

CQ471

NEPA Implementation

Comments of the
Natural Resources Defense Council

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NEPA Task Force
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Re: Comments Concerning NEPA Implementation

The Natural Resources Defense Council (NRDC) submits the following comments regarding the importance of the National Environmental Policy Act (NEPA) to promoting sound and accepted government decisions. For over 30 years, NEPA has provided an essential tool for analyzing the impacts of proposed federal agency decisions and providing the affected public a say in those decisions. NEPA and its accompanying regulations have worked well to help ensure that public resources are managed, and public funds are spent, through a public process.

Recent actions by this Administration, however, threaten to shut the public out of agency decision-making. By denying the public access to information about what its government is doing and by making decisions behind closed doors, this Administration risks losing the trust and confidence of the people it serves. Efforts to streamline the NEPA process or completely remove agency actions from the process will exacerbate the public's growing distrust. Attention to NEPA procedures, on the other hand, can serve as an antidote.

The NEPA Task Force has the opportunity to enhance the NEPA process to fulfill the statute's goals. Improving implementation of NEPA can, and should, be done without changing the existing regulations. The Task Force, with the leadership of the Council on Environmental Quality (CEQ), can provide federal agencies with critical guidance on how to do NEPA efficiently, but right. In particular, the NEPA process can be improved by providing more effective public involvement, increased focus on cumulative impacts, and increased resources for monitoring and mitigating the actual impacts of decisions.

So far the Administration is going in the wrong direction. Rather than enhancing the NEPA process, the Administration has continually sought to circumvent it. See Appendix, Examples of NEPA Abuses. We urge the Administration to halt its efforts to exclude federal actions with serious environmental consequences—such as logging in our national forests and off-shore oil drilling—from NEPA. Instead, we hope both CEQ and President Bush will lead the way in implementing the following suggestions to produce more informed and less controversial decisions.

I. Public Involvement: Should Occur Early and Often

As CEQ itself has recognized, one of the most important elements of NEPA is public participation. Council on Environmental Quality, The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years (January 1997)

(hereafter “CEQ Effectiveness Study”), at ix (“NEPA’s most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social and economic impacts of agency decisions.”) The Task Force should help agencies increase proactive public outreach to involve those affected by agency decisions early and often in the decision process.

When done right, NEPA works. NEPA provides an essential mechanism for building trust in communities affected by agency decisions. By requiring analysis of the impacts of proposed decisions, NEPA ensures better final decisions. NEPA encourages consideration of alternatives that may have less detrimental impact. When the public affected by agency decisions is involved early and often in those decisions, controversy and appeals can be avoided. Existing CEQ regulations already provide for minimizing paperwork and reducing delay. 40 C.F.R. § 1500.4, 1500.5. The challenge is not to revise the regulations, but use the existing ones as they were intended.

Recent actions by this Administration have sought to reduce, rather than enhance, public involvement. For example, the Navy has proposed to exclude completely from NEPA numerous activities—such as oil drilling, ocean dumping, and underwater explosives testing—that occur in our nation’s coastal waters. Federal agencies have increasingly used categorical exclusions to avoid detailed analysis and public review of the consequences of proposed decisions. Furthermore, federal land management agencies are relying on out-dated information, rather than conducting new analysis and review.

Instead of shutting the public out, the Administration should look for creative ways to involve the public in a meaningful way. Engaging the public effectively can be challenging. Providing easy access to information helps. Some agencies are much better than others in making notices of proposed decisions and NEPA documentation available on the internet. In addition to these documents, increased availability of data for relevant environmental indicators (such as water and air quality, threatened or endangered species populations) and links to this information from the notice of proposed decision would enhance the quality of public input.

Timing of public input is critical. Members of the public likely to be affected by federal agency decisions should be involved early and often in the decision-making process. Too often agencies are already well down the path on a particular course of action before involving the public. For example, agencies sometimes define the purpose and need of a project narrowly to exclude options that may be widely accepted by the public and less environmentally destructive. In other cases, environmental impact statements (EIS’s) often fail to include a diverse range of alternatives. For example, all the alternatives may include oil drilling with the difference being simply the number of wells. Even when an EIS includes a diverse range of alternatives, sometimes an agency is only serious about one or two options. The public is left feeling that the input they provide has little or no impact on the agency’s decision.

