

# THE ROLE OF NEPA IN THE MID-ATLANTIC STATES

---

## OVERSIGHT FIELD HEARING

BEFORE THE

COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

---

Saturday, September 17, 2005, in Norfolk, Virginia

---

**Serial No. 109-30**

---

Printed for the use of the Committee on Resources



Available via the World Wide Web: <http://www.gpoaccess.gov/congress/index.html>  
or  
Committee address: <http://resourcescommittee.house.gov>

---

U.S. GOVERNMENT PRINTING OFFICE

23-836 PDF

WASHINGTON : 2006

---

For sale by the Superintendent of Documents, U.S. Government Printing Office  
Internet: [bookstore.gpo.gov](http://bookstore.gpo.gov) Phone: toll free (866) 512-1800; DC area (202) 512-1800  
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

## COMMITTEE ON RESOURCES

RICHARD W. POMBO, California, *Chairman*  
NICK J. RAHALL II, West Virginia, *Ranking Democrat Member*

Don Young, Alaska	Dale E. Kildee, Michigan
Jim Saxton, New Jersey	Eni F.H. Faleomavaega, American Samoa
Elton Gallegly, California	Neil Abercrombie, Hawaii
John J. Duncan, Jr., Tennessee	Solomon P. Ortiz, Texas
Wayne T. Gilchrest, Maryland	Frank Pallone, Jr., New Jersey
Ken Calvert, California	Donna M. Christensen, Virgin Islands
Barbara Cubin, Wyoming	Ron Kind, Wisconsin
<i>Vice Chair</i>	Grace F. Napolitano, California
George P. Radanovich, California	Tom Udall, New Mexico
Walter B. Jones, Jr., North Carolina	Raúl M. Grijalva, Arizona
Chris Cannon, Utah	Madeleine Z. Bordallo, Guam
John E. Peterson, Pennsylvania	Jim Costa, California
Jim Gibbons, Nevada	Charlie Melancon, Louisiana
Greg Walden, Oregon	Dan Boren, Oklahoma
Thomas G. Tancredo, Colorado	George Miller, California
J.D. Hayworth, Arizona	Edward J. Markey, Massachusetts
Jeff Flake, Arizona	Peter A. DeFazio, Oregon
Rick Renzi, Arizona	Jay Inslee, Washington
Stevan Pearce, New Mexico	Mark Udall, Colorado
Henry Brown, Jr., South Carolina	Dennis Cardoza, California
Thelma Drake, Virginia	Stephanie Herseth, South Dakota
Luis G. Fortuño, Puerto Rico	
Cathy McMorris, Washington	
Bobby Jindal, Louisiana	
Louie Gohmert, Texas	
Marilyn N. Musgrave, Colorado	
Vacancy	

Steven J. Ding, *Chief of Staff*  
Lisa Pittman, *Chief Counsel*  
James H. Zoia, *Democrat Staff Director*  
Jeffrey P. Petrich, *Democrat Chief Counsel*

---

## TASK FORCE ON IMPROVING THE NATIONAL ENVIRONMENTAL POLICY ACT

CATHY McMORRIS, Washington, *Chairwoman*  
TOM UDALL, New Mexico, *Ranking Democrat Member*

Ken Calvert, California	George Miller, California
George P. Radanovich, California	Edward J. Markey, Massachusetts
Chris Cannon, Utah	Frank Pallone, Jr., New Jersey
Jim Gibbons, Nevada	Grace F. Napolitano, California
Greg Walden, Oregon	Jay Inslee, Washington
Rick Renzi, Arizona	Mark Udall, Colorado
Stevan Pearce, New Mexico	Raúl M. Grijalva, Arizona
Henry Brown, Jr., South Carolina	Jim Costa, California
Thelma Drake, Virginia	Nick J. Rahall II, West Virginia, <i>ex officio</i>
Louie Gohmert, Texas	
Richard W. Pombo, California, <i>ex officio</i>	

## C O N T E N T S

---

Hearing held on Saturday, September 17, 2005 .....	Page 1
Statement of Members:	
Drake, Hon. Thelma, a Representative in Congress from the State of Virginia .....	2
McMorris, Hon. Cathy, a Representative in Congress from the State of Washington .....	1
Statement of Witnesses:	
Besa, Glen, Appalachian Regional Staff Director, Sierra Club, Richmond, Virginia .....	30
Prepared statement of .....	33
Holloway, Alverce, Jr., Pulp and Paperworkers Council Member, International Brotherhood of Firemen and Oilers, Local #176, Franklin, Virginia .....	8
Prepared statement of .....	9
Kelman, Gary F., C.E.P., President, National Association of Environmental Professionals, Bowie, Maryland .....	16
Prepared statement of .....	17
Shafer, John H., Manager, Sustainable Natural Resource Practices, NiSource Corporate Services Company, on behalf of the Interstate Natural Gas Association of America, Lafayette, Louisiana .....	10
Prepared statement of .....	12
Spainhour, Charles J., Corporate Manager of Environmental Services, Vulcan Materials Company, Birmingham, Alabama .....	26
Prepared statement of .....	28
Stiles, William A., Jr., Vice President, Wetlands Watch, Norfolk, Virginia .....	36
Prepared statement of .....	38
Wagner, Hon. Frank W., Senator, Seventh District, Senate of Virginia, Virginia Beach, Virginia .....	4
Prepared statement of .....	6



## **OVERSIGHT FIELD HEARING ON THE ROLE OF NEPA IN THE MID-ATLANTIC STATES**

---

**Saturday, September 17, 2005  
U.S. House of Representatives  
NEPA Task Force  
Committee on Resources  
Norfolk, Virginia**

---

The Committee met, pursuant to call, at 1:00 p.m., in the Ted Constant Convocation Center at Old Dominion University, Norfolk, Virginia, Hon. Cathy McMorris [Chairwoman of the Task Force] presiding.

Present: Representatives McMorris and Drake.

### **STATEMENT OF HON. CATHY McMORRIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON**

Ms. McMORRIS. Good afternoon. The hearing will come to order. I would like to welcome everyone, and welcome the members of the Old Dominion University Navy/Army ROTC Color Guard, who will post the colors, and then Robert Brown will lead us in the Pledge of Allegiance. So please rise.

[Presentation of the Colors and Pledge of Allegiance.]

Ms. McMORRIS. Please help me thank them.

Well, welcome to everyone. We are really pleased to be here. This is our fifth field hearing of the NEPA Task Force, the National Environmental Policy Act, and I am pleased that my fellow Representative, Thelma Drake, would invite us to this area of the world, and I look forward to hearing from her as well as everyone here today.

I am Cathy McMorris. I am from Washington State and have been asked by Chairman Richard Pombo to chair the NEPA Task Force. This will be our last field hearing, and then we will be wrapping up our business in Washington, D.C.

Already, we have learned a lot about the NEPA process and the way that we can make it work better. We have heard from a broad range of people on what works and what needs to be improved when it comes to NEPA.

We kicked off our field hearings back in April in Spokane where we heard about some key transportation projects that have been stalled because of time and costs. In Arizona, we heard that NEPA is hurting our ability to keep our forests healthy.

In Texas, we heard that it can take up to 20 years for a project, whether it is a reservoir, an oil refinery or a power plant that can or cannot be built. In New Mexico, we heard about the impact of NEPA on our private lands and ranches.

Farmers, ranchers, small businesses, tribal leaders, environmentalists and others all have had the chance to share their ideas and concerns with the Task Force, either in person or through written comments. We have encouraged that participation. We have had a website set up from the very beginning, welcomed e-mails, letters, comments from a host of people all across the Nation.

Over the past two weeks, Congress has focused on how best to address the aftermath of Hurricane Katrina. As we work together to rebuild the Gulf region and deal with record high energy costs that are hurting our farmers, our families and our businesses, our Task Force will look at how we can work to make sure NEPA doesn't impede access to affordable domestic energy, rebuilding of roads and homes, and managing our Nation's natural resources.

We all share the same goal of clean air, clean water and a healthy environment. We want to focus NEPA to ensure sound environmental decision instead of endless analysis and litigation. We must protect and enhance our wildlife, watersheds and communities, and put common sense back into environmental decision-making. NEPA shouldn't become bureaucracy in action.

In this process, we want to preserve the intent of NEPA, including the public involvement which is at the heart of this 35-year-old law.

Virginia and other States represented by our witnesses provide us unique examples of how NEPA works and how it can be improved. The goal of this Task Force has been to get out of Washington, D.C., to listen first to the people on the ground so that we can better understand if NEPA is living up to its intent.

So it is no secret that NEPA as well as other environmental laws have caused vast amounts of litigation, in some instances have stalled important economic development projects, and has cost taxpayers millions. Nearly every word in NEPA has been litigated. That, in my opinion, doesn't help our economy, and it certainly doesn't help our environment.

The question before this Task Force has been "how can we do better for our economy and for our environment?"

At this time, I would like to recognize Congresswoman Drake for her opening statement.

#### **STATEMENT OF HON. THELMA DRAKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA**

Ms. DRAKE. Thank you. Good afternoon, everyone. I would first like to thank Resources Chairman Richard Pombo and Chairwoman Cathy McMorris for allowing the NEPA Task Force to travel to Norfolk, and providing Hampton Roads citizens the opportunity to participate in this public hearing.

I would also like to thank today's witnesses for their testimony, Old Dominion University for providing this great space, and for all of the citizens who have decided to spend this beautiful Saturday afternoon at a Congressional hearing.

This field hearing provides us with the rare opportunity to put a local face on decisions made at the Federal level. It is one thing to discuss the merits of policy from within the confines of a Congressional committee room and quite another to bring the debate home. So often you hear of people going to Washington to get things done. It is refreshing to be able to say that we have brought Washington back to the local community.

We are a government of the people, by the people, and for the people, and therefore, I view today's exchange as an opportunity to participate in an exercise of democracy in one of its purest forms.

As we all know, when the National Environmental Policy Act was signed into law in 1970, it provided a foundation for environmental policymaking in the United States. As our nation's first comprehensive environmental law, its purpose is to help public officials make decisions based on an understanding of environmental consequences and take actions that protect, restore and enhance the environment. I believe that everyone here can agree that such a policy is needed, and its intent is worthwhile.

When the National Environmental Policy Act is mentioned out west, heads turn because of this region's unique relationship with the Federal Government. NEPA is a part of business as usual, because more than 44 percent of the west is owned by the Federal Government.

A colleague of ours characterizes it by saying, "We aren't just neighbors with the Federal Government. They are the entire neighborhood." As a result, NEPA is understood by many people and factors into many decisions made out west.

On the East Coast, NEPA can go unnoticed by ordinary citizens and businesses, because we are not in constant contact with the law. This may lead people to believe that we do not care about the implementation of NEPA and the effect it has on projects having to do with resources production, road building, and other construction projects. However, that statement could not be further from the truth.

The recent court case with the OLF in Washington County, North Carolina, is an example of NEPA working well. We will hear testimony today from several industries whose interactions with NEPA can change the way in which they do business.

I think every American can agree that each of these industries plays a pertinent role in everyday living. The purpose of this Task Force is to dig deep and learn as much as possible about this Act as we can.

We have held similar hearings all across America, and we will be using this information to examine if there are ways to improve the Act. We must remember that this law impacts many important sectors of our economy. We need a policy that is protecting our environment, but also one that is not hindering our economy.

I look forward to hearing from our witnesses, and I yield back my time.

Ms. MCMORRIS. Thank you very much.

As everyone recognizes, one of the key elements is public participation. Today we have invited seven witnesses who represent broad experience and backgrounds, and we want to hear from everyone as to their thoughts on NEPA. We encourage your comments, and

so we will be taking all of those comments into consideration as we move forward.

At this time, I would like to introduce our panel. First is Senator Frank Wagner. He is from the Seventh District of Virginia.

Next is Alverce Holloway, proud member of the Pulp and Paperworkers Resource Council; John Shafer of NiSource, on behalf of the Interstate Natural Gas Association of America.

Next is Gary Kelman, President of the National Association of Environmental Professionals. Following Mr. Kelman is Mr. Spainhour of Vulcan Materials. We also have Glen Besa of the Sierra Club, and wrapping it up is Skip Stiles of Wetlands Watch.

Thank you all for joining us today. We appreciate you taking the time to be here.

It is the policy of the Resources Committee to swear in witnesses. So at this time, I need to ask you to stand and raise your right hand.

[Witnesses sworn.]

Ms. MCMORRIS. Let the record reflect, the witnesses answered in the affirmative.

Before we get started, I need to point out that we have a time clock here. We have asked each of you to present five minutes worth of oral testimony. The yellow light will suggest that it is time to wrap up, and then the red light means that your time has expired. We will be asking questions following your testimony.

So we are just going to start and have each of you present your testimony. Then we will follow it all with the questions.

Senator Frank Wagner, if you would begin, that would be great.

#### **STATEMENT OF FRANK WAGNER, A SENATOR IN THE GENERAL ASSEMBLY OF THE STATE OF VIRGINIA**

Mr. WAGNER. Thank you, Madam Chairman, Congresswoman Drake. I want to thank you for taking the time from your schedule to hold the hearings in Hampton Roads. It is indeed an honor to have you here today.

As this country faces an increasingly severe energy crisis, it is altogether appropriate that you reexamine the 35-year-old NEPA laws. Our nation's energy crisis threatens our national security, our economic stability, and threatens the quality of our environment. However, I believe the manifestations of our failure to implement a sound energy policy is being borne by our constituents every day in sticker shock at the gas pump and skyrocketing cooling and heating bills.

This problem should not exist. It is solvable. But the problem can only be solved if we as policymakers provide the tools necessary to our citizens to solve it.

Let me start by saying that NEPA, as initially implemented, was a very positive process. Industries, utilities, and the environmental community and government regulators worked together to ensure that, as new projects came on line, the impact to the environment was minimal, and yet allowed the country to move forward through investments in energy development, domestic resources, and new technologies. However, over the decades, NEPA and other policies have evolved into tools that are being used successfully to block most new energy projects.



The proof of this lies in our failure to permit new, clean nuclear electric generation, nuclear power plants, and new liquified natural gas, or LNG, offload terminals. We have substantial domestic resources off limits in our country to development, including clean burning natural gas. Is it any wonder that we face an energy crisis?

Madam Chairman, we have all been shocked as we have watched events unfold in the aftermath of Hurricane Katrina. Our Commonwealth, indeed our entire nation, is assisting in any way we can in the relief and rebuilding efforts in the Gulf region. But if there is a silver lining in this cloud, it is the education of Americans as to the vulnerability, lack of redundancy and extreme limits that our nation's energy system is currently operating on.

The entire nation has felt the shock, and they are, rightfully, demanding solutions. We must not forget this lesson, and we must correct these intolerable situations.

Let me add one more comment on this terrible storm. Hurricane Katrina has shown us a glimpse of the future, a glimpse of where this country is headed in terms of our energy availability and our energy affordability under our existing energy policies.

As I mentioned in my opening comments, I believe existing NEPA laws can and will have a negative impact on the environment. Let me explain. Even prior to Katrina, the issue of availability and affordability of home heating products was an issue. Now it has become a crisis.

Madam Chairman, I have attached an article as part of your testimony about a firm in Maine written in the Boston Globe, and if I could read—if I could find it real quickly, I would read a little quick excerpt from that article. But it says, in commenting from the proprietor of this facility, "Now it is just unbelievable," he said. "I can't keep up with it. High oil prices have Mainers searching for cheaper alternatives, and firewood is at the top of the list."

Madam Chairman, I have attached an article. I can only assume that this is the case at thousands of locations all over the country, including New England and the Midwest, no doubt accelerating in the aftermath of Hurricane Katrina.

One question I have asked myself: What will put more pollution in the air this winter? Millions of unregulated fireplaces spewing tons of chemicals and ash into the air, or a few well regulated and carefully monitored coal burning utilities? What will produce more pollution, the millions of unregulated fireplaces or a few offshore natural gas wells producing hundreds of millions of cubic feet a day of clean burning natural gas?

I believe, through the well-intentioned efforts of some in the environmental community, using NEPA laws and other regulatory blocking actions, the stage has been set for record air pollution this winter.

More tragic than this are the millions of Americans who will not be able to afford to heat their homes or will be forced to decide on whether to pay for food, medicine or home heating. This is an inexcusable and intolerable condition for the greatest nation on earth. We must work to alleviate the short term impact of this situation; but, more importantly, we must resolve the long term policy mistakes that have driven us to where we are today.

In order to achieve an optimum condition for the environment, NEPA must look at the environmental impacts of not permitting a facility. Let me give you one example.

Much progress has been made in the area of hydrogen fuel cells. In fact, many predict that we are driven toward—and I look forward to that day—a hydrogen economy. These fuel cells can and will power our cars, if we have the capability of producing hydrogen in far greater quantities and at less cost than we currently do.

Hydrogen is produced by using electricity to convert water into hydrogen and oxygen. Our ability to produce electricity in this country can barely satisfy our current demand, much less the demands for hydrogen production created by fuel cells.

We will need to increase our electric power generation capability many times to meet this demand. Then it becomes an equation. What produces less pollution? We continue on our present course, that of fuel burning cars, producing noxide and all the rest of the car emissions, or millions of cars that were formerly burning gas but are now producing zero emissions from energy produced by several new coal, nuclear or renewable generating plants. The answer is (b), which also results in a much cleaner environment. Thousands of Americans will be employed, using American energy and American technology to meet American demand in fuel cells and automobiles.

One can follow this logic train through most of the nation's energy needs. Unfortunately, NEPA, in my estimation, as it is currently being used is being misused, and the legal and regulatory hurdles imposed have made what I have outlined a new impossibility.

Witness the many attempts of trying to establish renewable sources of energy—wind generation—in Cape Cod, Massachusetts and here in Virginia, only to have the permits blocked or the expenses associated with compliance too great to make an otherwise worthy project unfeasible. It is no wonder we are in the current energy plight.

Madam Chairman, I submit we must change this system. We have done much in Virginia to take a leadership role in attempting to open our offshore natural gas resources to development and working on a new energy strategy.

I am sorry. I wasn't even looking at the lights. I read that. I will yield no time back, and be glad to answer any questions that you have. Thank you, Madam Chairman.

[The prepared statement of Frank Wagner follows:]

**Statement of The Honorable Frank W. Wagner, Senator,  
7th District, Senate of Virginia**

Thank you, Madam Chairman, Congresswoman Drake; I want to thank you for taking time from your schedule to hold this hearing in Hampton Roads. It is indeed an honor to have you here today.

As this country faces an increasingly severe energy crisis, it is altogether appropriate that you re-examine the 30-year-old NEPA laws. Our nation's energy crisis threatens our national security, our economic stability and threatens the quality of our environment. However, I believe the real manifestation of our failure to implement a sound energy policy is being borne by our constituents every day in sticker shock at the gas pump and skyrocketing cooling and heating bills.

What really makes me angry is that this problem should not exist—it is solvable. But the problem can only be solved if we as policy makers provide the tools necessary to our citizens to solve it.

Let me start by saying that NEPA as initially implemented was a very positive process. Industry, utilities, the environmental community and government regulators worked together to insure that, as new projects came on line, the impact on the environment was minimal, yet allowed the country to move forward through investments in energy development, domestic resources and new technologies.

However, over the decades, NEPA and other policies have evolved into a tool that is being used successfully to block most new energy projects. The proof of this lies in our failure to permit new, clean nuclear electric generation and new Liquefied Natural Gas, or LNG, terminals. We have made substantial domestic energy sources off-limits to development, much of it clean burning natural gas. Is it any wonder we face an energy crisis?

Madam Chairman, we all have been shocked as we watched events unfold in the aftermath of Hurricane Katrina. Our citizens and our Commonwealth, indeed our entire nation, are assisting in any way we can in the relief and rebuilding efforts in the Gulf region.

But, if there is in any way a silver lining in this cloud, it is the education of Americans as to the vulnerability, lack of redundancy and the extreme limits on how our nation's energy system is allowed to operate. The entire nation felt the shock and they are, rightfully, demanding solutions. We must not forget this lesson and we must correct this intolerable situation.

