mistakes of the past will be repeated. This is a bad idea. If baseline assessment included what caused the existing conditions, then it might be useful.

Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis. CEQ would be instructed to prepare regulations that would modify the existing language in 40 CFR 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are "reasonably foreseeable." As an example, Western North Carolina is developing fast. It is reasonably foreseeable that much of the habitat surrounding Forest Service land will be parceled into large ex-urban or suburban lots. This will degrade habitat on private land, and it is entirely foreseeable. However, building permits have not been issued for all of this inevitable development. Will such certainly reasonably foreseeable actions have to be considered? If not, then this suggestion limits NEPA just for the sake of expediency and not for reform.

The staff recommends amending the definition of "cumulative impacts" to focus analysis of future impacts on *concrete proposed actions* rather than actions that are "reasonably foreseeable." This would severely limit the range of actions and impacts that must be considered in an environmental impact statement.

Cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions...Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

"Reasonably foreseeable future actions" is not defined in the regulations but courts define the term as "actions that are sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." Western North Carolina Alliance v. N.C. Dep. of Transportation, 312 F. Supp. 2d 765, 771 (E.D.N.C. 2003)(quoting Sierra Club v. Marsh, 976 F.2d 763, 767 (1st Cir. 1992)).

The need to analyze "reasonably foreseeable future actions" is perhaps best illustrated in transportation projects. Often, the Department of Transportation engages in multi-phase road construction projects. In many instances, only the first of several phases is fully conceptualized at the time of the decision-making process.

However, under NEPA the Department must consider the impacts of all phases of construction. Each phase is a "reasonably foreseeable future action" requiring analysis even though they may be at different points in the planning and funding process or geographically removed. See Western North Carolina Alliance, 312 F. Supp.2d at 771. Furthermore, while the impacts of each phase may be individually minor, collectively, their impacts may be significant.

As such, the cumulative impacts of the entire multi-phase action must be addressed in a single EIS. See 40 C.F.R. § 1508.7.

Requiring the agency to consider all "reasonably foreseeable future actions" is one of the essential procedural requirements designed to force the agency to follow NEPA's "hard look" mandate: "To consider every significant aspect of the environmental impact of the proposed action and inform the public that it has indeed considered environmental concerns in its decision making process." Earth Island Inst. v. United States Forest Serv., 351 F.3d 1291, 1300 (9th Cir. 2003)(emphasis added).

Removing this requirement from the regulations would allow the Department (and other agencies) to ignore NEPA's command simply because future development plans have not been finalized by the agency. If this recommendation is implemented, large-scale multi-phase projects with significant cumulative environmental impacts may no longer be subject to a "hard look" under NEPA.

Accordingly, the task force must not direct CEQ to remove "reasonably foreseeable future actions" from the definition of "cumulative impacts" under 40 C.F.R. §1508.7.

I. Group 9 – Studies

Recommendation 9.1: CEQ study of NEPA's interaction with other Federal environmental laws. Done properly, such a study may well produce some good information for making future improvements to federal agency implementation of both NEPA and the other environmental laws.

Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues. This is a good idea unless it results in out-sourcing the job of producing NEPA documents. Our experience with outsourced NEPA documents have almost always been bad.

Recommendation 9.3: CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws. Any state NEPA (and many states, such as Alabama, do not even have NEPA-like statutes) must provide not only for comparable review, but also provide at least as comprehensive rights of participation by the public. This is especially important given that the DRAFT acknowledges the important function the public has played in helping NEPA to achieve the environmental benefits it has over the last few decades.

All of the above studies should be done **prior** to any changes being considered for NEPA itself.

VI. Conclusion

We agree with the conclusion of the DRAFT that "it is clear that NEPA is a valid and

functional law in many respects." We even agree that NEPA compliance and implementation could be made more efficient and inclusive. We hesitate to agree that this is the appropriate time and mood within which to suggest changes to NEPA itself. We do not share the opinion that doing nothing legislatively "would be a disservice to all stakeholders who participate in the NEPA process." There is much that can be done to improve the NEPA process AS APPLIED (see our original testimony) before we need to even discuss making changes to the statute itself. The law is not broken.

Sincerely,

Ray Vaughan
Senior Policy and Program Director
WildLaw