More proactive outreach is needed to involve voices that do not regularly participate in agency decisions. In particular, tribal representatives can provide critical

information and support for protecting both cultural and natural resources through the NEPA process. Tribes should be included in joint planning, research and assessments as state and local governments are now. In addition, federal agencies should share their resources with tribes to encourage tribal participation as cooperating agencies.

In order to make the NEPA process more efficient and effective, CEQ and the public need to better understand just how it is working now. In particular, it would be useful for CEQ to survey federal agencies to determine how many EIS's are completed annually and how many are challenged in court, as well as how many are upheld.¹ In addition to EIS's and litigation, it is equally important to quantify the number of environmental assessments (EA's) together with findings of no significant impacts (FONSI's) each agency has completed annually. Such quantification will provide an objective assessment of how many EIS's are done in comparison to EA's/ FONSI's and how many NEPA decisions are actually challenged in court. In many cases, the decisions that end up in court are those in which the agency short circuits the process rather than uses it effectively to involve the affected public.

II. Cumulative Impacts: Greater Attention and Resources Needed to Address Combined Effects

NEPA can help agency managers do their jobs. As CEQ has previously recognized, NEPA's requirements "can make it easier to discourage poor proposals, reduce the amount of documentation down the road, and support innovation." CEQ Effectiveness Study, at 12. By integrating NEPA early in the agency planning process, agencies can coordinate rather than duplicate review procedures required by other statutes such as the Federal Land Management Policy Act (FLMPA), the National Historic Preservation Act (NHPA), and Transportation Equity Act for the 21st Century (TEA-21). The Task Force should encourage greater use of NEPA in the development of policies and programs in order to permit their impacts to be assessed before resources are spent and a specific direction is taken.

Despite these benefits and the explicit mandate of the NEPA regulations to address cumulative impacts,² many agencies remain focused on individual project decisions ignoring the combined effects that several projects may have on the environment and surrounding communities. For example, pursuant to the Administration's energy plan, federal agencies (in particular the Bureau of Land Management (BLM)) are considering numerous oil and gas leasing and development proposals across the West that have never before been seen. These proposals have the

¹ Some of this information was collected for many years as part of CEQ's Annual Report, but has not been published since 1997.

² 40 C.F.R. § 1502.16 (analysis to address direct and indirect effects, including cumulative effects); 40 C.F.R. § 1508.8 ("Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative."); 40 C.F.R. § 1508.7. ("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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions.")

potential to result in widespread industrialization not just in individual BLM resource areas, but also cumulatively across the West. Already roads, waste pits and other development activities are slicing up habitat for migratory and wide-ranging species like the mountain plover. Coalbed methane (CBM) development in particular is increasingly affecting aquifers and surface water resources.

These actions threaten on a broad scale both the scenic and recreational attributes that characterize the West and traditional western values, particularly those associated with ranching. Yet, no overall assessment of the cumulative impacts of the new National Energy Plan has been conducted.

The draft EIS prepared by the Wyoming BLM for coalbed methane development in the Powder River Basin illustrates the flawed and short-sighted approach to decision-making some land management agencies have taken recently. Wyoming's Powder River Basin is slated for the largest number of oil and gas wells—over 51,000 CBM wells—ever studied for approval by the Department of Interior. In fact, this number of wells would nearly double the *total* number of wells that now exist on federal lands. BLM has conducted no analysis of the combined effects of the wells in the Powder River Basin and elsewhere across the Rocky Mountain region on Western landscapes and lifestyles. In fact, the agency has not even accurately assessed the combined effects of the wells in the Powder River Basin alone, having split the evaluation for the area into two separate environmental analyses.³ Rather than take EPA's advice to go back to the drawing board and prepare a single EIS addressing the entire Basin, BLM appears to be proceeding with its original decision to try to fast-track this planning effort.