Let me add one comment on this terrible storm. Hurricane Katrina has shown us a glimpse of the future. A glimpse of where this country is headed in terms of our energy availability and affordability under our existing energy policies.

As I mentioned in my opening comments, I believe existing NEPA laws can and will have a negative impact on the environment. Let me explain.

Even prior to Hurricane Katrina, the issue of availability and affordability of home heating products was an issue. Now it could become a crisis.

Madam Chairman, I have attached an article from a Maine newspaper that details the soaring sales in firewood, the largest demand that the particular supplier interviewed had ever seen. I can only assume that this is the case at thousands of locations across the country—no doubt accelerating in the aftermath of Hurricane Katrina.

One question I have asked myself is, what will put more pollution in the air this winter? Millions of unregulated fireplaces spewing tons of chemicals and ash into the air, or a few well-regulated and carefully monitored coal-burning utilities? What will produce more pollution, millions of unregulated fireplaces or a few offshore natural gas wells producing hundreds of millions of cubic feet—a day—of clean-burning natural gas? I believe through the well intentioned efforts of some in the environmental community, using NEPA laws and other regulatory blocking actions, the stage has been set for a record in worst air pollution ever.

More tragic than this is the millions of Americans who will not be able to afford to heat their homes or will be forced to decide on whether to pay for food, medicine or home heating. This is an inexcusable and intolerable condition for the greatest nation on earth. We must work to alleviate the short-term impact of this situation. But, more importantly, we must resolve the long-term policy mistakes that have driven us to where we are today.

In order to achieve an optimum condition for the environment, NEPA must look at the environmental impacts of not permitting a facility. Let me give you one example.

Much progress has been made in the area of hydrogen fuel cells. These fuel cells can and will power our cars, if we have the capability of producing hydrogen in far greater quantities and at less cost than we currently do.

Hydrogen is produced by using electricity to convert water into hydrogen and oxygen. Our ability to produce electricity in the country can barely satisfy our current demand, much less the demands for hydrogen production created by fuel cells. We will need to increase our electric power generating capability many times to meet the demand. Then, it becomes an equation. What produces more air pollution? A) We continue on our present course or B) millions of cars that were formerly burning gas, but are now producing zero emissions from energy produced by several new coal, nuclear and renewable generating plants. The answer is B), which also results in a much cleaner environment. Thousands of Americans will be employed, using American energy and technology to meet American demand.

One can follow this logic train through most of our nation's energy needs. Unfortunately, NEPA, in my estimation, is being misused and the legal and regulatory hurdles imposed have made what I outlined a near impossibility. Witness the many attempts of trying to establish renewable sources of energy—wind generation—in Cape Cod, Massachusetts and here in Virginia, only to have permits blocked or the

expenses associated with compliance too great to make an otherwise worthy project unfeasible. It's no wonder we are in this plight.

Madam Chairman, I submit that we must change this system. We have done much in Virginia, taking a leadership role in attempting to open our offshore natural gas resources to development and working on a new energy strategy. But you in the federal government must act to provide a framework so that our critical energy needs can be met. From the factory worker to the farmer to the fixed-income retiree trying to keep his or her house warm, we look to your leadership.

Once again, thank you for the opportunity to speak before you today. I look forward to answering any questions you may have.

NOTE: The article submitted for the record is copyrighted and has been retained in the Committee's official files.

---

Ms. MCMORRIS. Thank you very much.  
Mr. Holloway.

**STATEMENT OF ALVERCE HOLLOWAY, INTERNATIONAL  
BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 176**

Mr. HOLLOWAY. Thank you, Madam Chairman, Congressman Drake. My name is Alverce Holloway. I am an hourly employee at International Paper and a member of the Pulp—

Ms. MCMORRIS. Hold the mike a little closer.

Mr. HOLLOWAY. Sorry, I apologize. My name is Alverce Holloway. I am an employee of International Paper and a member of the Pulp & Paper Resource Council. I am married with two children and one grandchild.

My paper mill which was built in Franklin and built and owned by one family, the Camp family, in 1930 has also employed my father and my brother, with approximately 75 years of working for the paper mill in Franklin, now owned by International Paper.

I believe it is a good idea that we are holding a hearing now on NEPA to allow the Committee to hear different views as to what is right and what is wrong with NEPA. Let me explain what the Pulp & Paper Resource Council is.

The Pulp & Paper Resource Council is a national grassroots labor coalition associated with fiber supply, the Endangered Species Act, and the environment in a way that promotes knowledge and political activism so that we may influence legislation that affect our jobs.

The Pulp & Paper Resource Council is the only national grassroots labor organization solely dedicated to the representation of natural resource-based workers. As an active member of the PPRC, I will help unify the voice of over 1.5 million workers throughout the United States.

In the early 1990s, the extreme environmentalists were determined to shut down forest industries by using the ESA. They stated that the spotted owl could not live in new growth forest. This resulted in many manufacturing industries being shut down. Thousands of jobs and lucrative tax bases were lost.

We now know that the spotted owl thrives in new growth forests. However, because the forest industry did a poor job of explaining our issues, communities and thousands of individuals and their livelihoods were changed forever. This is why the PPRC was formed, so that decisions being made by legislators would be made after hearing our concerns and scientific facts from within the forestry community.

I want it to be understood that the Pulp & Paper Resource Council does not want NEPA eliminated. However, based on the time it was introduced over 30 years ago, changes need to be made. We feel that NEPA does need to be streamlined and modernized.

NEPA's intent was to bring a balance to the environment and industry, but it seems that the message has been lost. NEPA is being used as a tool to hinder forestry production, just as the Endangered Species Act and the New Source Review is currently doing.

The American pulp and paper industry is greatly challenged by competition of less developed countries with much lower costs for production for things such as natural gas. Part of my mill's production is based on natural gas, a fuel that increased greatly in price in the last year. Higher natural gas costs can lead to less paper production in Franklin, Virginia, and cost of fuel—less fuel, less jobs for people like myself.

NEPA has been used by lawyers and environmental groups to stop and delay natural gas exploration at the expense of manufacturing workers. The Resources Committee needs to find a way to minimize litigation which only produces pink slips for hourly workers.

I would like to reiterate that NEPA is a good program, providing it is used for its intended purpose. We cannot continue to let hundreds of acres of timber sales turn into a three-foot stack of paperwork as a result of ending up in courts because of litigations.

The forest product industry is an industry under fire. We face major obstacles every day. We face an uphill battle because of the cost of growing imports and the strict environmental laws in the United States.

All we ask for is a level playing field. We ask the Federal and the State government to help us remain competitive in a global market. When the companies we work for decide it is no longer profitable to operate here in the United States, they will join those others who have chosen to operate out of this country where there is less restrictions. We need to keep our manufacturing industries in the United States where we have environmental laws implemented for the best interest for our country.

Thank you.

[The prepared statement of Alverce Holloway follows:]

**Statement of Alverce Holloway, Jr., Pulp & Paperworkers Resource Council Member, International Brotherhood of Firemen and Oilers, Local #176,**

Mr. Chairman and Members of the Committee, my name is Alverce Holloway, Jr. I am an hourly employee at International Paper and a member of the Pulp & Paperworkers Resource Council (PPRC). I'm married with two children and one grandchild.

Thank you to the committee for allowing me the opportunity to testify. I believe that it's a good idea that you are holding a hearing on NEPA to allow the committee to hear different views on what is right and what is thought wrong with NEPA.

Let me explain who the Pulp & Paperworkers Resource Council are. The Pulp & Paperworkers Resource Council is a national grassroots labor coalition associated with fiber supply, the Endangered Species Act, and the environment in a way that promotes knowledge and political activism so that we may influence legislation that affect our jobs. The PPRC is the only national grassroots labor organization solely dedicated to the representation of natural resource-based workers. As an active member of the PPRC, I will help unify the voice of over 1.5 million workers throughout the United States.

In the early 1990's, the extreme environmentalist were determined to shut down forest industries by using ESA. They stated that the spotted owl could not live in new growth forest. This resulted in many manufacturing industries shut down, thousands of jobs and lucrative tax bases were lost. We now know that the spotted owl thrives in new growth forest. However, because the forest industry did a poor job of explaining our issues, communities and thousands of individuals and their livelihoods were changed forever. This is why the PPRC was formed so that decisions being made by legislators would be made after hearing our concerns and scientific facts from within the forestry community.

I want it to be understood that the Pulp & Paper Resource Council does not want NEPA eliminated; however, based on the time it was introduced, over 30 years ago, changes need to be made. We feel that NEPA does need to be streamlined and modernized.

NEPA's intent was to bring a balance between the environment and industry, but it seems that the message has been lost. NEPA is being used as a tool to hinder forestry production just as the Endangered Species Act and the New Source Review is currently doing.

I would like to reiterate that NEPA is a good program providing it is used for its intended purpose. We cannot continue to let hundreds of acre timber sales turn into a 3 ft. stack of paperwork, as a result, ending up in the courts because of litigations.

Forest product industry is an industry under fire. We face major obstacles everyday. We face an uphill battle because of the cost of growing imports and the strict environmental laws in the United States. All we ask for is a level playing field. We ask federal and state governments to help us to remain competitive in a global market. When the companies we work for decide that it is no longer profitable to operate in the United States, they will move overseas and by the way some companies already have. We need to keep our manufacturing industries in the United States where we have environmental laws implemented for the best interest for our country.

---

Ms. MCMORRIS. OK. Thank you.

We are going to take a quick break.

Ms. DRAKE. I would just ask Chairman McMorris if we could take a break just for a moment so we could recognize that ODU's President, Roseann Runte, is here, and we want to thank her very much for her hospitality and for allowing this public meeting to take place. Thank you, Dr. Runte.

Ms. MCMORRIS. And just to make sure that it all seems fair, we will allow you a little extra time. We will move it to six. I think we will have enough time to get through everyone in a timely fashion. Thank you.

Mr. Shafer, please continue.

#### **STATEMENT OF JOHN H. SHAFER, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA**

Mr. SHAFER. Madam Chairwoman, Congressman Drake, it is a pleasure to be here today, coming up from Louisiana to represent my company, NiSource, as well as the Interstate Natural Gas Association of America, INGAA.

Natural gas markets are very sensitive to supply disruptions, such as the one caused by Hurricane Katrina just two weeks ago. Even though assessment is preliminary, damage from the storm to some energy infrastructure could take months to repair.

Offshore production in the Gulf is gradually coming back on line, but processing plants on shore are a bottleneck, and may be out for as long as six months or more. These processing plants are critical to the supply chain. It becomes more critical as we look to winter months ahead and increasing demand.

Underground storage is also vital. About half the natural gas demand is satisfied on winter peak days by withdrawing supplies from underground storage reservoirs that have been filled with extra gas on nonpeak days. The injection of storage has been slowed, but it is now improving. Any delays in the establishment in the flow of energy could be very costly.

The recommendations INGAA brings today will not alter the objectives of NEPA: Diminish environmental protection or lower any existing environmental quality standards. Some of these solutions are found in part in the Energy Policy Act of 2005, at least as it relates to natural gas projects under jurisdiction of the Federal Energy Regulatory Commission.

INGAA suggests that these solutions should be applied to all types of energy project reviews under NEPA, not just FERC approved natural gas projects.

Recommendation 1: Establish a clearly defined lead agency for each type of proposed project. Eliminate the conflict among agencies as to who has the lead, and it should be an agency that has primary responsibility for the approval of the proposed development project.

Recommendation 2: Allow the lead agency to institute specific timelines for NEPA reviews. An agency's inaction can delay and even kill a project. Empower the lead agency to set a schedule. Establish joint meetings and reviews, and the process becomes more simultaneous rather than sequential. If a cooperating agency does not act within the published timeframe, then their approval is assumed.

Recommendation 3: Ability to enforce a lead agency deadline. There must be a mechanism that allows the lead agency to enforce the published schedule. The enforcement must enable the lead agency to presume that all appropriate and applicable comments are in when the deadline passes.

Recommendation 4: Creation of a consolidated record for a NEPA review on all energy projects. There should be only one NEPA record for review, one environmental impact assessment, and all permitting decisions drawn from that basis. Allowing the development of separate NEPA documents is time consuming, costly, and unfair to the developer and the agencies that cooperate.

Recommendation 5: Streamline subsequent reviews and permit approvals for projects managed pursuant to the Pipeline Safety Improvement Act 2002. This new Act will require significant excavation activities for inspection and possible repairs of pipelines. It may even require a large volume of permits. Many pipelines already have an environmental assessment/environmental impact study on that facility that may need some safety work. NEPA should recognize previous studies and allow pipeline operators to move expeditiously to perform inspections and repairs. For facilities who have no environmental assessment or study, NEPA should allow for expedited analysis of impacts by lead agency and establish a streamlined schedule.

Recommendation 6: Make a "Team Permitting" opportunity available on a voluntary basis. This could be patterned after the team permitting concept established in the State of Florida. It would promote early input by all stakeholders.

Under team permitting, a lead agency, cooperators and others would work with the applicant to achieve acceptable permit conditions and mitigation. The group would also work proactively with the applicant to set "net ecosystem benefits" that are pledged and will be furnished as soon as all approvals are in.

Recommendation 7: Streamline NEPA permit reviews and approvals by adopting a process similar to the one used pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, CERCLA or Superfund. NEPA reviews could be managed in a manner similar to the way projects are handled under CERCLA.

The CERCLA law required EPA or principal responsible parties to respond to releases of hazardous constituents. In the beginning, administrative requirements imposed by jurisdictional agencies were delaying the cleanup of these sites. Legislation was passed to require EPA to impose all substantive requirements of existing environmental law, but exempted those projects from the administrative aspects of other agencies.

A NEPA lead agency could act much like the EPA and serve as a place where the applicant for energy projects would seek NEPA clearance and move forward. An innovative, one-stop shopping NEPA approach could significantly streamline the process. When the NEPA review would be complete, it would be deemed that approvals had been received for all permits necessary to implement the development.

Let me conclude by thanking the Committee for allowing me to testify today. I will be happy to answer any of your questions. Thank you.

[The prepared statement of John H. Shafer follows:]

**Statement of John H. Shafer, Manager, Sustainable Natural Resource Practices, NiSource Corporate Services Company, on behalf of the Interstate Natural Gas Association of America**

**Opening Remarks:**

My name is John H. Shafer and I reside in Benton, Louisiana. I am currently employed by NiSource Corporate Services as Manager of Sustainable Natural Resource Practices. As an energy sector professional, I have over 35 years of experience in environmental and regulatory planning and permitting. This experience includes the siting, permitting and construction of petroleum and natural gas facilities such as pipelines and terminals. I also served as Assistant Director of Environmental Policy at the White House in 1993, during which time I created the President's Council on Sustainable Development.

NiSource Inc. is a fully integrated energy company and it engages in natural gas transmission, storage and distribution, as well as electric generation, transmission and distribution. NiSource operating companies deliver energy to 3.7 million customers located within the high demand energy corridor that runs from the Gulf Coast through the Midwest to New England. NiSource pipelines and distribution subsidiaries are active in several Mid-Atlantic States such as Maryland, Virginia and West Virginia. NiSource distribution companies are experiencing growth in the Mid-Atlantic region and its pipelines are experiencing opportunities for growth to meet market demand.

NiSource is a member of the Interstate Natural Gas Association of America (INGAA) and I am pleased to appear here today to represent INGAA in these proceedings. INGAA is a trade organization that represents virtually all of the interstate natural gas transmission pipeline companies operating in the U.S., as well as comparable companies in Canada and Mexico. Its members transport over 95 percent of the nation's natural gas through a network of 180,000 miles of pipelines.

First, I would like to thank you, Representative McMorris for your leadership in Chairing this Task Force, and House Resources Committee Chairman Richard Pombo, and the other Task Force Members and the staff for your willingness to



review NEPA and look for opportunities to improve the environmental review and mitigation process.

Many of you are acutely aware that natural gas markets are currently in a delicate balance of supply and demand, which is driving up prices. This tight supply/demand balance makes the natural gas market even more sensitive to supply disruptions such as the one that occurred with Hurricane Katrina two weeks ago. Our industry is still assessing the damage from the storm, and we will clearly be working for some months on repairs, but I would like to share some initial thoughts today.

Natural gas pipelines in the Gulf region did sustain some damage as a result of Hurricane Katrina, although most of the damage was minor and natural gas deliveries to other regions of the country have largely continued. However, a number of off-shore production facilities were damaged, and perhaps most troubling, several key natural gas processing facilities in the area sustained major damage. While off-shore production in the Gulf is gradually coming back on line, these processing plants may be out for as long as six months. Natural gas processing is critical, especially during cold weather periods, to ensure that the gas has acceptable quality and does not damage pipelines and end-use equipment. Getting these processing facilities back into operation before the winter heating season should be a priority.

In addition, the nation's natural gas storage has been impacted by the hurricane. Natural gas storage is a critical component to meeting winter peak demand; on the coldest days of the year, a given market area may be meeting 30 to 50 percent of its natural gas demand through storage withdrawals. Therefore, it's important that gas storage reservoirs be filled during the fall in order to be ready for winter. With gas production and processing at reduced levels, however, current storage injections have slowed, and in fact some storage in the Gulf region has already been withdrawn in order to meet immediate demand. This is yet another reason to get pipelines, production and processing back on line as soon as possible.

As you can see, the delicate balance that exists for the natural gas industry to meet energy demand in the U.S. is reason enough to eliminate unnecessary permitting delays for gas infrastructure. Our economic security often depends on the timely expansion, or repair, of these energy facilities. In fact, a study completed by the INGAA Foundation last year, which looked at delays in needed natural gas infrastructure projects, suggested that a two-year delay in getting such projects built would cost American consumers \$200 billion by 2020. Let me repeat that: \$200 billion by 2020, and that is only for delays, not project cancellations. I would be happy to provide a copy of this report to the Committee for the record.

This leads me to the topic of today's hearing, the National Environmental Policy Act (NEPA). In the 35 years since its enactment, compliance with NEPA has taken progressively longer and longer for natural gas projects. We do not, however, propose to alter the objectives of the NEPA. On the contrary, NEPA remains an important environmental safeguard, balancing the needs of economic development with the need to protect environmental quality. Our suggested solutions deal with the implementation of NEPA, and in particular, the ways different federal and state permitting agencies should work together under the Act.

I am happy to report that a number of these solutions were part of the recently enacted Energy Policy Act of 2005 (Public Law 109-58), at least with respect to natural gas projects approved by the Federal Energy Regulatory Commission (FERC). Our association has grappled with the issue of NEPA compliance for many years, looking specifically at ways to reduce unnecessary delays and improve cooperation among the many federal and state agencies that might be reviewing a proposed project. These suggestions do not alter existing environmental quality standards. They do, however, increase the level of accountability, cooperation and efficiency among permitting agencies—hardly an unfair or unreasonable set of expectations. We hope the Committee will look at extending these ideas to all types of energy project reviews under NEPA, not just FERC-approved natural gas projects. Here are our suggestions:

**Recommendation 1—Establish a clearly defined “lead agency” for each type of proposed project.**

On any given proposed project for development, there can be conflict among agencies as to who should take the lead. There does need to be one lead agency for each type of project though, and direction from Congress or the Council on Environmental Quality (CEQ) could resolve such conflict before it arises. For example, Section 313 of the new Energy Policy Act designates the FERC as the lead agency under NEPA for all projects requiring an authorization or approval pursuant to the Natural Gas Act; in other words, all interstate natural gas pipelines, storage

facilities, or LNG import terminals. The lead agency should be one that has primary responsibility for the ultimate approval of an activity or project.