The fast-track, myopic approach taken by the BLM in the Powder River Basin is leading to enormous controversy and delay. In contrast, a more faithful adherence to NEPA's purpose and tools, including a meaningful analysis of cumulative impacts, could help produce a balanced solution to meet our nation's energy needs while protecting treasured Western landscapes and lifestyles.

BLM is not alone among federal agencies in its failure to adequately address cumulative impacts as part of the NEPA process. The recent analysis completed by the U.S. Army Corps of Engineers for its nationwide wetlands permit program makes little attempt to address cumulative impacts. *See*, U.S. Army Corps of Engineers, Draft Nationwide Permits Programmatic Environmental Impact Statement (July 2001). Although the scope of the Corps' proposed action—issuance of nationwide permits—is national, the Corps failed to analyze cumulative impacts of that nationwide action. Instead, the Corps has subdivided the impact analysis into a series of regional analyses,

³ The U.S. Environmental Protection Agency (EPA) Region 8 severely criticized BLM for this bifurcated approach, as well as numerous other failures in its analysis. Letter from Jack W. McGraw, Acting Regional Administrator, EPA, to Al Pierson, Director, BLM, Wyoming State Office, EPA's Review of the Draft Environmental Impact Statement (Draft EIS) and Draft Planning Amendment for the Powder River Basin, Oil and Gas Project. EPA concluded that the draft EIS was inadequate and that the proposed water quality impacts were unacceptable. *Id.* at 2. The National Park Service and the U.S. Fish and Wildlife Service have also raised major concerns with the draft EIS.

none of which considers the full extent of cumulative impacts of the nationwide permits at issue.

Furthermore, the Corps has failed to analyze adequately the combined effects of the various nationwide permits that have been issued or proposed. Nationwide permits cover a range of activities including filling of wetlands for housing developments, surface coal mining, and road construction. Together, these actions are causing widespread environmental damage, yet the Corps has done little to analyze the combined impacts. *See*, U.S. Army Corps of Engineers, Finding of No Significant Impact for the Nationwide Permit Program (June 23, 1998). The Corps also has failed to assess the impacts of proposed nationwide permits when added to additional discharges of pollutants or projects approved by the Corps or other federal agencies, such as Corps civil works projects, Corps (or, in delegated states, state-issued) § 404 individual permits, and other discharge permits (such as § 402 (National Pollutant Discharge Elimination System) permits) issued by EPA or states.

Finally, the Corps has failed to consider impacts of actions undertaken without permits. For example, the NPDES and § 404 programs apply to discharges into U.S. waters from point sources. However, U.S. waters can be harmed by activities that regulators do not treat as discharges subject to regulation—such as nonpoint source runoff of pesticides or excessive fertilizers from large corporate farms and chemicals from urban streets.

Thus, for example, many areas are currently stressed because of past actions (such as wetlands whose extent has been vastly reduced by prior agricultural conversions or development activities, and streams that have been degraded by past channelization or mining). Likewise, many areas can be expected to suffer impact from future, reasonably foreseeable actions (such as future development, agricultural conversion, or increased pollution in areas where current and recent trends give reason to foresee such developments). The significance of the nationwide permit impacts must be gauged cumulatively with those past and future impacts. Yet, the Corps has failed to engage in this necessary analysis.

III. Tiering: Proper Use of Programmatic Analysis Can Reduce Costs

One way to address cumulative impacts is through the effective use of tiering. Tiering is an established procedure that has been both well-used and misused in practice. Properly applied, it offers multiple benefits. The Task Force should encourage and guide agencies in its helpful application and guard against its misuse.

The CEQ regulations explicitly provide for tiering. 40 C.F.R. §1502.20 (“Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review”). As defined by CEQ regulations, tiering refers to “the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower

statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.” 40 C.F.R. § 1508.28. Courts have recognized it as a legitimate technique, and a relatively evolved case law discusses the timing, content, and need for the programmatic environmental impact statements (PEIS) which are the heart of tiering practice, from Kleppe v. Sierra Club, 96 S.Ct. 2718 (1976) through Native Ecosystems Council v. Dombeck, 2002 WL 31051552 (CA9), Sept. 16, 2002.

Tiering offers agencies efficiencies in the review of environmental impacts from broad and/or connected actions. Impacts that are similar across various aspects of a program are studied and reported once, in a PEIS. Then those aspects can simply be summarized or incorporated in subsequent documents, rather than recreated from whole cloth. 40 C.F.R. § 1502.20.

For the public, sister agencies, and Congress, tiering can mean efficiencies in focusing comments and improved understanding of programmatic impacts. Done right, a PEIS presents concentrated information about the impacts of those aspects of a decision that are ripe to be made. 40 C.F.R. § 1508.28. PEIS's can and should provide an overview of program-wide effects before commitments to programs are under made, either formally or as a practical matter. Agencies can then focus their attention and resources at the project level on fully assessing and addressing the particularized impacts on specific places of specific actions. While a PEIS cannot substitute for subsequent site-specific analysis, it can allow for more efficient and effective consideration of broad-scale, long term impacts of agency decisions.

Unfortunately, too often federal agencies have ignored the benefits of legitimate tiering, or actively subverted the review process for programmatic decisions. A very counterproductive trend is evident towards deferring study of potentially significant impacts until late in the decision process, sometimes well after an agency has become largely committed to a course of conduct. The U.S. Forest Service, for instance, often cites California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) in its preamble to programmatic documents, to the effect that NEPA obligations do not attach until an irretrievable commitment of resources is made. This not only misconstrues Block, it is flatly inconsistent with the statute, which directs that irreversible and irretrievable commitments of resources be studied “to the fullest extent possible”, 42 U.S.C. § 4332(C), not “at the last moment possible.” Were that directive not clear enough, CEQ’s NEPA regulations address this question of timing directly: “Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” 40 C.F.R. § 1501.2; *see also id.* at § 1501.2(d)(3) (an agency involved with a non-Federal proponent shall similarly “commence[] its NEPA process at the earliest possible time”). The consequences of agency failure to heed this mandate are serious: less meaningful public participation, poorer integration of environmental factors into decisions, balkanization of decisionmaking, and devaluation of advance planning.

Likewise, in an effort to expedite new energy exploration and production on public lands, federal agencies have relied on out-dated environmental analyses rather than updates to reflect new and increased levels of proposed development. For example, the BLM is relying on old—some as many as ten and twenty years old—resource management plans (RMPs) to justify coalbed methane development that was never addressed in those plans nor the environmental analyses that accompanied them. In the Powder River Basin, as well as elsewhere across the West, BLM is approving new CBM wells even in areas where the agency has announced its intention to amend the RMPs in order to have a sound basis for energy decisions. Such approval of new projects before the old RMPs are updated through the required public process is inconsistent with the FLPMA, the BLM's "organic act," as well as NEPA.

The NEPA issues raised by this approach include jeopardizing the full range of alternatives in the amended RMP.⁴ Furthermore, the original documents fail properly analyze CBM development. Such method of extracting energy supplies was not being actively used and therefore not considered at the time the old RMPs and their accompanying environmental analyses were completed. *See Wyoming Outdoor Council, et al.*, 156 IBLA 347 (April 26, 2002).

As discussed, tiering can be used to reduce and improve NEPA documentation. A PEIS can provide a vehicle to assess the impacts of a course of action, such as the National Energy Plan, across a geographic area and over time. With a PEIS, the documentation for a specific project can be reduced and the focus can be on the added impacts of the new proposed development together with what has already occurred in the area and what is expected to occur. Attempts to short-circuit the process by delaying environmental analysis or relying on out-dated analysis will likely result in more delay and controversy than if the agency had devoted the resources and time to doing the analysis completely and correctly the first time. Moreover, whether an agency chooses the more efficient and forthright path of producing and tiering to programmatic analyses or not, it will at all events still be responsible for examining the cumulative impacts from reasonably foreseeable impacts together in one or more documents. *See, e.g., Native Ecosystems Council*, 2002 WL 31051552 at *10.