**Recommendation 2—Allow the lead agency to institute specific timelines for NEPA reviews.**

This recommendation is important to keeping the review process manageable while providing some time certainty to applicants. While most agencies are willing to work with the sister organizations in a cooperative manner, our own experience in the gas pipeline industry is that some agencies will use inaction as a way to delay and even kill a project. If the lead agency is empowered to set a schedule, and to establish joint agency meetings and reviews, then the process becomes more cooperative and efficient as agencies negotiate face-to-face rather than from some distance. Here again, Section 313 of the Energy Policy Act allows the FERC, for pipeline and LNG projects, to set such a schedule. However, the Act also states that the FERC should incorporate any existing timeframes any agency might have to reach a decision on a permit. An amendment to NEPA should establish that the lead agency has overall authority to establish a time schedule for review and all cooperating agencies must act within that time frame.

**Recommendation 3—Ability to enforce a lead agency deadline.**

Ideally, the ability to set a deadline should be coupled with a way to enforce the deadline, so that agencies take a lead agency deadline seriously. Several earlier versions of the Energy Policy Act contained a provision requiring cooperating agencies to either act within the FERC-approved deadline (for natural gas projects), or else have their approval “conclusively presumed.” Both the Coastal Zone Management Act (CZMA) and the Clean Water Act contain deadlines for state enforcement agencies to either make permitting decisions or have their approval assumed, so the proposals in the energy bill debate weren’t all that unusual. Nonetheless, the Energy Bill Conference Committee decided to be more conciliatory, by instead allowing an applicant to appeal an agency permitting delay to the U.S. Court of Appeals for the D.C. Circuit. We believe there must be a mechanism applicable to all involved agencies that allows the lead agency to enforce its schedules.

**Recommendation 4—Creation of a consolidated record for a NEPA review and all permitting decisions.**

The lead agency should be charged with the responsibility to develop a consolidated record for the NEPA review and EIS development, and all permitting decisions required as a result. Once again, this encourages the various federal and state agencies to work together in a cooperative fashion to develop a consolidated record. In order to make sure that agencies take this requirement seriously, Congress should require that this consolidated record be the record used for all subsequent appeals or Administrative reviews.

A consolidated record is important. Our industry has found that some agencies have “sat out” on FERC NEPA reviews of proposed projects, and then subsequently appealed FERC’s approval decisions and attempted to develop a de novo review of all the facts previously considered by FERC and the cooperating agencies. Developing an entirely new record, when ample opportunity is given to participate in the development of the first one, is time-consuming and unfair to all of the agencies that did participate cooperatively. This consolidated record requirement is a part of the Energy Policy Act with respect to natural gas projects; it should be considered for other NEPA approvals as well.

**Recommendation 5—Streamline subsequent reviews and permit approvals for projects managed pursuant to the Pipeline Safety Improvement Act.**

The natural gas industry is facing a huge amount of work to comply with the safety regulations codified pursuant to the passage, in 2002, of the Pipeline Safety Improvement Act. The Act created specific timeframes for all natural gas transmission pipelines to assess (or inspect) the integrity of all pipeline located in populated areas. By December of 2012, all pipelines located in these “high consequence areas” must have a baseline assessment of its integrity. These inspections, and any subsequent repairs, will require significant excavation activity, triggering permit requirements. The ability to obtain the necessary permits, so that this inspection/repair activity can be completed pursuant to the Congressionally mandated timeframe, will be critical to the success of the program.

Most of the effected pipelines have already developed an EIS years ago, as part of any construction or expansion activity. We need to make certain that the permitting process for the integrity management program recognizes previous work, and gives pipeline operators some flexibility to meet requirements that, after all, have been mandated for safety purposes by Congress.

In the event that a pipeline has work that must be performed pursuant to compliance with the regulations under the Pipeline Safety Improvement Act and that particular pipeline segment has never had an EIS performed on its facilities, NEPA should allow for expedited analysis of impacts by the lead agency and the establishment of a streamlined review schedule for all cooperating agencies that meets the safety requirements imposed by DOT, OPS, or PHMSA.

**Recommendation 6—Make a “Team Permitting” opportunity available on voluntary basis.**

This voluntary process, would be one similar to the “Team Permitting” concept employed within the State of Florida, pursuant to Chapter 403.075, Florida Statutes, for early coordination with regulatory agencies, local governments, and special interest groups for development related permitting.

An amendment to NEPA could include a section to establish the opportunity for a developer to engage a lead agency, other regulatory stakeholders, and interested parties in an open process in which all NEPA issues could be identified and dealt with to the satisfaction of those involved. In this voluntary process, an applicant seeking any federal permit applicable for NEPA review could enter into a non-binding agreement with the federal “lead agency.” This would be initiated by the applicant and would be only on a voluntary basis. Once initiated by the applicant, the lead agency would notify all potential cooperating agencies of the opportunity to join this collaborative and advisory “Team Permitting Group.” A federal notice of such meetings of the group would be published and any interested party could join the review process (this could include any environmental group or other interested party). A schedule for review and processing of all permits would be developed by the lead agency and the Team Permitting group and all milestone dates for processing would be met by the applicant as well as the agencies involved.

In Team Permitting all permitting agencies and interested parties would meet together and work simultaneously on the technical aspects of the proposed development and to reduce the overall total impact of the project. This would also include any necessary mitigation. This collaborative effort on the technical aspects of the proposal would greatly help the various regulatory permitting personnel who too often work in a silo effect as they assess the impact of the proposed development and any mitigation that might be required. In order to enter into this voluntary Team Permitting process, the applicant would pledge, in the beginning, to do what will be referred to as “net ecosystem benefits” which will be over and above any level of mitigation assigned by the various permitting agencies. No “net ecosystem benefits” would be performed by the applicant until all timely permits are issued, required mitigation agreed to by the parties, in accordance with the schedule agreed to in the beginning by the Team Permitting Group. Their respective regulatory division will issue all individual required environmental permits from federal regulatory agencies, from any state government, as well as any local government. Again, the agreed to “net ecosystem benefits” will not be performed by the applicant unless all permits are issued in accordance with the agreed to schedule.

**Recommendation 7—Streamline NEPA permit reviews and approvals by adopting a process similar to the one used pursuant to CERCLA (or Superfund).**

Permitting for projects undergoing NEPA review (especially those that have an existing EIS) could be managed in a manner similar to the way in which permits are expedited pursuant to CERCLA. In the early 1980’s, Congress faced a similar situation with response actions needed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund. This legislation required the EPA or potentially responsible parties to respond to releases of hazardous constituents. During the initial implementation of CERCLA, it was quickly recognized that Federal, State or local requirements imposed significant delays to this critical work. To avoid these delays, legislation was passed to require EPA to impose all substantive requirements of these rules, but exempted the projects from the administrative aspects of Federal, State and local requirements. Natural gas facilities could be sited, permitted, constructed, repaired and upgraded, pursuant to an amended NEPA that would have language similar to the language contained in Section 121 of CERCLA.

Under this revised process, during the NEPA review the lead Agency would act in a manner similar to the role EPA plays in authorizing work under CERCLA. Applicants would be required to discuss and comply with substantive requirements of all applicable, relevant and appropriate requirements (known as ARARs under CERCLA). The public and any affected Agencies would have an opportunity to comment on all planned work. However, the approval under NEPA would also

constitute approval for all permits necessary to implement the work. This would greatly streamline the process to gain approval for needed maintenance or new construction while still insuring all technical requirements are met.

Let me conclude by thanking the Committee for allowing me to testify today. I would be happy to answer any questions you might have.

Ms. MCMORRIS. Great. Thanks for being here.  
Mr. Kelman.

**STATEMENT OF GARY F. KELMAN, NATIONAL ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS**

Mr. KELMAN. Madam Chairwoman, Congressman Drake, good afternoon. I am Gary Kelman, President of the National Association of Environmental Professionals. I appreciate the invitation to testify before the Task Force.

We have submitted written testimony to the Task Force, which includes an attachment that addresses interpretations of NEPA by Federal courts. NAEP is a national professional organization with approximately 1300 members, thousands of affiliated professionals with chapters throughout the United States. NAEP members include professionals with expertise in a broad cross-section of engineering, scientific, planning, technical, legal and academic disciplines. Our members work in and with government agencies at the Federal, State and local levels, as well as in private practice with contractors and consulting firms, and also in universities and other academic positions nationwide.

NAEP members have been involved in implementing NEPA since its enactment. Such activities have included preparation and review of NEPA documents, development of training programs for other NEPA practitioners, and providing expert technical and policy assistance to both government and private sector clients.

NEPA and its implementation are frequent topics in our quarterly journal, *Environmental Practice* which is published by Cambridge University Press. A special December 2003 issue was devoted entirely to NEPA. NAEP welcomes the opportunity to share with you our collective professional experience with NEPA.

Our position with regard to NEPA may be summarized as follows: NAEP supports the environmental analysis process established by NEPA, including the public's right to participate in that process. NAEP opposes any revisions of NEPA that would likely be detrimental to NEPA's established purpose, policy, and procedures.

NAEP supports and intends to help implement the recommendations of the CEQ NEPA Task Force for modernizing NEPA that were made in 2003. NAEP recommends that the Congress mandate significant increases in staffing, funding, and training to enable CEQ and the Federal agencies to do more efficiently and effectively fulfill their responsibilities for compliance with NEPA.

NAEP believes that it is essential to preserve and maintain the role of judicial review as the primary external NEPA compliance mechanism. The best way to reduce NEPA related litigation is to improve existing NEPA capabilities within the agencies.

In particular, I would like to emphasize the following: Many of the allegations raised against NEPA in recent years stem not from either NEPA but from government agencies having failed to follow adequately the clear language and intent of both of these

documents. Nothing in either NEPA—in NEPA requires agencies to take years to complete environmental studies or to produce multi-volume documents or to spend millions of dollars to do so.

Furthermore, the record of NEPA litigation shows that in most of the court cases that agencies have lost, the root cause has been their failure to perform the basic planning functions that NEPA requires.

In addition, we strongly recommend that one or more additional professional positions be established at CEQ to provide the agencies with more ongoing NEPA related technical advice, policy guidance, and coordination. At present, only one professional staff member is assigned this function full time, and must deal with more than 80 Federal agencies subject to NEPA. There were as many as six at CEQ in the past. We believe that additional CEQ oversight can and should help the agencies to be more efficient and more effective in the conduct of their NEPA compliance, and should help reduce unnecessary delays, expense and litigation.

The Task Force should also conduct an evaluation of the professional staff levels, funding opportunities for training and advancement, and workloads in the NEPA compliance offices in the Federal agencies, and should make appropriate recommendations for improving their capabilities.

In the past several years, many NEPA offices have been subjected to reductions in both their budget and staff positions. NAEP believes that these cuts, sometimes up to 50 percent, have contributed to a decline in the quality of NEPA documents and to unnecessary delays and costs in implementing the NEPA process.

For its part, NAEP intends to continue working with CEQ and the agencies to help improve the NEPA process. We would, for example, be pleased to contribute to a "Citizens Guide to NEPA" and/or to help develop additional administrative guidance to make NEPA's environmental evaluation and review process more effective and efficient and less costly and time consuming.

In conclusion, NAEP has supported and continues to advocate improvements in the implementation of one of our nation's most important environmental laws. We are, however, concerned that any Congressional recommendations for changes in the existing NEPA process be based on a careful, objective analysis of facts, rather than on vague allegations of problems that may result from causes other than the requirements of NEPA.

NAEP's view is that the recommendations we have described here and in our written testimony should be implemented, and their effectiveness should be objectively evaluated before other potentially unnecessary or counterproductive legislative actions are pursued.

[The prepared statement of Gary F. Kelman follows:]

**Statement of Gary F. Kelman, C.E.P., President,  
National Association of Environmental Professionals**

This statement is submitted to the U.S. House Resources Committee Task Force on Improving the National Environmental Policy Act (NEPA) on behalf of the National Association of Environmental Professionals (NAEP), a national professional organization of approximately 1,300 members; thousands of affiliated professionals; and state, regional and student chapters throughout the United States. NAEP members include professionals with expertise in a broad cross-section of engineering, scientific, planning, technical, legal, and academic disciplines. Our

members work in and with government agencies at the federal, state and local levels as well as in private practice with contractors and consulting firms and also in universities and other academic positions nationwide.

NAEP members have been involved in implementing the National Environmental Policy Act from the 1970s to the present. Such activities have included preparation and review of NEPA documents, development of training programs for other NEPA practitioners, and providing expert technical and policy assistance to both government and private-sector clients. NAEP maintains a quarterly professional journal, *Environmental Practice*, published by Cambridge University Press, which contains technical articles, case studies, news, and information. NEPA and its implementation are frequent topics in the journal; a special December 2003 issue was devoted entirely to NEPA.

NAEP welcomes the Congressional Task Force's interest in reviewing NEPA and in developing recommendations for improving the way the law and its regulations are being implemented by the federal agencies and their state, tribal, and local cooperating agencies. We also welcome the opportunity to share with you our collective professional experience with NEPA, the NEPA Regulations of the Council on Environmental Quality (CEQ), and the practice of NEPA in the agencies. Our position with regard to NEPA may be summarized as follows:

#### **NAEP's Position on Improving the NEPA Process**

1. NAEP unequivocally supports the environmental analysis process established by NEPA and the regulations of the CEQ, including the public's right to participate in that process.
2. NAEP opposes any revisions of NEPA or the CEQ regulations that would likely be detrimental to NEPA's established purpose, policy, and procedures.
3. NAEP supports and intends to help implement the recommendations of the CEQ NEPA Task Force for "modernizing NEPA" that were made in 2003.
4. NAEP recommends that the Congress mandate significant increases in staffing, funding, and training to enable CEQ and the federal agencies to more efficiently and effectively fulfill their responsibilities for compliance with NEPA.
5. NAEP believes that it is essential to preserve and maintain the role of judicial review as the primary external NEPA compliance mechanism. The best way to reduce NEPA-related litigation is to improve existing NEPA capabilities within the agencies.

NAEP strongly supports the purpose and intent of NEPA, as expressed in Section 2 and Title I of NEPA itself, as well as in Part 1500 of the CEQ's NEPA Regulations. The environmental analysis process established by NEPA was intended as a way to assure our citizens that federal agencies, before taking actions that could have significant environmental impacts, would assess those potential impacts, including reasonable alternatives that might avoid or minimize adverse effects, and invite public review and comment on the adequacy of the results of that analysis.

In our experience, NEPA has resulted in thousands of improvements to proposed federal projects, plans, and programs and has helped to protect and maintain the quality of our human environment. NEPA's environmental analysis requirement, first adopted here in the United States, has proven so beneficial that it has been widely emulated around the world. Various adaptations of NEPA are now established law in more than 100 other countries and have also been adopted by the World Bank and most other multilateral development institutions. Having a pre-decision, public, environmental impact analysis process is now considered a key measure of democracy by citizens of many nations.

Few, if any, laws have ever been implemented perfectly or without controversy. Although Title II of NEPA established the Council on Environmental Quality and charged it with, among other duties, overseeing the implementation of NEPA's requirements by federal departments and agencies, CEQ initially lacked binding legal authority for its guidance, which meant that compliance with NEPA rested primarily with the federal courts. This deficiency was addressed in 1978 when CEQ published its Regulations (now codified at 40 C.F.R. Parts 1500-1508). Most federal agencies, state and local governments, business leaders, and environmental organizations welcomed the policy and procedural guidance in these regulations, which clarified the process and helped restrain inappropriate litigation.

#### **NEPA is Not the Problem**

In NAEP's view, many of the allegations raised against NEPA in recent years stem not from either NEPA or the CEQ Regulations, but from government agencies having failed to follow adequately the clear language and intent of both these documents. Nothing in either NEPA or the CEQ Regulations requires agencies to take years to complete environmental studies, or to produce multi-volume documents, or

to spend millions of dollars to do so. Furthermore, the record of NEPA litigation shows that in most of the court cases that agencies have lost, the root cause has been their failure to perform the basic planning functions that NEPA requires, i.e., to analyze objectively the potential impacts of their actions, including reasonable alternatives, and to prepare the required public documents—either an Environmental Impact Statement (EIS) or a shorter Environmental Assessment (EA). Attempts to defend such failures have often consumed more time and funds than it would have taken to produce at the outset the NEPA analysis and documents that the courts eventually required.

In an effort to review and improve the NEPA process, CEQ itself established an interagency NEPA Task Force in the spring of 2002. This Task Force, composed of experienced NEPA practitioners from multiple federal agencies, published its report, entitled “Modernizing NEPA Implementation,” in September 2003. This report made many recommendations for improving the NEPA process, organized under six general themes. None of those recommendations involves changes to NEPA or to the CEQ Regulations. The NAEP supports the findings of the CEQ Task Force; it is our position that the recommendations contained in its report should be implemented without delay, and that the Congress should provide CEQ and the agencies with the additional resources that will be needed to do so.

#### **NAEP’s Position on Specific Recommendations of CEQ’s NEPA Task Force**

The most important of these recommendations, in our opinion, is that one or more additional professional positions be established at CEQ to provide the agencies with more ongoing NEPA-related technical advice, policy guidance, and coordination. At present only one professional staff member is assigned this function full-time, whereas in past administrations as many as six full-time professionals on the CEQ staff performed these essential duties in dealing with the more than 80 federal agencies subject to NEPA. We believe that additional CEQ oversight can and should help the agencies to be more efficient and more effective in the conduct of their NEPA compliance, and should help to reduce unnecessary delays, expense, and litigation. Other CEQ Task Force recommendations that we consider to be very important are:

- CEQ should issue further guidance to the agencies regarding Environmental Assessment (EA) documents. This guidance should describe minimum requirements for short EAs, including requirements for public involvement, alternatives, impact avoidance and mitigation, and clarify that the size of EAs should be commensurate with the size and complexity of environmental issues, public concerns, and project scope.
- CEQ should issue guidance for better integrating the NEPA process with the Endangered Species Act’s Section 7 consultation requirements, with the National Historic Preservation Act’s Section 106 consultation requirements, and with relevant requirements of other environmental review laws and executive orders.
- CEQ should work with the federal agency NEPA offices to clarify and promote consistent practices for invoking the Categorical Exclusion option for certain agency actions pursuant to the CEQ Regulations, in order to expedite the approval process for actions that truly have no significant adverse environmental impacts.
- CEQ should develop, in conjunction with the agencies and the public, a document entitled “Citizens Guide to NEPA,” to enable non-government stakeholders and other interested persons to better understand and to participate in the NEPA process in a timely and constructive manner.
- CEQ should strengthen its “Lead Agency” guidance so that projects requiring multiple federal approvals (for funding and/or permits) can be expedited.

It should be obvious that CEQ will need additional professional staff resources to carry out these recommendations, which is why we urge the Congress to restore to CEQ at least some of those positions that have been lost over the past decade or more.

#### **Importance of Objective Analysis of Agency NEPA Staff and Resources**

The CEQ Task Force did not provide any analysis or recommendations concerning the adequacy of professional staff or budgets for the NEPA compliance offices in the federal agencies. However, a recent independent review of the NEPA process in 12 different federal agencies (reported in the above-mentioned December 2003 special issue of our journal, *Environmental Practice*, Vol. 5, No.4) found that:

...the majority of the NEPA offices that we evaluated have been subjected to reductions in both their budget and staff positions over the past several years. In some cases, repeated cuts have reduced these offices to less than

half their capacity of only five to ten years ago...As a result, NEPA officials have repeatedly been asked to 'do more with less'. (*R. Smythe and C. Isber, "NEPA in the Agencies: a Critique of Current Practices," p.292.*)

NAEP believes that these cuts have contributed to a decline in the quality of NEPA documents and to unnecessary delays and costs in implementing the NEPA process.

Any objective Congressional review of NEPA should include an evaluation of the professional staff levels, funding, opportunities for training and advancement, and work loads in these "front line" NEPA offices, and should make appropriate recommendations for improving their capabilities. We urge your Task Force to conduct such an evaluation.

#### **A Positive Strategy for Improving the NEPA Process**

Agency officials responsible for NEPA compliance need support and encouragement to do objective, professional work from the outset, rather than more pressure to rush through the process in order to meet rigid deadlines or to support predetermined decisions. These officials need better access to NEPA training programs and materials, to assure not only that their technical knowledge of NEPA policies and practices is current but also to inspire them to develop and apply innovative methods to improve the NEPA process, such as integrating the NEPA process with the development of Environmental Management Systems (EMS). EMS is a process originally developed by the private sector that federal agencies are now beginning to adopt as required by Presidential Executive Order 13148. Integration of these two processes should lead to improvements in both and therefore to better planning and long-term management of federal programs and activities.