IV. Categorical Exclusions: Should be Reserved for Ministerial, Non-controversial Actions

Like tiering, the proper use of categorical exclusions (CE's) conserves public time and agency resources, and focuses review on actions where environmental information can make a meaningful difference. *See, generally*, 40 C.F.R. §§ 1500.4(p), 1501.4(a)(2), 1508.4. Problems have arisen, however, as agencies attempt to extend the use of CE's

⁴ When one of the main purposes of the RMP process is to determine which areas should be leased (or open to lease) for their oil and gas resources, continuing to issue leases during the amendment process necessarily proscribes consideration of the "no leasing" option in development of the final, amended RMP, as prior planning guidance acknowledged. *See* BLM, Instruction Memorandum 2001-146 (May 2001). In addition, such leasing precludes attaching newly developed stipulations to the leases issued in the interim.

from largely administrative actions to substantive decisions alleged to have de minimis impacts on the environment. Where the public questions whether the effects are truly de minimis, the public deserves the opportunity to be part of the process evaluating potential impacts. CE's can be an effective tool, but should not be used to shut the public out of potentially controversial decisions. The long-range tenability of the use of categorical exclusions hinges on CEQ ensuring against misuses and outright abuses.

One problem area is the use of CE's to cover up behind-closed-doors analysis of potential impacts that belongs in public documents like Environmental Assessments (EAs). Where judgment is exercised by a federal official as to whether environmental impacts may be significant or not, that decision must be made in a publicly available Finding of No Significant Impact (FONSI). In the CE context, this issue arises when factors are present indicating that, despite an activity fitting nominally into an excluded category, there could be environmental impacts. Under these "extraordinary circumstances," agency procedures have to call for the activity to be bumped up to at least the level of an EA. *See* 40 C.F.R. § 1508.4. Agencies cannot, consistent with CEQ's regulations, allow officials to review situations in which extraordinary factors indicate the potential for significant impacts, for the purpose of determining, in-house, whether to proceed on a CE. A different case may be presented when the official can find that there will be no impact whatsoever owing to the extraordinary factors, but if some sort of significance determination is made, that belongs in a publicly noticed and distributed FONSI.

A second problem area concerns agency definition of extraordinary circumstances. Agencies understandably wish to limit the factors a decisionmaker must stay alert for, as triggers for an EA. Some agencies have tried to define extraordinary circumstances with a finite list of events that are known to occur with some frequency. This approach conflicts with the basic meaning of "extraordinary" and cannot be squared with either CEQ's regulations, *see* 40 C.F.R. § 1508.4, or the statute's mandate to investigate impacts "to the fullest extent possible." 42 U.S.C. § 4332. CEQ needs to stay vigilant that agencies do not adopt procedures purporting to include an exclusive list of extraordinary circumstances.

V. Adaptive Management: Improved Monitoring Needed to Assess Actual Impact of Decisions and Effectiveness of Mitigation

The NEPA process should not end with the completion of an EA or an EIS. Agencies must commit to, and be given the resources to complete, monitoring to evaluate how decisions are implemented once they are made. As CEQ previously recognized, monitoring is needed "to confirm [agency] predictions of impact, to ensure that mitigation measures are effective, and to adapt projects to account for unintended consequences." CEQ Effectiveness Study, at 31.

Adaptive management is already being practiced—at least on paper—by many agencies pursuant to existing CEQ and other regulations. Unquestionably, agency resources should be spent on evaluating actual outcomes and adapting mitigation and

project implementation to actual impacts that occur—rather than simply documenting decisions. For the most part, however, agencies are not engaged in a meaningful effort to complete the monitoring that is an essential prerequisite to any adaptive approach.

Some agencies do not even provide for monitoring in their record of decisions. Those that do often do not have the resources to actually carry out the monitoring, let alone act on it. Too often agencies have relied on mitigation to conclude that an action will have only minimal, or no, detrimental effects on the environment without providing any mechanism to ensure that the mitigation actually occurs or works the way it was intended.

For example, just last year, the U.S. Army Corps of Engineers released a draft PEIS for its nationwide 404 wetlands permit program. 66 Fed. Reg. 39499 (July 31, 2001). In this draft, the Corps relies on mitigation to conclude that the permits will only minimal effects on the environment. U.S. Army Corps of Engineers, Draft Nationwide Permits Programmatic Environmental Impact Statement (July 2001), at 3-21 (“Compensatory mitigation is a critical part of the equation of achieving minimal impacts.”); PEIS, at 4-31 (“[S]ubstantial impact results from legal filling of the Nation’s waters under the Corps permit program. Compensatory mitigation is the most important element remaining in the Corps permit process as a means for reducing or eliminating cumulative impacts from permitted fill.”)⁵

The Corps provided little analysis to support its conclusion. The Corps’ failure to support its mitigation assumptions and conclusions with substantial evidence violates well-established principles of administrative law. *See, e.g., Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 866 (D.C. Cir. 2001) (remanded because agency had failed to demonstrate[]” relevant point with “substantial evidence—not mere assertions”); *Edison Electric Inst. v. EPA*, 2 F.3d 438, 446 (D.C. Cir. 1993) (agency’s purported “justification on the record” rejected where it “consists of speculative factual assertions”); *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1187-88 (D.C. Cir. 1996) (“the law requires more than simple guesswork”).

Not only did the Corps fail to provide sufficient evidence to justify its conclusion, but the agency ignored evidence to the contrary. For example, the National Academy of Sciences recently concluded that the “goal of no net loss of wetlands is not being met for wetland functions by the mitigation program” and that “[p]erformance expectations in Section 404 permits have often been unclear, and compliance has often not been assured nor attained.” National Research Council, Compensating for Wetland Losses Under the Clean Water Act (National Academy Press, Washington, D.C. 2001), at 2, 6.⁶

⁵ Based on its conclusion that only minimal environmental effects would occur, the Corps determined that it was not required to conduct an EIS for either the program or any individual nationwide permit. According to the Corps, the PEIS it prepared is only draft.

⁶ For a complete criticism of the Corps abuse of NEPA in its nationwide permit program see October 29, 2001 comments submitted to Robert Brumbaugh, U.S. Army Corps of Engineers by NRDC and several other environmental organizations. These entire comments have been submitted separately to the NEPA Task Force under separate cover.

If mitigation and monitoring are taken seriously rather than abused, adaptive management can work to enhance NEPA. Strengthened environmental management systems can help meet this need.⁷ In addition, enforceable mechanisms must be put in place to ensure that monitoring and mitigation actually occurs. Such mechanisms will enable agencies to evaluate the actual impact of their decisions, increase knowledge about actual environmental conditions and help focus limited resources on the most serious environmental problems. This approach will provide agencies with flexibility to respond to changing circumstances and at the same time enhance the credibility of agency analysis and decision-making.

VI. Conclusion

Rather than turning its back on NEPA; the Bush Administration should embrace it. With its addiction to secrecy and behind-closed-doors decisionmaking, this Administration has already earned itself a large measure of public distrust. Efforts to remove actions like logging and off-shore oil drilling from NEPA's public process will only increase the public's distrust.

The NEPA Task Force has the opportunity through strong leadership and guidance to enhance this Administration's credibility with the public it serves. More public input, not less, is needed. By refocusing the NEPA process to evaluate and address the actual impacts of decisions and meaningfully assess cumulative impacts, the Task Force can achieve NEPA's goals more efficiently and effectively. When done right, NEPA provides the path to better informed and accepted government decisions. NEPA is the answer, not the problem.

⁷ Environmental management systems (EMS's) can take many forms, but to be effective must provide mechanisms for: (1) developing a sound baseline inventory of environmental resources; (2) assessing, measuring and forecasting critical trends and issues affecting resource systems; and (3) continual reappraisal of how adverse impacts can be avoided or mitigated. For example, to help accelerate NEPA reviews of transportation projects while enhancing environmental stewardship, the Oregon Department of Transportation has established memoranda of understanding with natural resource agencies, undertaken post-project audits of environmental performance, and is funding three Oregon Fish and Wildlife staff and one U.S. Fish and Wildlife staff person, as well as the state land use agency and related planning efforts.