NAEP intends to continue working with CEQ and the agencies to help improve the NEPA process. We would, for example, be pleased to contribute to a "Citizens Guide to NEPA" and/or to help develop additional administrative guidance to make NEPA's environmental evaluation and review process more effective and efficient, and less costly and time-consuming.

#### **Summary and Conclusion**

In conclusion, NAEP has supported and continues to advocate improvements in the implementation of one of our nation's most important environmental laws. We are, however, concerned that any Congressional recommendations for changes in the existing NEPA process be based on a careful, objective analysis of facts, rather than on vague allegations of problems that may result from causes other than the requirements of NEPA itself or CEQ's NEPA Regulations. NAEP's view is that the recommendations we have described above should be implemented, and their effectiveness should be objectively evaluated, before other potentially unnecessary or counterproductive legislative actions are pursued.

---

#### **ATTACHMENT TO NAEP TESTIMONY FEDERAL COURT INTERPRETATIONS OF NEPA**

Since NEPA's enactment in 1970, the courts have played a primary role in its interpretation and enforcement. Indeed one of the very first NEPA cases, *Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972), set the tone for NEPA compliance in the federal agencies, stating unequivocally their obligation to comply with the statute "to the fullest extent possible."

In this seminal case, the court was asked to review rules promulgated by the Atomic Energy Act on NEPA implementation. Although the rules required applicants for construction permits and operating licenses to prepare their own "environmental reports" and required the AEC's regulatory staff to prepare its own detailed statement of environmental costs, benefits, and alternatives, the rules did set limits on how environmental issues would be considered in the Commission's decision-making process.

In its decision, the court made several important points regarding NEPA and federal agency compliance with the statute:

- (1) The general substantive policy in Section 101 of NEPA is flexible. "It leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances."
- (2) The procedural provisions in NEPA Section 102 are not as flexible and indeed are designed to see that all federal agencies do in fact exercise the substantive discretion given them.



- (3) NEPA makes environmental protection a part of the mandate of every federal agency and department. Agencies are “not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require [all] agencies to consider environmental issues just as they consider other matters within their mandates.”
- (4) To insure that an agency balances environmental issues with its other mandates, NEPA Section 102 requires agencies to prepare a “detailed statement.” The apparent purpose to the “detailed statement” is to aid in the agencies’ own decisionmaking process and to advise other interested agencies and the public of the environmental consequences of the planned action.
- (5) The procedural duties imposed by NEPA are to be carried out by the federal agencies “to the fullest extent possible.” “This language does not provide an escape hatch for footdragging agencies; it does not make NEPA’s procedural requirements somehow ‘discretionary’.” Congress did not intend the Act to be a paper tiger.” NEPA’s procedural requirements “must be complied with to the fullest extent, unless there is a clear conflict of statutory authority.”
- (6) Section 102 of NEPA mandates a careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably could not reverse a substantive decision on the merits, but if the decision were reached procedurally without consideration of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.
- (7) The AEC’s interpretation of its NEPA responsibilities was “crabbed” and made “a mockery of the Act.” Section 102’s requirement that the “detailed statement” “accompany” a proposal through agency review means more than physical proximity and the physical act of passing papers to reviewing officials. It is not enough that environmental data and evaluation merely “accompany” an application through the review process but receive no consideration from the hearing board as contemplated by the AEC regulations.
- (8) The AEC improperly abdicated its NEPA authority by relying on certifications by federal, state, and regional agencies that the applicant complied with specific environmental quality standards. NEPA mandates a case-by-case balancing judgment on the part of federal agencies; in each case, the particular economic and technical benefits of an action must be weighed against the environmental costs. Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment and attend to only one aspect of the problem—the magnitude of certain environmental costs. Their certification does not mean that they found no environmental damage, only that it was not high enough to violate applicable standards. The only agency in a position to balance environmental costs with economic and technical benefits is the agency with the overall responsibility for the project.
- (9) NEPA requires that an agency—to the fullest extent possible—consider alternatives to its actions that would reduce environmental damage. By refusing to consider requiring alterations of facilities (which received construction permits before NEPA was enacted) until construction is completed, the AEC may effectively foreclose the environmental protection envisioned by Congress.
- (10) Delay in the final operation of the facility may occur but is not a sufficient reason to reduce or eliminate consideration of environmental factors under NEPA. Some delay is inherent in NEPA compliance, but it is far more consistent with the purposes of the Act to delay operation at a stage when real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible.

After the Calvert Cliffs case, other federal courts went on to define what the NEPA meant by “reasonable alternatives,” “significance,” and “major federal action.” In the 1970s, CEQ codified these decisions in its guidelines and later regulations that are binding on all federal agencies (40 CFR Parts 1500—1508). A discussion of the major cases interpreting NEPA, and recent NEPA cases, can be found at the NAEP website at [www.naep.org](http://www.naep.org).

#### **Recent Federal Court Rulings on NEPA**

Moving ahead to more recent judicial interpretations of NEPA, the following trends can be noted:

- Agencies prevail when they could demonstrate that they have given a “hard look” at the potential environmental consequences of the proposed action and alternatives.

- U.S. Forest Service used the best scientific evidence available and made reasonable judgments of activities to include in a cumulative impact analysis. *Selkirk Conservation Alliance v. Forsgren*: 336 F.3d 944 (9th Cir. 2003)
- National Marine Fisheries Service took a hard look at the dolphin mortality problem and the effects of the proposed rule on the environment. *Defenders of Wildlife v. Hogarth* 330 F.3d 1358 (Fed. Cir. 2003)
- Agency adequately considered and addressed the project effects on contamination and the environment and made an informed and reasoned decision that no EIS was required. *Highway J Citizens Group v. Mineta* 34 ELR 2513 (7th Cir. 2003).
- Agencies complied with NEPA procedures, did not conduct the assessment in bad faith, and followed relevant guidance. *Spiller v. White*: (Civil Action No. 02-50956 (5th Cir. 2003).
- The agency narrowed the range of reasonable alternatives by using a screening process and reasonable selection standards. *Lee v. U.S. Air Force*, 354 F.3d 1229 (10th Cir. 2004).
- The agency articulated a basis for its analysis and conclusions. In re *Operation of the Missouri River System*, (D. Minn. 2004) (unreported). Also, *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257 (10th Cir. 2004).
- The U.S. Navy made a detailed study of the risk and determined the risk to be remote. *Ground Zero Center for Non-violent Action v. United States Department of the Navy*, 383 F.3d 1082 (9th Cir. 2004).
- The Federal Aviation Administration adequate guidance to the EIS contractor and participated in the EIS preparation. *Communities Against Runway Expansion, Inc. v. Federal Aviation Administration*, 355 F.3d 678 (D.C. Cir. 2004).
- Agencies lose when they skirt NEPA procedures, ignore (or fail to demonstrate that they considered) opposing evidence, demonstrate bad faith, or change the proposal without complying with NEPA. For example,
  - U.S. Forest Service violated NEPA by denying requests to extend the scoping period, failing to explore alternatives, and failing to prepare a supplemental EIS after making “substantial” changes to the proposed action. *Wyoming v. Department of Agriculture* 33 ELR 20250 (D. Wyo. 2003).
  - Agency failed to respond to 7 scientific studies that cast doubt on the agency’s conclusions. *Center for Biological Diversity v. U.S. Forest Service* 34 ELR 20004 (9th Cir. 2003).
  - Reasoning relied on in a supplemental EIS had been considered and rejected in the original EIS, but the agency did not supply a “reasoned explanation” for the reversal of its views. *Fund for Animals v. Norton* Civil Action No. 02-2367 (D.D.C. 2003).
  - EA was inadequate because it failed to discuss a report critical of post-fire logging and disregarded scientific evidence that post-fire salvaging likely results in adverse environmental impacts. *League of Wilderness Defenders/Blue Mountains Diversity Project v. Marquis-Brong* 33 ELR 20187 (D. Ore. 2003).
  - The agency failed to engage in a reasoned analysis of two studies on the impact of low frequency active sonar on fish and failed to make evidence available to the public. *Natural Resources Defense Council v. Evans* 33 ELR 20153 (N.D. Cal. 2003).
  - The U.S. Army Corps of Engineers failed to provide a statement of reasons why the proposed action would have negligible impacts on the environment, leaving the court unpersuaded that it had taken a “hard look” at potential impacts. *Ocean Advocates v. United States Army Corps of Engineers*, 361 F.3d 1108 (9th Cir. 2004). Also *Pennaco Energy, Inc. v. U.S. Department of the Interior*, 377 F.3d 1147 (10th Cir. 2004); *Western Land Exchange Project v. United States Bureau of Land Management*, 315 F. Supp. 2d 1068 (D. Nev. 2004).
  - The Bureau of Land Management did not sufficiently identify or discuss the incremental impact that can be expected from each successive timber sale or how those individual impacts might combine or synergistically interact with each other to affect the surrounding environment. *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 968 (9th Cir. 2004)
  - The agency failed to adequately consider the impacts of past actions in a cumulative impact analysis. *Lands Council v. Powell*, 379 F.3d 738 (9th Cir. 2004).
  - The agency did not comply with NEPA when designating critical habitat under the Endangered Species Act. *Cape Hatteras Access Preservation*

*Alliance v. United States Department of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004).

- The agency failed to conduct any NEPA review before allowing tourist vans through a wilderness area. *Wilderness Watch & Public Employees for Environmental Responsibility v. Mainella*, 375 F.3d 1085 (11th Cir. 2004).
- The agency failed to prepare an EIS for, and to consider the cumulative impacts of, the issuance of multiyear special use permits to commercial packstock operators in wilderness areas. *High Sierra Hikers Association v. Blackwell*, 381 F.3d 886 (9th Cir. 2004).

Federal courts have also recently reiterated that:

- An agency is entitled to rely on their own experts as long as their decisions are not arbitrary and capricious. *Lee v. U.S. Air Force*, 354 F.3d 1229 (10th Cir. 2004).
- Agencies must use the best available scientific information and are not required to conduct their own studies (when existing studies are available). *Lee v. U.S. Air Force*, 354 F.3d 1229 (10th Cir. 2004).
- The agency is under no obligation to consider each and every alternative but rather it must evaluate a considerable range of alternatives to allow it to make a reasoned decision. *In re Operation of the Missouri River System*, (D. Minn. 2004) (unreported).
- Project alternatives derive from the purpose and need statement. Although an agency cannot define its objective in unreasonably narrow terms, an agency has considerable discretion to define the purpose and need for a project. *Westlands Water District v. United States Department of the Interior*, 376 F.3d 853 (9th Cir. 2004).
- When new information arises following the issuance of a DEIS, it may validly be included in the FEIS without recirculation. *Westlands Water District v. United States Department of the Interior*, 376 F.3d 853 (9th Cir. 2004).
- Documentation of reliance on a categorical exclusion need not be detailed or lengthy; it need only be long enough to convince a court that an agency considered whether a categorical exclusion applied and concluded that it did. *Wilderness Watch & Public Employees for Environmental Responsibility v. Mainella*, 375 F.3d 1085 (11th Cir. 2004).
- The existence of opposition does not automatically render a project controversial. *Cold Mountain v. Garber*, 375 F.3d 884 (9th Cir. 2004).
- Descriptions in the DEIS were sufficient to provide a “springboard for public comment.” A supplemental EIS is only needed where new information provides a seriously different picture of the environmental landscape. *National Committee for the New River, Inc. v. Federal Energy Regulatory Commission*, 373 F.3d 1323 (D.C. Cir. 2004).

### **Cumulative Impacts**

The need to adequately address cumulative impacts has also received attention in recent court decisions:

- *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002) (use of a home range scale, rather than a landscape scale as recommended by USFS scientists, rendered the cumulative impact analysis inadequate)
- *Native Ecosystems Council v. Dombeck*, 304 F. 3d 886 (9th Cir. 2002) (although individual projects had independent utility and were not required to be considered together in the same NEPA document, the EAs for each did not adequately consider the cumulative impacts of the other projects as reasonably foreseeable actions)
- *Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 339 (D.C. Cir. 2002) (FAA addressed only the incremental increase in noise that would occur as a result of its approval of a replacement airport near the Zion National Park, and not the cumulative impact on the park. There was no way to determine whether the FAA’s estimated 2 percent increase, in addition to other noise impacts on the park, will significantly affect the quality of the human environment. The FAA analysis does not aggregate the noise impacts on the park.)
- *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062 (9th Cir. 2002) (failed to adequately analyze cumulative impacts of proposed timber project)
- *Texas Committee on Natural Resources v. Van Winkle*, 197 F. Supp. 2d 586 (N.D. Tex. 2002) (Army Corps was required to consider the cumulative impacts of reasonably foreseeable future actions in the same geographical area, although those actions were not actual proposals and precise information about them was not available. There was a reasonable basis to assume some or all of the projects would be implemented. The cumulative impacts analysis was cursory)

and the agency did not take a “hard look” at the proposed action’s environmental consequences, including cumulative impacts).

- *Sierra Club v. Bosworth*, 199 F. Supp 2d 971 (N.D. Cal. 2002) (EIS for post-fire logging project fails to adequately disclose or analyze cumulative impacts on management indicator species, fuel break maintenance, or fire-fighting tactics. Although the project is not connected to other post-fire logging projects in the forest, the EIS fails to adequately disclose and consider those actions in the EIS. Given their similarities with respect to timing, geography, and purpose, these actions may result in significant impacts and such impacts must be addressed in a single EIS.)

#### **Recent U.S. Supreme Court Decisions**

Since NEPA’s enactment, the U.S. Supreme Court has issued 14 decisions regarding NEPA compliance issues. The two most recent cases were decided in the October 2003 term: *Department of Transportation v. Public Citizen*, 541 U.S. 752, 124 S.Ct. 2204 (2004), and *Norton v. Southern Utah Wilderness Alliance*, 541 U.S. \_\_\_\_\_, 124 S. Ct. 2373 (2004). Each of these cases is described below, along with the Court’s holdings.

#### **Department of Transportation v. Public Citizen**

In 2001, an international arbitration panel determined that a moratorium on the entry of Mexican motor carriers into the U.S. violated the North American Free Trade Agreement (NAFTA). President Bush subsequently announced that he would lift the moratorium after the Department of Transportation (DOT) issued regulations governing Mexican-domiciled motor carriers seeking to operate within the United States. Congress then prohibited the Department from expending any funds for licensing or permitting of Mexican-based motor carriers in the U.S. until the Department had issued safety and inspection rules to cover those carriers.

DOT promulgated three regulations governing Mexican motor carriers and, for two of them, prepared EAs that concluded that the regulations would have no significant impact on the environment. DOT did not prepare an EA for the third regulation because it concluded the regulation fell within its categorical exclusion regulations. DOT also did not make conformity determinations under the Clean Air Act for any of the three regulations because it concluded that the regulations fell within exceptions to Clean Air Act requirements.

Following the issuance of the regulations, the President lifted the moratorium, permitting Mexico-domiciled motor carriers to offer cross-border service.

Plaintiff public interest and environmental organizations and trucking unions filed suit in the U.S. Court of Appeals for the 9th Circuit, arguing that the regulations were invalid because DOT failed to comply with NEPA and the Clean Air Act. Specifically, they argued that allowing Mexican trucks to operate in the U.S. would increase air pollution in violation of state standards and would harm residents of border states.

DOT argued that additional Mexican truck and bus traffic and any incidental increases in air pollution would be the result of the President’s action in lifting the moratorium rather than as a result of the agency’s safety and licensing regulations. Thus, the effects of the traffic would be attributable to the President’s exercise of his foreign policy power, not agency rulemaking. Because NEPA and Clean Air Act requirements do not apply to actions of the President, DOT argued that the link between the regulations and any environmental impacts of increased traffic from Mexican vehicles were too attenuated to trigger NEPA or Clean Air Act requirements.

The Court of Appeals rejected that argument, stating that the “distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry” were “illusory.” Because the court limited its review to the question of whether DOT had authority to promulgate its regulations without complying with NEPA and Clean Air Act requirements, it found that its decision did not implicate the President’s “unreviewable discretionary authority to modify the moratorium” or affect the United States’ ability to comply with NAFTA. The court found that DOT had acted arbitrarily and capriciously by failing to prepare EISs and Clean Air Act analyses before issuing the regulations.

In a unanimous opinion authored by Justice Thomas, the U.S. Supreme Court reversed the Court of Appeals, finding that DOT lacked discretion to prevent cross-border operations of Mexican motor carriers and thus was not required to evaluate the environmental effects of such operations. The Court rejected the plaintiffs’ argument that DOT was required to examine releases of air emissions as an indirect effect of the issuance of the regulations because, according to the Court, DOT was unable to countermand the President’s lifting of the moratorium or otherwise

exclude Mexican trucks from operating in the United States. DOT was required by law to register any motor carrier willing and able to comply with various safety and financial responsibility rules, and only the moratorium prevented it from doing so for Mexican trucks. The causal connection between the proposed regulations and the entry of Mexican trucks was insufficient to make DOT responsible under NEPA to consider the environmental effects of entry, citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). "It would not, therefore, satisfy NEPA's 'rule of reason' to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform." Slip opinion at 15.

The Court also declined to address the plaintiffs' argument that the agency should have considered other alternatives that might mitigate the environmental impacts of authorizing cross-border truck operations because the plaintiff had not raised the issue of additional alternatives during the NEPA process:

"None of the [plaintiffs] identified in their comments any rulemaking alternatives beyond those evaluated in the EA, and none urged [DOT] to consider alternatives. Because [plaintiffs] did not raise these particular objections to the EA, [DOT] was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. [Plaintiffs] have therefore forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action." Slip opinion at 10.

The Court also held that DOT did not act improperly by not performing a full conformity analysis pursuant to the Clean Air Act, stating that emissions attributable to an increase in Mexican trucks across the border were not indirect emissions because DOT could not control the emissions.

Commentary: The Court's holding is that an agency is not responsible for, and thus is not required to evaluate under NEPA, any direct, indirect, or cumulative environmental impact over which it has no control. While in many circumstances an agency can refuse to act because the environmental impacts of its proposed action would be too great, here DOT only had jurisdiction to enact safety and financial responsibility regulations. It did not have authority to refuse to issue regulations or to refuse, on environmental grounds, to allow Mexican trucks to enter the United States if they met safety and financial responsibility.

The Court also concluded that the informational purpose of NEPA would not be served by evaluating air emissions because no matter what the public said about that analysis, DOT could not act upon those views. This ignores, however, that NEPA documents are prepared for the information of the agency, the public, and Congress. While DOT may not have been able to act upon the information, Congress could have. As CEQ stated in its "40 Most Asked Questions," "[a]lternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies." Question 2b.

The Court also reiterated that members of the public must put forth their concerns regarding the scope and content of a NEPA document during the NEPA process, and not wait for a court proceeding to raise an issue for the first time. Of course this presumes, in the case of an EA, that there is a public comment process in which the public is encouraged to present their concerns.

#### **Norton v. Southern Utah Wilderness Alliance**

The Southern Utah Wilderness Alliance (SUWA) sued the U.S. Bureau of Land Management (BLM) for violating the Federal Land Policy and Management Act (FLPMA) and NEPA by not properly managing off-road vehicle (ORV) use on federal lands that had been classified as wilderness study areas or as having wilderness qualities. SUWA sought relief under the Administrative Procedure Act (APA) claiming that BLM should be compelled to carry out mandatory, non-discretionary duties required by FLPMA and NEPA.

SUWA claimed that current levels of ORV use were impairing the suitability of the wilderness study areas so that they would no longer be appropriate for wilderness designation, and that BLM's failure to ensure non-impairment violated a statutory duty, constituting the violation of a mandatory, non-discretionary duty actionable under the APA, which gives courts authority to compel "agency action unlawfully withheld or unreasonably delayed." SUWA acknowledged that it could not compel BLM to act in any specific way—BLM has discretion to comply with the non-impairment requirement in a variety of ways—but argued that it could sue to compel BLM to act in some way of its choosing that would meet BLM's non-impairment obligation.

BLM argued that all judicial review under the APA is limited to final agency action, or to compel final agency action that has been withheld, and that the day-

to-day operations of BLM land management that SUWA is attempting to challenge were outside the concept of final agency action.

Although the U.S. District Court dismissed SUWA's claims, the U.S. Court of Appeals for the 10th Circuit reversed the lower court, holding that "[w]here, as here, an agency has an obligation to carry out a mandatory, non-discretionary duty and either fails to meet an established deadline or unreasonably delays in carrying out the action, the failure to carry out that duty is itself 'final agency action.'"

Before the 10th Circuit, SUWA also argued that BLM's failure to take a "hard look" at information suggesting that ORV use has substantially increased since NEPA studies for the wilderness study areas were issued violated NEPA. SUWA argued that BLM should be compelled to take a hard look at this information and decide whether supplemental NEPA documents should be prepared. The Court of Appeals agreed that BLM could be compelled, dismissing BLM's arguments that it should not be compelled to take a hard look at new information because (1) the agency would be undertaking NEPA analysis in the near future and (2) the agency faced budget constraints.

In a unanimous opinion authored by Justice Scalia, the U.S. Supreme Court reversed the Court of Appeals, holding that an APA claim can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action, as opposed to a broad program, that it is legally required to take. Further, the Court held that while BLM was obligated to not impair the suitability of wilderness study areas for preservation of wilderness, the agency had discretion to decide how to achieve that objective.

With respect to the NEPA claim, the Court noted that supplementation of a NEPA document is required if there are significant new circumstances or new information relevant to environmental concerns and bearing on the proposed action or its impacts (40 CFR §1502.9). The Court stated that supplementation was required only if there remains a federal action to occur (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989)). The action that required the EIS was the approval of the land use plan; once that plan was approved, there was no ongoing "major federal action" that could require supplementation. The Court did state that BLM would be required to perform additional NEPA analyses if a land use plan were amended or revised.

---

Ms. MCMORRIS. Thank you. Hold your applause, please.  
Mr. Spainhour.

#### **STATEMENT OF CHARLES SPAINHOUR, VULCAN MATERIALS**

Mr. SPAINHOUR. I want to thank Congresswoman Drake and Madam Chairwoman for this opportunity to testify. My name is Charles Spainhour, and I am the environmental manager for Vulcan Materials Company.

Vulcan Materials Company is the nation's leading producer of construction aggregates, primarily crushed stone, sand, and gravel. The materials that we produce and the rest of the aggregates industry produces are key building blocks to most construction activities. Without construction aggregates, most roads, sidewalks, driveways, bridges, dams, sewer, water main projects, railroads, and other building construction would not exist.

We are headquartered in Birmingham, Alabama. We currently have 356 facilities in 21 states, including the District of Columbia and Mexico. In 2004, we employed approximately 7,800 men and women, and shipped 243 million tons of products, and had sales totaling \$2.2 billion. We do have a local connection in this area. We have operations in this area in Richmond, Virginia Beach, and we also have an office in Richmond.

When NEPA was enacted in 1969, it was a landmark piece of legislation with a noble cause, to ensure that Federal agencies evaluated the effects of their activities on human environment and

factored the results of that analysis into their decisionmaking process.

Since NEPA's enactment, an enormous amount of additional environmental legislation and regulation has been promulgated. Vulcan Materials Company, like the rest of our industry, is heavily regulated. Permitting of new and expansions of existing quarries and sand and gravel operations is a very complex and time consuming activity. Depending on the area of the country that you are in, it can be a multi-hear, several hundred thousand dollar process.

A typical facility requires air emissions permits, storm and process water discharge permits, mine permits and land use authorizations, and a myriad of local regulations and authorizations. In many cases, we have overlapping requirements from Federal, State and local agencies.

In the event an operation has impacts on wetlands and endangered species, we are also going to have Federal involvement with the Corps of Engineers, EPA, and possibly Fish and Wildlife Service.

So what is the connection with NEPA? In the event that a NEPA review is required due to Federal agency involvement, the permitting process can be extended almost indefinitely. Given the already burdensome and time consuming process of permitting a new operation, the additional delays posed by the NEPA process are onerous.

In working with our resource managers regarding Vulcan projects that involve NEPA review, I have observed a trend that speaks volumes about the burden of the process. In some cases, we conclude to not develop resources that would otherwise be available to us, so that we can avoid interaction with the NEPA process and the delays associated with it.

Suggestions for reform from Vulcan Materials Company: A significant issue with the current NEPA process is that there is no clear endpoint. Clear definition needs to be given regarding what constitutes a completed environmental study.

Another significant and related issue is that NEPA does not prescribe significant timeframes.

There need to be specific, prescribed timeframes for completion of the various aspects of the NEPA process, including agency review and decisionmaking. NEPA also needs to provide responsibility and authority for the lead agency to ensure adherence to those timeframes.

The triggering mechanisms within NEPA for requiring preparation of an environmental impact statement are "Federal actions significantly affecting the quality of the human environment." However, NEPA does not define what actions are considered significant. NEPA needs to be revised to provide clear definition of what constitutes significant Federal actions.

NEPA requires evaluation of alternatives to Federal actions considered significant as part of the Environmental Impact Statement. This requirement also results in the evaluation of a significant number of alternatives, which both delays the process and increases the cost of permitting.

Lead agencies concerned about legal challenges require detailed and exhaustive reviews of alternatives. While this is important to

understand the environmental impact of the process, we believe in some cases it goes overboard.

NEPA needs to be revised to provide a clear definition of the types and number of alternatives that must be considered. The NEPA process should also consider alternatives that are truly valid, economically viable, and technologically demonstrated and provide an alternative to the project.

NEPA includes provisions for a judicial review process of Federal agency decisions. The original intent of these provisions is honorable: To ensure that all affected parties have an opportunity to challenge agency decisions. However, over the last 10 to 20 years the process has been taken hostage over fear of judicial challenges and lawsuits.

Federal agencies involved in the process require extensive and exhaustive and detailed analysis of issues associated with a project. Agencies place a disproportionate emphasis on the preparation of documentation. The concern over legal challenges handicaps the decisionmaking process. Lead agencies are resistant to consider actions as nonsignificant, resistant to grant final approval for a project because of fear over litigation.

We offer the following suggestions for reform of the judicial review process. Establish clear guidelines on who has standing to challenge an agency decision. Establish a reasonable time period for filing the challenge. Establish clear timeframes for the judicial review, and create a clear endpoint to the judicial review process.

In conclusion, I wanted to show the Committee an example of an environmental impact statement that affected some of my fellow mining companies down in the Miami-Dade area. This is an example of how burdensome the documentation can become.

This process involved development of a freshwater lake belt plan in the Miami-Dade area that has taken over 10 years and they still do not have an endpoint on the process.

In conclusion, I want to thank the Committee once again for the opportunity to testify. I appreciate the willingness and interest to focus on this important issue.

[The prepared statement of Charles Spainhour follows:]

**Statement of Charles J. Spainhour, Corporate Manager of Environmental Services, Vulcan Materials Company**

**Introduction**

Good afternoon. My name is Charles Spainhour and I am the manager of environmental services for Vulcan Materials Company ("Vulcan"). I want to thank the Committee for giving me this opportunity to provide testimony on the role of NEPA, and to offer suggestions on how NEPA can be improved.

Vulcan Materials Company is the nation's leading producer of construction aggregates, primarily crushed stone, sand, and gravel. The construction aggregates industry extracts natural resources such as stone, sand and gravel through mining. Once these materials are extracted they are processed through crushing, grinding, and screening to reduce them to a size, shape and gradation where they can be used as construction aggregates. These aggregate products are the literal building blocks for most construction activities. Without construction aggregates, roads, sidewalks, driveways, bridges, dams, sewer and water systems, railroads, and most building construction could not exist. Even wooden structures need construction aggregates for sound foundations.

Vulcan is headquartered in Birmingham, Alabama. We operate 356 aggregate production and related facilities in 21 states, the District of Columbia and Mexico. In 2004, the company employed approximately 7,800 men and women, shipped 243 million tons of aggregates, and had sales totaling \$2.2 billion. Our Mideast Division,



which is based in Winston-Salem, has a regional office in Richmond, Virginia, in the heart of the Mid-Atlantic area.

In 2004, the entire construction aggregates industry produced approximately 3 billion tons of aggregates valued at approximately \$16 billion, contributing \$37.5 billion to the nation's Gross Domestic Product. In 2004, the industry employed over 115,000 men and women.

### **Impact of NEPA on the Construction Aggregates Industry**

When NEPA was enacted in 1969, it was a landmark piece of environmental legislation with a noble cause—to ensure that federal agencies evaluated the effects of their activities on the human environment and factored the results of this analysis into their decision making process. Since NEPA's enactment, an enormous amount of additional environmental legislation and regulation has been promulgated. Vulcan Materials Company facilities, like the rest of the aggregates industry, are heavily regulated. Vulcan Materials Company is proud of our commitment to and our accomplishments in environmental and social responsibility. As a company, we constantly strive to meet or exceed our obligations under the various environmental permits that have been granted to our operations.

Permitting of stone quarries and sand and gravel sites is a very complex and time consuming activity. A typical Vulcan facility requires air emissions permits, storm and process water discharge permits, mine permits or land use authorizations, and a myriad of local registrations or permits. In many cases there are overlapping permit requirements from federal, state and local governmental agencies. In the event an operation affects wetlands or endangered species, additional permits may be required from federal agencies such as EPA, the Corps of Engineers, and the Fish and Wildlife Service.

So what is the connection with NEPA? A majority of Vulcan's permitting activities are handled at the state or local level and do not involve NEPA. However, even when NEPA is not involved, the permitting of a new operation or major expansion of an existing operation is normally a multiyear process. In the event that a NEPA review is required due to federal agency involvement, the permitting process can be extended almost indefinitely. Given the already burdensome and time consuming process of permitting a new quarry operation, the additional delays posed by the NEPA process are onerous.

In working with our resource managers regarding Vulcan projects that involved NEPA review, I have observed a trend that speaks volumes about the burden of the NEPA process. In some cases we conclude that the process is so burdensome we choose to not pursue aggregate resources rather than work through the drawn out and costly NEPA process.

### **Suggestions for Reform**

#### *1. Endpoint Needed in Process*

A significant issue with the current NEPA process is that there is no clear endpoint to the process. Clear definition needs to be given regarding what constitutes a completed environmental study, whether that study is an Environmental Assessment (EA) or Environmental Impact Statement (EIS). This definition is currently left to the discretion of the lead agency, which creates opportunities for inconsistencies and the incorporation of specific agency agendas.

Another significant and related issue is that NEPA does not prescribe timeframes. There need to be specific, prescribed time frames for completion of the various aspects of the NEPA process, including agency review and decision making. NEPA needs to place responsibility on the lead agency for adherence to these time frames, and include provisions for default approval decisions in the event the agency misses the designated time frames.

#### *2. Clear Definition of Significant Federal Actions*

The triggering mechanisms within NEPA for requiring preparation of an Environmental Impact Statement (EIS) are "federal actions significantly affecting the quality of the human environment." However, NEPA does not define what actions are considered significant. As currently applied this shortcoming causes project proponents to go through the full Environmental Impact Statement (EIS) process for actions that should be addressed through categorical exclusions or the simpler Environmental Assessment (EA) process.

NEPA needs to be revised to provide a clear definition of what constitutes significant federal actions.

### *3. Clarify Requirements for Alternatives Analysis*

NEPA requires evaluation of alternatives to federal actions considered “significant” as part of the Environmental Impact Statement (EIS). This requirement as currently applied often results in the evaluation of a significant number of alternatives, which can both delay the NEPA process and increase its associated cost. Lead agencies concerned about legal challenges require detailed and exhaustive reviews of alternatives that we believe go beyond the intent of the legislation. This requirement is also a common way for project opponents to delay a project by suggesting additional alternatives that have to be evaluated late in the review process.

NEPA needs to be revised to provide a clear definition of the types and number of alternatives that must be considered. NEPA should also be revised to prevent project opponents from extending the process by suggesting alternatives as a stalling tactic. This can be done by only allowing suggested alternatives early in the NEPA process. The NEPA process should also allow only the consideration of economically viable and technologically demonstrated alternatives that support the goals of the project.

### *4. Reform of the Judicial Review Process*

NEPA includes provisions for a judicial review process of federal agency decisions. The original intent of these provisions is honorable—to ensure that all affected parties have an opportunity to challenge decisions that they feel are not sound. However, over the last ten to twenty years the NEPA process has been taken hostage by the fear of judicial challenges and lawsuits. Federal agencies involved in the process require exhaustive and detailed analysis of all issues associated with a project under review, to the extent that minor issues are treated as “significant.” Agencies place a disproportionate emphasis on the preparation of voluminous documentation to “pad” the record. The concern over legal challenges handicaps the decision making process. Lead agencies are resistant to consider actions as non-significant. This results in full Environmental Impact Statements (EIS) where Environmental Assessments (EA) should have been allowed. Additionally, lead agencies are hesitant to grant final approval for a project or to resist pressure from project opponents to consider irrelevant issues, for fear of litigation.

We offer the following suggestions for reform of the NEPA judicial review process:

- 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;
- Establish a reasonable time period for filing the challenge. We suggest that challenges should be allowed to be filed within 60 days of notice of a final decision on the federal action;
- Establish clear time frames for the judicial review process to minimize delays in completing the process;
- Reduce or eliminate a challenger’s right to appeal once a judicial decision is rendered, and
- Eliminate the multiple challenge delay tactic.

### **Conclusion**

I thank the Committee for the opportunity to provide testimony on the reform of NEPA. I applaud the willingness and interest of the Committee to focus on this important issue. I hope my testimony has helped you in this effort.

Thank you very much.

---

Ms. McMORRIS. Thank you. Thanks for being here.  
Mr. Besa.

### **STATEMENT OF GLEN BESA, SIERRA CLUB**

Mr. BESA. Thank you very much, Madam Chairman, Congresswoman Drake. I think it is very important to appreciate what Mr. Kelman said, and that in the analysis of the testimony given before this Committee, including some of the comments by yourself, Madam Chairman, that there be an analysis as to where NEPA applies and where it doesn’t, for example, with regard to nuclear power plants and natural gas facilities.

I don't believe NEPA has been a problem there, and I think, with Three Mile Island and Chernobyl, industry's interests comport with that. In the case of an LNG plant, I know of one in Chesapeake Bay, the Cove Point plant, that was mothballed for many years. So I think it is very important to analyze actually what NEPA does and what NEPA hasn't done in your efforts.

I would also suggest that there have been some unique exceptions to NEPA written into law just recently, that any real analysis of this statute should also include a comprehensive review of all those exceptions that have been written into the law recently, including the current energy bills before you. Look before you leap.

It is a good lesson we learn as children. It is just common sense to think ahead about the consequences of the actions that we take. Right now, that is what the National Environmental Policy Act requires the Federal Government to do.

Before you build a highway near a person's home or truck nuclear waste through their neighborhood, the government must tell you, ask your opinion, and consider alternatives. That is how democracy, government of, by, and for the people, is supposed to work.

It is no accident that the most progress in protecting the environment and ensuring citizens' rights to clean air and clean water has occurred in the United States and other democracies, and you just compare places like the former Soviet Union and the legacy of pollution that they have had because of the lack of freedom of information, the lack of public participation.

Most projects sail through the NEPA process without undue delay. Big projects with major environmental impacts take longer, just because they have a longer planning process. In fact, the NEPA review has become an integral part of the planning process for most Federal agencies.

NEPA does not stop projects. If a project does not proceed through the NEPA process, it is either because, in the course of the NEPA analysis, it was determined by the agency that the project lacked sufficient merit, which is often the case, or because the agency conducting the NEPA review did not do an adequate job, as Mr. Kelman referred to. In the latter case, the agency may be ordered by a court to go back and consider the elements or impacts of the project that had been ignored or omitted.

A good example of that, of course, is the Outlying Landing Field that Congresswoman Drake referred to, where the Navy did not do a very good job, and they have been sent back to do a supplement EIS.

Just to share another example with you, the King William Reservoir, which is a massive drinking water project proposed by Newport News—It is interesting that that project was initiated through a contract between the City of Newport News and King William County, and it wasn't until the NEPA process kicked in that the citizens of King William County, including the Native Americans severely impacted by this project, became aware of the reservoir.

NEPA is critically important to citizens knowing what is going on and being able to participate in the process, because oftentimes other governmental processes do not include that guaranty of public participation.

It is most unfortunate that some view NEPA and the information gathering and sharing and the public participation that it requires, as an obstruction to getting Federal projects completed and permits issued. Recent statements in the media and actually by this Committee have attempted to link the flooding in New Orleans and the high gasoline prices to the application of NEPA. I would like to use my time here in rebutting those.

The last few days we have seen attempts—Excuse me, I just said that. A couple of cases that I would like to mention that I think have been used here.

Save Our Wetlands v. Rush in 1977: This actually is a case around New Orleans where there was a proposal to build a 25-mile long barrier from the Mississippi border to the Mississippi River. The communities around Lake Pontchartrain and local fishermen opposed this project because of the massive impact it would have had on the economy.

Save Our Wetlands, a local organization there, filed a lawsuit, and they secured an injunction from Federal District Court Judge Charles Schwartz. The Judge required the Corps to do proper studies of the proposed new levee system before moving forward. The Corps just decided not to do it, and 30 years later they haven't done those studies that the court asked them to do.

Another case that involved the Sierra Club was Mississippi River Basin Alliance v. Martin Lancaster in 1996. Although this case has been cited in some newspaper accounts, it is important to recognize that the lawsuit actually involves levees that were proposed 100 miles north of New Orleans that would have involved the digging up of the wetlands there that actually prevent flooding.

While we were not opposed to the levees per se, we were opposed to the source of the fill material to build the levees, which was basically excavation of wetlands 100 miles north of New Orleans. It didn't have really anything to do with New Orleans at all.

On the heels of Hurricane Katrina where there is widespread distrust as to whether government can protect the public, it is vital that we have in place mechanisms to hold government accountable. There are right ways and wrong ways to design a highway or even to build a levee. By ensuring that there is good science and local input, the government is much more likely to get it right.

Another allegation leveled at NEPA, and Senator Wagner made this point, is that it has delayed energy development projects that have resulted in gasoline price spikes and also shortages of natural gas experienced as a result of Hurricane Katrina.

In its September 8 statement, this Committee quoted you, Congresswoman McMorris, as stating, "Throughout the NEPA Task Force we have heard from numerous industries that expensive and time consuming legal and procedural delays are preventing energy production and construction projects." Again, this is where I would strongly suggest that there be an analysis with regard to whether or not NEPA is actually involved.

The unprecedented drilling boom that is going on right now in the country indicates that, far from NEPA being an impediment to oil and gas development, it appears that there are fewer and fewer environmental safeguards in place to assure that exploration and

development take place in the appropriate places with appropriate environmental precautions.

Meanwhile, industry profits are at an all-time high, as we all know, and the numbers clearly show that the National Environmental Policy Act is not standing in the way of energy production. Let's look at some of those numbers.

The Bureau of Land Management has issued thousands more drilling permits than the industry can actually drill. In 2004 BLM issued a record number of drilling permits on Federal lands, particularly in the west, a total of 6,052 permits. But the industry only drilled 2,702 of those areas that had been authorized for drilling.

Natural gas production from Federal onshore lands has significantly increased over the past decade. Natural gas production from onshore Federal lands has more than doubled in 1992—since 1992, and between 2003 and 2004 there was an increase in western lands of 42 percent.

I might want to mention, I actually got a call from an official with Chesapeake City who—and that is why you've got this Black Bear landfill issue here, recognizing that in many instances there are impacts on Federal properties like the Great Dismal Swamp where, in fact, NEPA does not apply, and they wish it actually had.