APPENDIX: EXAMPLES OF NEPA ABUSES

Eliminating Review for Ocean Activities

Prompted by an NRDC lawsuit challenging a Navy program that tests powerful sonar systems responsible for harming whales, the Bush administration has taken the position that NEPA does not apply beyond the U.S. territorial sea (three nautical miles from the nation's shorelines) to the so-called Exclusive Economic Zone (EEZ). The EEZ is a vast area extending 200 nautical miles from shore and covering millions of square miles of rich ocean habitat where the U.S. exercises exclusive control over fisheries, endangered species, marine habitat and other natural resources.

On September 20, 2002, a federal judge in Los Angeles rejected the administration's position. Nevertheless, the White House may seek to change the law to strip NEPA protection from the oceans. If this major policy change occurs, it would open up a Pandora's box of potentially harmful environmental consequences. For example, if NEPA no longer applies to activities within the EEZ, the area then would be subject to unregulated waste dumping, commercial fishing, oil and gas drilling, military maneuvers, and other activities – all without careful review of environmental impacts, assessment of alternatives, and opportunity for public scrutiny that NEPA currently provides.

Eliminating Review for Logging in National Forests

In his Healthy Forests Initiative, President Bush has proposed to waive environmental review and appeals for certain logging projects in the national forests. The summer's record wildfire season is the excuse. However, the proposal does little to address the problem. Rather than getting on with the non-controversial removal of small trees and brush that will best protect communities, the administration is proposing to waive NEPA for a broad category of commercial logging, even in remote, wild – roadless – areas of national forests. Congress is now considering free standing legislation based on the President's proposal (H.R. 5214, H.R. 5309, H.R. 5319), as well as NEPA waivers in the Senate Interior appropriations bill (S. 2708).

Accelerating Coalbed Methane Development in Wyoming's Powder River Basin

BLM's draft environmental impact statement for thousands of new gas wells in the Powder River Basin relies on out-dated environmental analysis that did not even consider coalbed methane development. In addition, the draft EIS failed to address a full range of alternatives. The draft looked at only two action alternatives, both of which allowed the maximum number of wells desired by industry and neither of which explored different timing, spacing, mitigation, directional drilling and reclamation options. The BLM has conducted no analysis regarding whether fewer wells, combined with improved energy efficiency and conservation measures (such as higher appliance efficiency standards and increased fuel economy standards for automobiles), provides a better alternative. The U.S. Environmental Protection Agency, the National Park Service and the U.S. Fish and Wildlife Service have all criticized the draft EIS prepared by BLM.

Allowing Nationwide Wetlands Destruction

Last summer, the U.S. Army Corps of Engineers issued a draft programmatic environmental impact statement that ignores the significant adverse impacts of the agency's nationwide permit program for filling wetlands. U.S. Army Corps of Engineers, Draft Nationwide Permits Programmatic Environmental Impact Statement (July 2001). The Corps has done little to assess the cumulative impacts of the numerous activities—such as housing development, surface coal mining and road construction—on the land and people. The agency assumes, despite undisputed scientific research to the contrary, that mitigation will prevent any significant environmental impacts from the wetlands destruction that is authorized.

Promoting Highway Expansion

In an effort to speed up the pace of transportation projects, highway proponents have blamed the environmental review process for delays and have suggested restricting opportunities for public participation and imposing unrealistic deadlines on participating federal agencies. In fact, where delay has occurred, recent data have shown that more often than not such delay resulted from lack of funding and project complexity – not environmental review. Federal Highway Administration, Reasons for EIS Project Delays (September 2000).

On September 18, 2002, the Bush Administration issued an executive order highlighting the problem of delay in highway projects. Some in the Bush Administration and in Congress are considering legislative proposals to limit environmental review requirements and public participation opportunities for highway projects.

Promoting Seismic Exploration in Utah's Redrock Canyon Country

In its efforts to encourage new oil and gas drilling, BLM has failed to conduct the environmental analysis required by NEPA before approving the Yellowcat seismic project near Arches National Park. BLM has authorized WesternGeco to take 50,000 lb thumper trucks across miles of fragile desert soil to test for new oil and gas deposits. BLM failed to consider alternatives to the destructive trucks such as shot-hole seismic testing or using existing paths instead of new ones. BLM also failed to address damage to wildlife habitat and soils that could last hundreds of year from increased off-road vehicle use encouraged by the new access created by the thumper trucks.