Ms. MCMORRIS. Mr. Besa, I really do have to ask you to wrap up.

Mr. BESA. OK. Well, I'll do that. Thank you.

In conclusion, under the guise of speeding up projects, some want to waive environmental review requirements and shut people out of the decisionmaking process. As Americans committed to a democratic process, we cannot let that happen. We can't let public officials in Washington, D.C., decide, without citizen involvement, what happens here in our own backyard. NEPA is about democracy and open government. It is not about delay. Thank you very much.

[The prepared statement of Glen Besa follows:]

**Statement of Glen Besa, Appalachian Regional Director,  
Sierra Club**

Madame Chairwoman, Members of the Task Force on Improving the National Environmental Policy Act.

My name is Glen Besa, and I am the Appalachian Regional Staff Director for the Sierra Club. I am representing the Sierra Club today. My business address is 6 North 6th Street, Richmond, VA 23219. I appreciate this opportunity to appear before you.

Look before you leap. It's a good lesson we all learned as children. It's just common sense to think ahead about the consequences of the actions we take.

And right now that's what the National Environmental Policy Act requires the federal government to do. Before it builds a highway near your home or trucks nuclear waste through your neighborhood, the government must tell you, ask your opinion and consider alternatives. That's how democracy—government of, by and for the people—is supposed to work. It is no accident that the most progress in protecting the environment and ensuring citizens' rights to clean air and clean water have occurred in the United States and other democracies.

The National Environmental Policy Act has played a key role in America's conservation leadership. A landmark law that puts people before politics, values science over short-term thinking, and respects democracy more than dollars, it was signed into law in 1970 by President Nixon. Thanks to NEPA, every American can expect major federal actions—oil drilling, highway construction, logging in our National Forests, and so on—to be subject to scrutiny and review. NEPA doesn't prevent those activities—it only says that people are entitled to have the best information possible about how the environment will be affected and that less harmful alternatives should be considered.

And under NEPA, when the federal government doesn't do its job well, citizens have the right to petition their Government for redress. At the heart of NEPA is its requirement that alternatives must be considered—including those that will minimize possible damage to public health, the environment or quality of life. Adequate review of projects at the front end saves time and money in the long run, since it lessens the need for difficult remedies to fix big mistakes. Because NEPA ensures balance, common-sense and openness in federal decision-making, it is an effective tool to keep "Big Government" in check.

Most projects sail through the NEPA process without undue delay. Big projects with major environmental impacts take longer just as does their planning process. In fact, the NEPA review has become an integral part of the planning process for federal agencies.

Too often, agencies, under political pressure, are tempted to cut corners to accomplish jobs more quickly. But cutting corners can have disastrous consequences, especially when it comes to spending taxpayer money on projects that might harm citizens or their environment.

As I stated before, NEPA does not stop projects. If a project does not proceed through the NEPA process it is either because in the course of the NEPA analysis it was determined by the agency that the project lacked sufficient merit or because the agency conducting the NEPA review did not do an adequate job. In the latter case, the agency may be ordered by a court to go back and consider elements or impacts of the project that it had ignored or omitted.

Consider a recent example. Just this month the Fourth Circuit Court of Appeals, a circuit not known for its environmental activism, ruled that the Navy failed to take a "hard look" at the environmental impacts of its proposed Outlying Landing Field in eastern North Carolina. This jet training facility would be located adjacent to the Pocosin Lakes National Wildlife Refuge, in the heart of the Atlantic migratory bird flyway, posing a severe safety risk to Navy pilots and a serious threat to large flocks of migratory birds such as tundra swans and snow geese. Proximity to the Refuge, which Congress created to protect these migratory birds, was a key factor in the Court's ruling. The Navy's own documents further showed that an existing facility in southeastern Virginia meets the Navy's needs, yet, responding to political pressure, the Navy "reverse engineered" the process and mischaracterized scientific studies to justify the new OLF in North Carolina. As the District Court Judge, Terrence Boyle, observed, "NEPA's purpose is—to foster excellent action.—The very purpose of the environmental due process afforded by NEPA is eradicated if a federal agency makes a decision without proper consideration of the environmental impacts of the proposed project." The OLF is opposed not only by conservation groups but by the counties where the field would be located, farmers whose land would be taken for the field, and by property rights advocates.

Let me share another example of a project that just received a permit from the Corps of Engineers. In Virginia, the proposed King William Reservoir, a 1,500 acre drinking water reservoir, would be constructed near native American lands and would impact the native American community by pumping water from the Mattaponi River, which has long supported the tribe's culture with a rich supply of shad. Pumping water from the coastal plain may irreparably harm the fragile shad fishery as well as the culture it supports. The reservoir also would wipe out over 300 acres of a unique wetland complex, the largest authorized loss of wetlands in the mid-Atlantic in the history of the Clean Water Act. Through the NEPA process, the U.S. Army Corps of Engineers discovered that the demand for the reservoir was substantially less than originally asserted and could be met in other ways. Even the Mayor of Newport News, a major proponent of the project, recognized the value of the NEPA process for clarifying the true demand for drinking water. The Corps initially denied the permit for the reservoir, although the permit eventually was granted just last month. I want to add that this project was initiated with contract between the City of Newport News and King William County. However, it was not until the initiation of the NEPA process that King William citizens including the local Native American tribes learned of this locally unpopular project.

It is most unfortunate that some view NEPA, the information gathering and sharing, the public participation, as an obstruction to getting federal projects completed and permits issued. Recent statements in the media have attempted to link the flooding in New Orleans and high gasoline process to the application of NEPA. I would like to use my remaining time rebut these allegations.

The last few days have seen an attempt by some to blame environmentalists for the disaster that struck New Orleans. At issue is the role that conservation groups played in two cases—one almost 30 years ago—involving levee projects proposed by the Army Corps of Engineers. The following is a quick summary of those projects and an accurate account of the role that those groups played.

### **Save Our Wetlands v. Rush—1977**

In 1977, the Army Corps of Engineers was told by a federal judge to look at the impacts of a massive levee project it had proposed. Nearly three decades later, the Corps has never done that work and instead chose to abandon the project altogether.

The proposed project would have built a 25-mile long barrier from the Mississippi border to the Mississippi River. Communities around Lake Pontchartrain and local fisherman opposed the project because of the massive impact it would have had on the economy and environment in the region. Those groups had advocated building higher levees as a simpler and safer alternative to the Corps' plan.

After the Army Corps of Engineers refused to evaluate the impacts of its proposed project and consider ways to reduce them, Save Our Wetlands filed suit and secured an injunction from U.S. District Judge Charles Schwartz, Jr., who concluded that the region "would be irreparably harmed" if the barrier project was allowed to continue and chastised the Army Corps of Engineers for a shoddy job. The Judge required the Corps to properly study its proposed massive new levee construction project before moving forward.

The Corps has never bothered to do the work despite having nearly 30 years to do so.

In the 1977 case conservation groups simply asked the government to look before it leapt and to make sure that local citizens knew what their government had been planning in their backyard.

### **Mississippi River Basin Alliance, et al. v. H. Martin Lancaster—1996**

This 1996 lawsuit involved levees that were 100 miles north of New Orleans, did not breach after Hurricane Katrina, and had nothing to do with the flooding.

In addition, in the suit filed by Sierra Club, American Rivers, the National Wildlife Federation, Arkansas and Mississippi Wildlife Federations, and the Mississippi River Basin Alliance, these groups did not oppose raising the levees; they opposed the destruction of wetlands for construction material.

These are the very sort of wetlands that we needed more of when Katrina struck. The impacts of the storm surge were clearly exacerbated by the loss of coastal Louisiana wetlands. Wetlands act as a buffer for coastal areas, soaking up the storm surge. According to the Army Corps of Engineers, three-square miles of wetlands can reduce storm surge by a foot.

The U.S. Fish and Wildlife Service, Environmental Protection Agency and the Louisiana Legislature all urged the Corps to look at how the proposed project would have impacted the area. It refused to do so.

The case was settled, with the Corps of Engineers agreeing in 1997 to a supplemental environmental impact statement. According to a 1997 Baton Rouge Advocate article, "Corps officials said it will take them 30 years to finish the levee work. That much time is required because funding is lacking for the projects—not because of the new environmental study, called an environmental impact statement."

These accusations mistake efforts to ensure good government decisions with a tragedy that had everything to do with bad judgment on the part of our government leaders. In each of the legal cases cited so far, conservation groups simply asked government agencies to look before leaping into projects that would have had major impacts on people and the natural systems on which they depend and to give local communities what our democracy requires: a say in projects coming out of Washington. That isn't just common sense; that's also the law.

On the heels of Hurricane Katrina, when there is widespread distrust as to whether government can protect the public, it is vital that we have in place mechanisms to hold government accountable. There are right ways and wrong ways to design a highway or even build a levee. By ensuring that there is good science and local input, the government is much more likely to get it right.

Another allegation leveled at NEPA is that it has delayed energy development projects which has resulted in the gasoline price spikes experienced as result of Hurricane Katrina. In its September 9th announcement of this September 17 hearing, the Task Force release quoted Chairwoman McMorris as stating "Throughout the NEPA Task Force we have heard from numerous industries that expensive and time consuming legal and procedural delays are preventing energy production and construction projects."

The unprecedented drilling boom in the United State indicates that, far from NEPA being an "impediment" to oil and gas development, it appears that there are fewer and fewer environmental safeguards in place to assure that exploration and development take place in the appropriate places with appropriate environmental safeguards. Meanwhile, industry profits are at an all-time high. The numbers below

clearly show the National Environmental Policy Act is not standing in the way of energy production.

The BLM has issued thousands more drilling permits than the industry can actually drill.

- In FY 2004, the BLM issued a record number of drilling permits on federal lands—6,052.
  - But the industry drilled only 2,702 new wells on those permits.
- Natural gas production from federal onshore lands has significantly increased during the past decade.
- Natural gas production from onshore federal lands has more than doubled since 1992.
  - And between 2003 and 2004, production increased from 2.226 TCF to 3.133 TCF—a 42% increase in one year on western federal lands alone.

While I am discussing energy related issues I'd like to acknowledge that over the past several years, we have seen successive records set in coal production. Present in our audience today is Maria Gunnoe of Bob White, West Virginia. Ms. Gunnoe did not have the opportunity to testify today but if she had she would have told you of the devastating floods that she and her neighbors in southern West Virginia experience as a result of mountaintop removal coal mining. Having had her property flooded 7 times in the last 5 years, Ms. Gunnoe would have asked this Task Force and the Congress for more protection not less. The depopulation of southern West Virginia as a result of energy development is an under reported story. Unlike Hurricane Katrina, it is a slowly unfolding tragedy, affecting people, communities and the economy. It is the kind of environmental and social tragedy we do not want replicated along our coasts or in other places that might have energy deposits.

I also want to note that the controversies swirling around drilling in the Arctic National Wildlife Refuge and drilling off our coasts are pitched political battles in the Congress, not the result any bureaucratic delay.

In conclusion, under the guise of speeding up projects, some want to waive environmental review requirements and shut people out of the decision-making process. As Americans committed to a democratic process, we can't let that happen. We can't let public officials in Washington, D.C. decide—without citizen involvement—what happens here in our backyard. NEPA is about democracy and open government—not delay.

Thank you,

Ms. MCMORRIS. Thank you.  
Mr. Stiles.

#### **STATEMENT OF WILLIAM A. "SKIP" STILES, JR., WETLANDS WATCH**

Mr. STILES. Hi. I am William A. Stiles, Jr., Skip Stiles to everyone but insurance solicitors over the phone. Thank you for holding the hearing, Madam Chairman. Congresswoman Drake, thank you for coming into our community—into your community.

I am Vice President of Wetlands Watch, which is a local all volunteer group. We are engaged in the conservation and protection of wetlands, mostly through intervening in the permit process at the State, local and Federal level. By intervening, I mean we are lay citizens. We don't have lawyers, and we aren't environmental professionals. We all have day jobs outside the environment.

We look at permit applications and comment on them. We also help educate citizens on how the laws work that affect them with regard to wetlands. We work with regulators and with the regulating community to try to find a better way to operate these environmental regulations.

In this region, with such a large Federal footprint, on land with Navy in a number of the cities in the region and in the water—most of these are navigable waters, so the Corps of Engineers controls much of the waterways—we are constantly bumping into the Corps of Engineers and Section 404 of the Clean Water Act, which



is implemented through the provisions of NEPA. So we have extensive experience with NEPA through this process, and also through the process is involved in citing some of the freeways and highways in our region which are funded by the Federal Highway Administration.

In the process of this work we have come to rely on NEPA because, as I say, we are work outside of the environmental profession. We depend on the analyses that are done by the professional staff of these agencies to show us how the projects, either Federal projects or projects that the Federal Government is permitting—how they are going to affect our community, our quality of life, our property in this region.

We also depend upon NEPA to give us accurate warning when somebody is up to something in our backyard that we should know about. Some say that this is a burdensome process, but let me give you an example out of West Norfolk here just across the river where it actually provided the citizens of the community of West Norfolk with advanced warning that there was a major project going to affect their community.

Maersk Shipping is putting in a terminal just across the river here. It is a \$600 million facility. Because they were dredging the bottom, they had to get a Federal dredging permit, and that permit required an environmental assessment through the provisions of NEPA.

Back at the end of that document was a secondary impact statement that said 1500 trucks a day were going to enter, and 1500 trucks a day were going to leave this neighborhood of 100 homes over in West Norfolk. The only way those folks found out that this was in the works was when we in Wetlands Watch contacted them and asked them if they had—were aware of this. They were not.

The city officials, of course, were aware of this traffic estimate about a year and a half beforehand, according to documents that I had. The bottom line is that these citizens raised a ruckus, and the officials of Portsmouth and representatives of the largest shipping company in the world had to come into their community in an evening session in their community church and explain to them eye to eye exactly what was going to be happening in their community as a result of this permit.

This was the first and only time that these citizens knew that this was going to be happening, and it was because of the analysis that was performed by the Corps of Engineers and the publication of that analysis in the environment assessment that they held this meeting.

The permit went forward. We were all looking for a full environmental impact statement. It went forward with an EA. It was a \$600 million project. It dredged 10.3 million cubic yards of bottom. It was the largest dredging permit that ever went through without an EIS, went through in about a year and a half.

So NEPA was not unduly burdensome in this case, unfortunately, from our perspective, because we felt that there were a number of environmental impacts and secondary impacts that should have been analyzed. But it illustrates the point that, for many citizens in this community, NEPA and its provisions has implemented, at least for us, through the Clean Water Act and by the

Corps of Engineers, is a necessary safeguard, frequently the last line of defense that we have to know that either the Federal Government or someone seeking a permit from the Federal Government is going to be proposing environmental impacts that will have significant and detrimental impact on our community.

It does level the playing field, but we feel in a positive way. I know that many in industry feel that it levels—it is leveling the playing field in the wrong direction, but again for the common citizen who doesn't have access to the professional expertise of Mr. Kelman's society members, we have to rely on the Federal Government to do these analyses and do them completely, and do them early.

I would make an observation based on my experience with Wetlands Watch and with the 22 years that I've spent on the professional staff in the House of Representatives. In my experience, most of the problems with NEPA could be broken down three different ways.

Sometimes NEPA is not involved at all. The NEPA issues are not involved at all. For example, the offshore oil and gas drilling issues on a moratorium and an Executive Order, NEPA is not yet involved in that.

The issue of the wind farms off the Eastern Shore: The Corps of Engineers asked the applicant for that permit to provide it with information as to how he can explain the fact that the electricity being generated would overpower the grid of the Eastern Shore, because they hadn't done the work to actually move the energy any farther to the Eastern Shore.

The applicant, who was not going to be operating that system, is, I guess, coming up with that answer, because the permit process has been suspended pending further information. So sometimes NEPA is not involved at all.

At other times, it is the underlying statute. In the case of Tolich Ditching, for example, it is a dispute with the Clean Water Act, and the fight is taking place within the boxing ring that is NEPA; and folks don't like the Queensberry Rules within that boxing ring, but the actual dispute is back in an underlying statute, either there or the Endangered Species Act.

Sometimes, oftentimes, as Mr. Kelman mentioned, the problem is that the Federal agency simply does not have the expertise or resources to properly implement the statute.

So I would be careful. You know, my daughter rolls a white gumball across the carpet. It picks up a whole lot of stuff it doesn't want. So in your analyses here, be careful to parse out those things that are truly the problems and those things that are in the underlying statutes.

Thank you very much.

Ms. MCMORRIS. Very good.

[The prepared statement of William A. Stiles, Jr. follows:]

**Statement of William A. Stiles, Jr., Vice President,  
Wetlands Watch**

Madam Chairwoman, Members of the Task Force, thank you for inviting me to testify on the role of the National Environmental Policy Act (NEPA) in the Mid-Atlantic States.

My name is William A. Stiles, Jr. and I am vice president of Wetlands Watch, a regional, non-profit, all-volunteer organization dedicated to protecting and conserving wetlands in Virginia. Wetlands Watch does not have paid staff and receives limited grant funding. We work with local citizens, regulators, and the regulated community to educate them about the need to conserve wetlands and the ways in which the regulatory system works to protect wetlands disturbance. I am also vice-president of the Virginia Conservation Network, a coalition of over 100 Virginia conservation organizations.

Much of Wetlands Watch's work involves direct intervention in the wetlands permitting process. This brings us into constant contact with NEPA and its implementation in various agencies and statutes, mostly the provisions of section 404 of the Clean Water Act as implemented by the United States Army Corps of Engineers (USACE). We also deal with NEPA-like provisions in the state laws and regulations administered by the Virginia Department of Environmental Quality and the Virginia Marine Resources Commission; two agencies that work with the USACE on joint permit applications for disturbances to tidal wetlands. Finally, we have been involved with NEPA as it is implemented through Federal Highway Administration project approvals.

Our group is made up of common citizens who all have "day jobs" outside of environmental organizations. We see NEPA as a tool for citizens such as ourselves to be involved in environmental regulatory decisions affecting our community and our lives. Without NEPA, we would be powerless against big government or big corporations proposing activities that would disturb our region's environment.

The federal government directly or indirectly controls much of this region's land area. The federal government owns forty percent of Norfolk and sixty percent of Portsmouth. Large expanses of Virginia Beach and Chesapeake are under federal government ownership as well. Navigable waterways, which thread throughout this region, are under the control of the USACE.

NEPA is one major protection available to the citizens of this region when the federal government is considering projects affecting our lives, property, and communities. NEPA guarantees that citizens can see and comment upon analyses of the project's environmental costs and economic benefits, its environmental impact, alternatives to the project, and long-term impacts on the community.

Some view this process as unnecessary or burdensome. For the residents of West Norfolk in the City of Portsmouth, NEPA was their only hope.

West Norfolk is a small community of about 100 households of working class residents in Portsmouth. They are just upriver from the new Maersk Marine Terminal that will bring 1,500 trucks a day through their neighborhood. The off ramp to accommodate that traffic will involve the condemnation of three homes in the community.

The residents of this community only found out about the truck traffic because of the draft Environmental Assessment (EA) done to allow the dredging of the Elizabeth River near this new Terminal. The details of this plan were in the secondary impacts section of the draft EA, an analysis required by USACE's implementation of NEPA in its regulations and guidelines. These facts were known to city officials more than a year before the Maersk permit was filed, but were not shared with the residents of West Norfolk.

When the residents of West Norfolk were made aware of the draft EA, days before the public comment period expired, they asked for a delay in the permit approval and wanted public hearings on the traffic impacts to their community. In lieu of that, a delegation of Portsmouth city council members and Maersk representatives held a civic meeting in a community church in West Norfolk to meet with the citizens.

I was at that meeting and my faith in democracy was restored to see insensitive public officials and representatives of the largest shipping company in the world meeting with the citizens of this small community as equals. The Maersk representatives explained in public for the first time what was going to happen to these people and their neighborhood.

That port project was approved and the dredges are working now not far from here on the Elizabeth River. The approval time from application to a finding of "no significant impact" was less than one year, this for one of the largest dredging projects in the Nation, involving 10.3 million cubic yards of material. Wetlands Watch and the citizens of that community wanted the project to move to a full Environmental Impact Statement, but we did not prevail.

However, despite our disappointment in the USACE decision to issue the permit without full review, in that one evening in West Norfolk, we had a small victory. The facts revealed by the NEPA process allowed those folks in West Norfolk to compel politicians and corporations to come to them and explain themselves.

I don't know who would want to "streamline" or change this process. Democracy was well served under NEPA that night. I imagined Thomas Jefferson looking down and chuckling at the scene.

I can cite other examples of NEPA making citizens in this region aware of proposed projects looking to take their property or adversely affect their quality of life. I can also cite examples of where NEPA was not fully followed and we are now paying dearly for it, such as the \$70 million + restoration effort on the Lynnhaven River.

The Task Force background material also mentions affordable energy and the effects of Hurricane Katrina. The press release issued by the Task Force on September 9, 2005, mentions improving NEPA to "prevent these barriers to energy production and development in the Mid-Atlantic states."

I am aware of proposals to allow the drilling of gas and oil off the mid-Atlantic coast, drilling now prohibited by a congressionally imposed moratorium and a Presidential executive order. However, lifting this moratorium does not involve NEPA, but rather passage of legislation and the rescinding of an executive order. This action would involve considerable political capital since most of the elected officials in the mid-Atlantic region oppose lifting the moratorium.

This year a bill was passed by the Virginia General Assembly endorsing offshore gas and oil drilling. The terms of the legislation were not publicly debated during passage due to legislative sleight of hand. In fact, the city most affected by this legislation, Virginia Beach, did not even know the General Assembly had passed such a bill until they were contacted to ask for Governor Warner's veto of the bill.

The only public debate on the terms of this offshore gas and oil drilling bill was in the Virginia Beach city council chambers, as advocates and opponents had to explain their positions on the bill. The Virginia Beach hospitality industry was opposed, as were many citizens groups. In the end, Governor Warner vetoed the legislation.

My point in bringing this up is to illustrate the shortcuts that can happen in government processes, shortcuts that exclude regular citizens. NEPA provides a safety net, a guarantee that any significant federal action, or federal action taken on behalf of private industry, will require analysis, public notice, and comment. To "streamline" NEPA is to threaten the guarantee that our region's citizens, even if excluded from legislative decisions affecting our natural resources, as they were this year with the natural gas drilling legislation, will always be included in the final decision on permitting the use of those natural resources.

Finally, on Hurricane Katrina and the role of NEPA I will comment that I think it is more important to fix the problem than fix blame. From my perspective, the problem is that the potential damage from a storm increases with each acre of wetlands lost, and Louisiana loses about 400 acres of wetlands per week. Department of the Interior information cites a value for hurricane protection from wetlands in Louisiana of between \$1600 and \$1700 per acre.

USGS's Louisiana Coast website mentions the threat to oil and gas pipelines from the loss of wetlands and barrier islands on the Davis Pond website:

"This degradation of the landscape not only increases exposure of pipelines to the periodic ravages of storms and hurricanes, but to the constant erosive force of waves that now travel unimpeded across vast stretches of open water that were once sheltered."

The point is driven home by this statement, so relevant to today's hearing, made by Richard Greene, the Regional Environmental Protection Agency Administrator for Region 6, which includes the Gulf Coast:

"No other place on Earth is disappearing as quickly as the Louisiana coastal ecosystem, where a half-acre of land turns to open water every 15 minutes. The impact of such a loss includes destruction of nationally important energy production infrastructure and the possible relocation of over 2 million people. At risk are approximately 30,000 oil and gas production wells, some 20,000 miles of offshore pipelines, and thousands more miles of pipelines inland. The decline of the coastal marshes would dramatically effect the integrity of a national energy infrastructure, as well as nationally significant commercial fishing, transportation, and recreation industries."

So to come full cycle on my remarks today, it seems that the conservation and protection of wetlands is one of the most important things we can be doing to protect our economy. And that effort involves the rigorous application of the National Environmental Policy Act.

In Hampton Roads, wetlands provide sediment and nutrient reduction for free. Once wetlands are removed, we have to pay for the environmental services they provided, through increased waste treatment fees, loss of water quality-related economic activity, and through direct payments for remediation efforts, such as on the

Lynnhaven River. Nationally, especially in the Gulf Region, wetlands provide other services, such as buffering from violent storms. We need to conserve and restore wetlands to better avoid the economic shocks such as we are experiencing now.

NEPA forces us to do some of the analyses that insure we adequately value wetlands. NEPA requires that we look at "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

I am left to conclude that if we had done all that NEPA required, we would have made different decisions along the way—both in our region and nationally—that would have lessened the bills we are paying today.

Thank you again for the opportunity to present my views today on this very important issue.

---

Ms. MCMORRIS. I just want to thank everyone for being here, each of the panelists, for taking the time to put together testimony, thoughtful testimony from your experiences and backgrounds.

At this time, we are going to start the question and answer period. Just before we do, I want to make a couple of comments.

In 1970, NEPA was signed by President Nixon into law. It was the first of many environmental laws that were passed in this country, and today we are simply asking the question, can we do better? We all share the goals of having clean air and clean water and a healthy environment, and the question before us is if we can accomplish those goals in a better way.

NEPA is the process by which we look in making those decisions, and no one is suggesting that we do away with public participation. I value public participation. I value local input, and encourage people to be involved. I think that the best decisions are made when more people are involved.

The standards, the environmental standards, are actually laid out in other laws, whether it is the Endangered Species Act, the Clean Water Act or the Clean Air Act. NEPA is simply the process by which we take into consideration the impact, the environmental impact, and make the best decision possible.

This has been our fifth field hearing that we have held across the country, and it has been disappointing that some—and it was characterized in the press yesterday that this was possibly a dog and pony show. I personally invited Mr. Besa to be here today, and at every hearing around the country we have invited either the Sierra Club or other environmental groups to be participants on this panel. We encourage their participation.

We have also invited people from a whole host of other backgrounds and industries that have been impacted by NEPA. We have been welcoming that input from everyone.

Some of our witnesses today suggested that there has been a lot of talk about Hurricane Katrina and who is to blame. This Task Force has not pointed the finger at anyone. We have acknowledged that there are potential roadblocks and bureaucratic red tape that NEPA may have created prior to the hurricane, but I believe there will be a more appropriate time and place for us to explore those issues; and just as some legislators must look at what we can do better to respond to a disaster, heaven forbid, we also need to look at what we can do to better prevent a disaster the next time.

If I have learned anything through this process, it is that NEPA is certainly the law for allowing public input in environmental

consideration, but it is not the law to be used to simply stop or stall projects simply because you disagree with it. So that is what we are trying to accomplish. I appreciate everyone being here. I appreciate the panels for being here.

I am going to turn it over to Ms. Drake to start the questioning. I have to sneak out just for a couple of minutes, but I will be back. Thank you very much.

Ms. DRAKE. Thank you, Chairman McMorris. First of all, I would like to point out to you that there are sheets in the room that, if you would like to fill one of these out and give us your comments—Otherwise, as Chairman McMorris told us, you can submit comments by e-mail, letter, however you would like to do it, but this may make it easier for you, if you would like to do it today.

I would like to start with Senator Wagner, because I know that he is on a tight timeframe, and I thought we would ask him first in case he does need to leave.

Senator Wagner, can you tell us what took place in the 2005 General Assembly session regarding the issue of natural gas, if there are things you are working on now, and what you think may take place in '06?

Mr. WAGNER. Congresswoman Drake, let me—

Ms. DRAKE. Oh, you need a mike.

Mr. WAGNER. I need a mike. Let me respond by giving a little background on how we came to the 2005 General Assembly session. We have a joint commission studying the needs of manufacturers throughout Virginia. We felt that was absolutely essential, because we have lost 70,000, as Mr. Holloway has implied, at the paper mill. We have lost 70,000 manufacturing jobs around Virginia.

Ms. DRAKE. Senator Wagner, I asked to serve on that, and then I ended up in Congress. So I apologize for not being there with you.

Mr. WAGNER. Well, we certainly missed your participation, Congresswoman Drake, but your support of it while you were there was certainly encouraging.

We all recognize that. We all recognize how important manufacturing jobs are. They are the jobs that represent, as I put it, with lack of an MBA of turning dirt into money. Most people call it value added or those that are not just service economy, but actually inject money into the economy of this country.

So when you lose 70,000 jobs in a relatively small manufacturing state like Virginia, it causes you a great deal of concern. So we delved into the reasons why. Now some of them are out of our ability to control, things like furniture and textiles. We simply cannot compete against the labor rates that we see offshore, particularly in China and certain other places in the Orient, India being one of those. However, there are several industries that we remain competitive in, and do.

The other issue we found is that the manufacturing industries are heavily reliant, as you might imagine, on energy. One of those issues that they are very reliant on, more so than perhaps we think of in home heating, is the issue of natural gas. It is extremely important in many manufacturing processes.

If you mention the paper and pulp industry, it is heavily reliant on natural gas. Anybody involved in the machining and tools that involves heat treating processes, very heavily reliant on natural

gas. In fact, in Hopewell, Virginia, the Honeywell plant consumes 50 million cubic feet of natural gas a day and produces primary product as nylon and fertilizer.

For those that may not be aware, natural gas is a basic building block, not a heating element but the raw material that is ultimately converted into fertilizer through a chemical process. So now when we see the exorbitant rates we are seeing in natural gas, not only has it affected manufacturing jobs, obviously those that rely on heating their homes, but it also directly impacts the agricultural community due to the high cost of fertilizer, not to mention the high cost of just operating machinery to do that.

As you are aware, Congresswoman Drake, that agricultural products represent a significant export from this country. It is one of the few areas where we do have a positive balance of trade, and it is one of those areas that impacts virtually every farmer due to the skyrocketing cost of fertilizer.

So we felt it was very important to solve, to see what we could do in the Commonwealth of Virginia to resolve the issues of natural gas or at least to, hopefully, mitigate the prices, because it is so essential to so many jobs, as Mr. Holloway has already said.

In the course of our investigation, through the Federal Government, Department of Interior conservatively estimates there's some 30 trillion cubic feet of natural gas located offshore in the Atlantic Basin.

Then we looked in, is there a precedent? What we found already is that Canada is already offshore in the Atlantic Basin, successfully recovering 500 million cubic feet of natural gas per day, and supplying some of that back to the United States, interestingly enough, just off of Nova Scotia, just off the, if you will, righthand upper corner of the map here.

Based on that analysis and looking at it, plus what we've seen as the outstanding safety record of the offshore industry, we submitted legislation, because there is a Federal moratorium on the Atlantic Basin in terms of just even surveying, much less exploration and development of the resource. Initially, the bill was submitted as just conducting the surveying. Can we find out if resources are available off there in commercially recoverable amounts?

As that bill wound through, through calls I've got from Washington, in fact, and from the House Resources Committee talking about some proposed legislation in Washington that had to do with SEACOR—and the interesting thing about SEACOR, it stands for State Enhanced Authority over Coastal and Offshore Resources, gave Virginia actually veto power out to, depending on the version of the bill you were looking at, 40 to 60 miles, including everything. It could veto any type of exploration, which is currently a power Virginia doesn't enjoy. Virginia enjoys that power out to three miles. Beyond that, Virginia has no say. We thought that was probably a good idea that Virginia had that say-so.

The other interesting aspect of that is that royalty payments that derive from those that would explore and develop those resources that are paid to the Federal Government. For the first time the Federal Government said we are willing to share those resources with the States, and that represented—A conservative estimate

from your Committee, Representative Drake, was \$3.5 billion to the Commonwealth of Virginia over 20 years.

We thought that was an interesting proposal, that here we have something that is reliant on our manufacturers, that helps our agricultural community, that has a proven safety record of some of the cleanest—well, the cleanest burning fossil fuel, natural gas, may be available in commercially recoverable amounts off the coast of Virginia, and provide a new source of revenue that doesn't cost the taxpayers any money. We thought that was a pretty good win idea.

We had the legislation modified. It passed the House. It passed the Senate. Ultimately, it went on to the Governor where the Governor subsequently vetoed it, not because of the objection to offshore drilling, I might add, but because, as he stated, he wanted to study the issue further and wanted further information, and he felt it was inappropriate that the General Assembly—The actual bill is directed to the Virginia Liaison Office to do that.

So that was the legislation as it transpired through that. I will say that the Governor is continuing with the study. I think the results of what the Governor is finding is very similar to what our manufacturing committee found. But since that time, we have taken a look at, and have been working for a number of months pre-Katrina, on legislation that basically was a Virginia energy bill.

We have tried to look at some of the things that we felt we read in the Senate—or the Federal energy bill that's recently passed, but we are taking a rather unique approach in 2006. We are talking about it now.

The legislation is still in a draft form and being worked on at this point in time, but much of what you've heard from each and every person up here, I believe, was when the applicant applies, when the applicant pushes forward with, when the applicant does this.

One of the approaches that we are looking at here in Virginia and taking a very serious look at—and we have heard Senator McCain as he talked, and we are certainly one of the aspects of this bill, says it is the policy of the Commonwealth to support renewable energy. It will be the policy of the Commonwealth to support, if you will, nuclear power generation.

Those types of things will be put in there, but we are going to take it a step further, because we feel it is important that, if it is a policy of the Commonwealth to support renewable energy, that we also come through and evaluate Virginia and say where in Virginia we might think that is appropriate to establish that, whether it be wave driven generation capability, whether it be wind driven generation capability, whether it be those types of things.

We think it is appropriate that we analyze Virginia up front as a government, not as a permittee but as a government, and come back and say we think these locations are OK. It doesn't relieve any applicant from putting them in the permit areas, but we will say that Virginia has done a number of legwork with the Sierra Club, with the Wetlands Watch to say is it appropriate in these areas? Do we want to support it?

We think it is the policy of the Commonwealth to support nuclear power. We have an outstanding track record in Virginia at



Surrey, North Anna nuclear power plants to do that. We recognize that it's zero emissions. We recognize there are some problems with it, but given some of the alternatives, that may be the way to go.

If we think that is the right policy decision to do that, we ought to step forward in Virginia as our regulators, as our government, and say we think it is probably appropriate that, if we want to pursue that in Virginia, that you probably ought to look at these areas to do it. Doesn't relieve you of any permitting requirements. Doesn't relieve you—and we certainly can't impact the Federal Government. But as we listened to Senator McCain in Washington talk about, and highly supportive of—may not support the approach, but saying that 10 to 15 percent, whatever the policy was, of every utility needs to be renewable source energy and, if not, then you are going to come up with a quantity of money to pay back to the Department of Energy for not meeting that goal.

We think it is incumbent that, if the Federal Government wants to make that policy, the Federal Government also says, and here is where you can do it. Here is where we think it is appropriate for you to do it.

I think it is not enough for us policymakers to say you will meet these goals, you will meet these criteria, but I think in this day and age it is very important that we also establish where it is we think we can do it.

So I'm sorry. It's a bit long-winded answer to your question, but I wanted to—It was a multiple answered question, and I felt it was appropriate to do that. And I'm sitting back one, and I know you know that, and I know everybody here, and I can—you know, the make-up of the audience behind us, and I see that. But the overriding issue that I am hearing within my district right now is the cost of energy, the affordability and availability of energy, and the real policy decisions.

I think we really look forward to a winter of—and I have already talked to Dominion Resources. They say that their account that they have set aside for money to help the elderly and those that can't afford energy is going to be tapped, and they don't know if they can replenish the kind of money to provide the subsidies. But we are looking forward in the short term to a real, real crisis this winter with home heating.

You have heard some instances on natural gas, the availability. Typically, this time of the year they are reliquefying it to store it in the northeast to meet the demands. That is not ongoing to the tempo that I would like to have right now to meet those demands. So we run a serious problem, but I would like to close with a question.

Basically, I have heard from everybody, NEPA is not the problem, NEPA is not this. We have a systemic problem. We would not have energy prices where they are today. It spiked to 11.50 per thousand cubic feet post-Katrina, but it had already risen from \$1.50 to \$2.00 or \$2.50 per thousand cubic feet in 2000-2001 to 6.50 prior to Katrina, a threefold increase in something that is absolutely essential for our economy, and now spiking to 11.50.

We have a problem. Is NEPA part of it? May be. Probably. I hear no. I hear no, but I also hear the same objections. We have worked at length on the King William Reservoir, for instance, a vitally

needed water supply project. You have heard some talk about that. I am not going to debate it, but there are certain things we have to do, and the constituents understand there is a problem now.

They understand there is a serious energy problem in this country, and it needs to be solved short term, and we need to look at the longer term, some of the things we've talked about, about a hydrogen economy, moving toward hydrogen cells and those types of things.

We had the ability to solve it. We had the resources. We had the technology. We knew how to do it.

Ms. MCMORRIS. Sorry, let me take—The question and answer period is really between Ms. Drake and myself, and we will continue as long as we would like.

Mr. WAGNER. Thank you. So I don't want to go on, you know. Obviously, the audience is just not in the mood to hear some of the facts. Thank you.

Ms. MCMORRIS. Thank you.

Ms. DRAKE. Well, Senator Wagner, before you finish up—Madam Chairman, if it is all right—looking at Hurricane Katrina and some of the other hurricanes that have moved through the Gulf Coast, would you say that today's offshore production is certainly much more environmentally acceptable and that there was very, very little damage to our environment with it?

Mr. WAGNER. Well, I have heard when the bill was going through, when we started in Virginia Beach there were several—you know, you are going to have oil spills on the beach, and you are going to have those types of things. The data that I have received from the platforms, the platforms stood up very well as designed. There were some problems in close to shore, interestingly enough, but there was no spills that I'm aware of.

I know the pipelines were done. They worked as advertised. They were shut down at the bottom of the ocean. The shutdown worked. I understand there are some pipeline problems, and they don't want to bring those pipelines—bring the product to shore along the pipeline from the platforms. They want to bring those pipelines on line again until they are sure they are intact.

I will say there were significant spills associated with Hurricane Katrina. I understand it is in the range of 44 million gallons. All that I am aware of that were caused were from shoreside storage facilities, due to either levee breaks or due to just a failure under the wind storms. The last data I got was an e-mail stating—I think there were some 44 million gallons from some 47 different sites, I think 10 or 11 I am recalling from memory, where they considered major, in excess of 100,000 gallons. But all that I saw were from shore products and shoreside storage facilities.

You know, one of the considerations we may want to consider if we are going site additional shoreside facilities, we might want to pipe it inland and get it significantly away from the shoreside, because the vulnerability of being so close where there is a potential for flooding makes that a fairly likely event, and one of the considerations that may want to go into the policy is, when you do site new storage facilities, that you site them amply afar away. It is easy enough to pipe a product underground to a storage facility significantly inland so you can avoid those types of problems in the

future, and look as we rebuild some of the infrastructure to perhaps looking with that eye. But I understand that the spills are fairly well contained and clean enough.

Ms. DRAKE. Thank you, Senator Wagner. I appreciate your answers. Appreciate your being here. I thought it was interesting you brought to our attention what we all did in the early Seventies, which was the wood stoves and the fireplaces. I got pretty darn good at those wood stoves, banking them down to make them go all night. I would prefer not to do that again, and I don't have a fireplace anymore. So we are going to listen to you and watch you.

Mr. WAGNER. Well, I can just—If it is an unaffordable product or people are having trouble affording it, apparently, as I read the newspaper, it would be the natural human reaction to go out and start to buy the firewood, and then we need to start asking ourselves as a policy, does a million fireplaces produce more pollution in the air than a well regulated plant that would not cause those to come on line and have to have those million fireplaces?

Ms. DRAKE. Thank you.

Mr. WAGNER. And I thank you again. And again, Madam Chairman, I apologize. I have something else on my schedule, and I need to go.

Ms. MCMORRIS. Yes, I understand.

Mr. WAGNER. Thank you so much.

Ms. MCMORRIS. Thanks for being here.

Ms. DRAKE. Madam Chairman, I will yield back to you.

Ms. MCMORRIS. Very good. I would just remind the audience, this is a Congressional hearing, and everyone deserves the respect that you would like to see afforded if you were sitting right up here also. So I would just ask you to keep that into consideration.

I wanted to—Feel free to excuse yourself whenever you need to go, Senator Wagner. I wanted to move to Mr. Shafer. Appreciate you being here from Louisiana. I wanted—You laid out some recommendations, very specific recommendations as to—in your testimony as to how you felt the NEPA process could be improved.

I wanted just to ask you a simple question as to the impact that you thought any of those recommendations may have on public participation, if any of those recommendations would in any way gut public participation.

Mr. SHAFER. Not at all.

Ms. MCMORRIS. OK. Second, could you just talk to us about the time involved in developing an EIS and permitting a new pipeline, and how long does it actually take to build on after the permitting process is completed?

Mr. SHAFER. I'll be glad to. Most of the major projects take at least a year and a half to two years on the planning side up front. That is before—And basically, usually the applicant will go out and hold its own open houses, touch base with the public in the area, you know, look at different engineering scenarios that might satisfy the movement of the product through the area.

So we look at various, oh, potential corridors, and it is done in different ways by different companies. But essentially that kind of flows into what you hear referred to at the Federal Energy Regulatory Commission as the pre-NEPA and a collaborative, cooperative approach.

Some of my suggestions that asked the Task Force to take a look at would, I think, further streamline that and improve that. It is not taking away from the public participation at all. In fact, the team permitting idea actually opens it up even more.

I have participated in a very large project where team permitting was used, and it was used very effectively. We did the entire EIS process in about 18 months, because we worked two years up front using a team permitting. So I think there are ways to look at it, not diminish it at all, but look at opportunities and avenues.

I do have a—If I might show you a display. I've got a chart.

Ms. MCMORRIS. OK.

Mr. SHAFER. This kind of gives you a visual impact. This is a Millennium project, Millennium Pipeline. It actually starts in 1997 and goes through year 2006. This project—What it is reflecting here is basically the entire environmental approach, not just the NEPA. But the NEPA approach is in here.

So just to give you an idea, you asked about timeframes, and this gives you an idea of what we go through. We just filed—On Millennium we just filed a—made an amended filing, and it took up pretty much, just that filing alone, the trunk of a car just to haul one set. So it's just a huge volume of material and data.

Part of what our suggestions are, at least INGAA's suggestions—Part of our suggestions deal a lot more with taking a look at this collaborative and cooperative approach, and see if there aren't some ways that, even at the Federal level—and I know the FERC has made great strides in promoting this, but getting all the agencies to look at—and I mentioned it in my oral presentation—more of a simultaneous look, which is the way NEPA was originally written, not a sequential where a lead agency would get the material and then have to farm it out to another agency, and it takes time for those comments to come back, and people comment. Then it goes out to another agency and then back to the lead agency.

What the FERC has promoted is there is a simultaneous look. So we get all the issues out on the table. They are identified. There are sensitive issues that can be addressed. Mitigation can—Appropriate mitigation can be called for, and that's fine. I think then we move forward.

Ms. MCMORRIS. Would you talk to us a little bit about natural gas prices? I understand we are going to be seeing some significant increases. I've heard 71 percent type increases in natural gas prices. Can you talk to us about Hurricane Katrina's impact on gas storage?

Mr. SHAFER. I can. It is steadily improving. What we saw just a few days ago was delays in getting gas to underground storage, but the reports that I had the middle of this week was that that is improving, and that is why I said in my oral presentation that those delays are basically going away pretty quickly.

So I just haven't seen any in the past day or two.

Ms. MCMORRIS. OK. Then a quick question of Mr. Holloway. Would you talk about what you may feel the increase in natural gas prices may mean to the Franklin paper mill?

Mr. HOLLOWAY. Yes. It has a big impact on the Franklin mill, because as you know, if natural gas increased, it will cause us to have to have our company to pay out more income for purchasing

gas and energy. Therefore, it will take away the profit that it will have and for employment with the people that were employed here.

So, therefore, I feel that natural gas is a big—would have a big impact, and also if it gets so tremendous, our companies close. That would be a terrible impact for the City of Franklin and the entire Tidewater area and North Carolina. So I do feel that it would be a big block impact on what could happen with us and our company.

Ms. McMORRIS. OK. Very good. Ms. Drake?

Ms. DRAKE. Thank you, Ms. Chairwoman. Mr. Kelman, you suggest in your testimony that there is nothing in NEPA that requires these huge encyclopedia type documents for NEPA. We just heard from Mr. Shafer about one copy filling a trunk.

Through the hearings across the nation, we have heard from many agencies. I mean, they will hold their hands up to take pictures beside the documents. So if you don't think there is anything that requires it, why do they spend so much time preparing these documents?

Mr. KELMAN. Well, you have to look at the project. I mean, some projects are simple. When I fill out my income tax, it might be two pages, because I have a simple situation. When General Motors fills out theirs, it could take several vans worth of tax information. It is the same thing about environmental assessments.

When you are doing an environmental impact statement or environmental assessment, it depends on how complicated the project is. If it is a simple project, you are going to have a simple statement. If it is a complex project, then I think we owe it to the public to bring out all the environmental issues involved.

Ms. DRAKE. Do you think—You mentioned also about judicial review. Do you think one of the reasons that there is so much documentation and so much is required is simply to defend a project within court, because people could very easily end up in court through this process, and not because of an underlying law, as we heard Chairman McMorris talk about, and I think Mr. Stiles referred to that as well, that—He mentioned—I wondered exactly what you were referring to, but if people are suing under NEPA rather than under Clean Water, Clean Air, Endangered Species, if that's what all those documents are all about.

Mr. KELMAN. They might be the feeling of the attorneys for those places that there are needs. They have to put all their ducks in a row in anticipation of judicial review, but I'm not an attorney. So I really can't—

Ms. DRAKE. Because this particular paragraph says that it should normally be less than 300 pages, and that is really not what we've seen, both from Mr. Shafer or from other people. But let me finish with Mr. Stiles, because I took a note when you said that, that you said—I interpreted what you said to be people are suing under NEPA rather than under an underlying Act.

I think it is important to clarify that NEPA, as Ms. McMorris said, was passed first, and there have been many environmental laws since. So I would wonder why—maybe I misunderstood you—why you would sue under NEPA rather than under the Act that you feel has been violated. That is the way I interpreted it.

Mr. STILES. It's sort of like the analogy that I gave about a boxing match being fought under the Marquis of Queensberry Rules.

NEPA provides the rules and standards as implemented through agency regulations, and the disputes frequently are an interpretation, say, of the Clean Water Act and its definitions. But the way you get there is by using the Queensberry Rules, by using the NEPA rules, but the actual problem is in some cases an inconsistency in the original Act or a changed definition—a changed interpretation of the definition in the original Act itself.

So you sue under NEPA to get to the original Act, but the actual problem is in the original Act, in some cases.

Ms. DRAKE. And why wouldn't you just sue under the original Act?

Mr. STILES. NEPA sets the standards. Again, the decisions are made within the agencies under the standards as implemented through the agencies and their regulations. So when someone—When the Corps of Engineers is making a decision under Section 404 of the Clean Water Act, for example, those determinations are set by these Queensberry Rules, by NEPA.

So the problem is in the statute, but the problem—The way you get at it is through the rules—through the standards in NEPA.

Ms. DRAKE. My understanding of NEPA, if that's all right, is that it provides for input and interaction within government agencies, Federal agencies. It allows for public input, and it requires that there be alternatives. But you are saying it is also being used—Is it easier—So it is obviously easier to sue under NEPA than under what you feel has been violated.

Mr. STILES. Well, you challenge the Clean War Act, for example, because of a standard that NEPA has set—well, a standard that the Corps of Engineers has set in their becoming compliant with NEPA. In other words, NEPA itself is, as you know, one of these sort of elegant, three-paragraph statutes that really doesn't give you a whole lot of detail.

Ms. DRAKE. It is a process.

Mr. STILES. Yes. The way it is implemented is each of the agencies is required in their activities to meet the standards that NEPA has set forth. In fact, the Council on Environmental Quality has set standards that each of the agencies then has to implement. So it's sort of down to the agency when they are making the determination on Section 404 of the Clean Water Act. They are doing it in accordance with these Queensberry Rules, with the NEPA standards that have been set.

So you are suing—You are using NEPA to challenge the Clean Water Act is what you are doing. But the problem itself is in the way that the definitions in the Clean Water Act have been implemented.

Ms. DRAKE. Thank you for that explanation. I just have one last question for him. That is: Your Wetlands Watch website states, "The regulatory system is set up to be adversarial. While this may seem unfortunate, it's the way that it is."

Since we have just had this discussion about NEPA being a process, don't you think that that in itself would ask for reform, that it should not be an adversarial process within NEPA?

Mr. STILES. Well, I think that any regulatory process, because it involves the balancing of a current economic need with some future environmental impact, is always going to be a conflict; because

what you are doing, in effect, is you are taking future costs that are somewhat unknowable and frequently have been disregarded, but you are taking those future environmental costs, and you are bringing them into the current regulatory decision.

For example, some estimates by the Department of Interior say that the hurricane prevention potential of an acre of wetland is 1600 bucks. Well, what the regulatory process does is it goes out and it does those kinds of analyses, and it says, OK, you want to disturb a wetland. Ordinarily, there is no value associated with it, but wait, now we know that there is a potential hurricane potential. We know that it is a recruitment ground for a number of fisheries.

You know, you begin to put value on the wetlands, and what the regulatory process does is it says to the person, even the Federal agency or the individual who is seeking the permit—It says, well, you are going to make some economic gain off of this, but we as a society are going to lose these future economic benefits. So we have to balance them out.

So the conflict comes, because I'm an applicant, I am going—I want to put a pipeline in. You are telling me I got to worry about these other economic benefits or these environmental benefits.

That's where the conflict comes, because that's what NEPA does. It basically balances the—It's a cost/benefit entry in many cases, and it balances current gain against future losses, especially where there are irreparable damages to the environment, and it is necessarily a conflict, because if I am a profit making operation, I want to put my project in, and yet you have to take all the societal costs into account in issuing a permit. That's the way the law was written.

Ms. DRAKE. I will yield back.

Ms. MCMORRIS. OK. Thank you. I wanted to go to Mr. Besa next.

We have heard concerns dealing with NEPA. You made the statement that NEPA doesn't stop projects. We have talked to folks from transportation departments across the country, public works. And although you didn't mention it in your remarks, the Sierra Club is often concerned about urban sprawl and urban growth issues.

It is not unusual for transportation projects from planning to actual time when the road is built for it to be years and years, and in that period there's been many examples where the Federal Highway Administration's NEPA analysis will be upheld ultimately, but yet during all of the litigation that takes place, roads are not built, projects do not move forward.

So isn't that in essence stopping the project?

Mr. BESA. Well, I don't think you would consider it stopping the project when basically this process is set up to evaluate, as Mr. Stiles said, the various competing interests. That's really what is involved here, and it does take some time. Democracy takes time.

You know, when you've got a complicated—It may seem simple out building a road, but when you figure that a road, for one thing, may destroy wetlands that have value in terms of flood impacts, when you consider that a road has secondary impacts in terms of stimulating development that may make a demand on local govern-

ments in terms of schools and police protection and a variety of other things, there really gets to a real balancing act involved.

It's not just simply building a road. It is considering all the impacts the road has on the environment, on the economy, on the communities.

I think all we need to do is look back to before NEPA during the time where we started building the Federal highway system, and recognize the devastation it caused to our cities. I think everyone who knows the way that we walled off certain communities that we wanted to separate, the way we destroyed other communities completely.

There's got to be a recognition that we really need to study the problems, because if you look at what happened in the way of road construction before NEPA, we've got lots of examples of it in a lot of our urban cities where roads destroyed communities which have still never recovered.

Ms. MCMORRIS. I am not for a moment suggesting that we go back to before NEPA. I am only asking if there is a better way that we can, as we move forward, look at the environmental impacts.

Just continuing with this example, what about those examples when there may be numerous cases and action taken against a particular project, and there's the examples when you might lose time after time after time, and in that meantime we have traffic congestion, we have air pollution, and what about that impact on the environment?

Mr. BESA. Well, you are asking a very complicated question here, and I think it goes well beyond the bounds of NEPA. I mean, we've got a situation in this country where suburban sprawl, as you mentioned, and it has been a concern of the Sierra Club, is a real problem for folks.

I would suspect that, if you talk with your constituents, they are oftentimes very concerned about development that is occurring somewhere where it hadn't before, and I don't know that NEPA really plays into that problem.

What you are suggesting is that the delay in building a road may exacerbate pollution problems or congestion. I would suggest to you that what is being debated, really, is a public policy question—maybe again NEPA is what's involved here—relative to whether a road gets built or whether we consider mass transit.

Whether a road is actually in effect future land use policies because, as we say, if you build it, they will come, and in many instances a lot of road projects—no disrespect to the Congress—are looked upon as pork barrel projects that open up a lot of vacant land, a lot of farm land to development that doesn't serve the environment and doesn't serve those local economies very well.

Ms. MCMORRIS. Thank you. Mr. Spainhour, I wanted to talk a little bit more about the aggregate industry, and if you could just give me a sense as to the type of regulations that you deal with and where you feel NEPA may be duplicating efforts.

Mr. SPAINHOUR. OK. Most of our operations—and I will speak for Vulcan Materials Company. Most of our operations are heavily regulated at the state and local level. Most of the permits that we have to operate, that we have to have before we can construct our



plants, before we can operate them, are usually state permits, depending on the state.

California is the best example. California has a series of overlapping regulations at the regional level, State level and local level. The involvement with NEPA is really when we get into an action that's going to involve a Federal agency decision.

One of the common examples would be if you have Federal lands that you are actually wanting to go onto and mine and recover the aggregates from. One of the anomalies of our industry—You know, aggregates are not available everywhere. You have to go to where the rock is. You have to go to where the sand and gravel is.

The Gulf Coast is a good example of that. Vulcan has a number of operations in Mississippi, Louisiana, and Alabama, coastline operations that are essentially yards. We don't produce the rock there, but we ship it in from other locations and distribute it to the local marketplace to help in the construction activities; because the aggregate resources are—at least for our company, are limited in that area.

So you want to be able to develop the resources where the resources are located. Now when the resources happen to coincide with Forest Service land or other Federal lands, that is going to activate the NEPA process. If they happen to be in areas where you have other concerns like endangered species or wetlands, that is going to usually activate a Corps of Engineers or EPA or Fish and Wildlife Service decisionmaking process that could trigger NEPA.

You know, Vulcan is very proud of our environmental efforts. So we want to protect endangered species. We want to protect wetlands. We want to do things the right way. So we want that process to work effectively to protect the environment, but where it really impacts us is where you have different directions and different positions and policies and ways that the actual requirements within the different agencies are implemented and enforced; and it creates uncertainty when a company like Vulcan goes into an area and we know we are going to activate Corps of Engineers permitting or we know we are going to be on Federal lands, understanding exactly how that area, that agency, is going to—what they are going to require, what we are going to have to put together as far as supporting information to support environment assessment or environmental impact statement.

To a company like Vulcan, we want to have some assurance that we understand that process, we are going to be able to work within that process to accomplish a common goal of protecting the environment, as well as developing the necessary resource. That is where a lot of the problems come in.

There are differences in approaches within different agencies, different areas, and you run the risk of sometimes having specific agendas within given agencies that can affect your process also. We have had some processes where we have been involved in that go multiple years, that we have to go through multiple alternatives' analysis.

We tried to design our projects in a way—The West Coast is the best example. We like to design our projects in a way that minimize the impacts to the environment and are designed in a way

that we can effectively work through the process. But when there's uncertainty out there, sometimes we are not able to do that.

Ms. MCMORRIS. OK. Thank you. Ms. Drake?

Ms. DRAKE. Just to wrap up—Thank you, Chairwoman—Mr. Besa, I think where Chairwoman McMorris was going when she asked you about the impact of not doing a project—Maybe since NEPA, part of NEPA, is alternatives. You know, what are other sites? Maybe one of the things we should look at is that: What is the impact of doing nothing?

I can tell you, the biggest concern in Virginia right now that for all of us here across the State is transportation, and I think it is a frightening thing to think we wouldn't have the highways we have today if they weren't built a long time ago. Not that that means we want to do them in any way other than the most environmentally friendly, but I can't imagine Virginia without the roads that we currently have today. But don't you think that could be a suggestion that comes out of this commission, is to look at what happens if you do nothing?

Mr. BESA. Well, actually, there is a "No Go" alternative. So there is a review of what happens in the event of doing nothing. It's called the "No Go" alternative.

I think that we have to consider transportation and energy policy together here, because, obviously, the serious problems we are having here now associated with energy demand relates directly to our transportation policy in part, and recognizing our increased dependence on oil and foreign oil is a result of a transportation policy that spreads this out further and further and further.

Now I think that, if we are going to get serious about energy and serious about transportation, then we need to basically start to be better planners, because when we just decide that we can run a road here or run a road there and not really worry about the consequences in terms of not only transportation but in terms of energy demand, particularly today when we see—These gentlemen who are involved in energy know about the concept of peak oil.

Really, they aren't making any new oil, and in 10 years or 15 years, I suspect that we are going to be on the downward side, and that means that, obviously, we are going to have to really look at the way we move ourselves around. So, consequently, I—I may not have answered your question directly, but I did my best.

Ms. DRAKE. Well, would it surprise you that the Canadian government believes that North America can meet her energy needs in North America, the North American continent, with Mexico, Canada and the U.S. working together with resources that we currently have?

What you just said—You kept talking about relying on foreign oil, but the information we have is there are a lot of resources within this continent.

Mr. BESA. Well, there certainly are, and those all involve significantly increased costs in terms of money. So you are going to raise the price if you are starting to go into coal bed methane, for example, or other forms of production. So it is going to raise the price, because those are hard to get at.

Then you've also got the environmental impacts of these, because in many instances it's very little oil spread over a large area, and

it involve extraction of tremendous tons of minerals or whatever to get at the oil. Then, of course, we haven't discussed the issue of global warming which, in light of the debate that seems to be clearly indicating that is a problem, that we need to think and, I'm sure, rethink our use of fossil fuels.

Ms. DRAKE. I just have one last comment, and that is in other hearings we have heard from people, one woman in particular, how the company that she is with has been trying for 20 years to open a mine in Arizona. At the same time, her company went to Chile, opened a mine in three years.

So when we start talking about offshoring of jobs—and I see Mr. Holloway shaking his head, because as a union representative, he understands that's probably the biggest reason we lose jobs rather than cheap labor, like people like to say. But I would like to know from Mr. Shafer or Mr. Spainhour, could you give us an average amount of time it takes you to get through the process, just to know that average amount of time? And that woman who was at 20 years had not even been to court yet in any cases, but she was up and running in Chile in three years, and that predictability, I think, is huge for our business community. Mr. Shafer, and then I'm done. I'm sorry.

Mr. SHAFER. I had spoken a little earlier about the planning process. My experience gives me these numbers I am going to give you, which would be an average, which would be what I would consider a major project, major large diameter, high pressure, natural gas transmission pipeline, not projects like the Alaska gas which we need desperately from the North Slope and that kind of thing. But a year and a half to two years in the planning process, and then about 18 months to work through that process, if you use the pre-NEPA filing, collaborative approach, kind of the quasi-team permitting approach.

Then if you have no legal actions to work through, it would take you at least a couple of years to build it. So you are talking about five, six years.

Ms. DRAKE. OK. Mr. Spainhour?

Mr. SPAINHOUR. On the aggregate facility side, it varies tremendously based on what part of the country you are in. California is probably our worst case scenario as far as timing. In California the planning process really has to start several years before you plan on beginning operation.

Part of that, as I mentioned, is the definition of the project, the design of the project. A lot of work goes into not just determining where your resource is, but also laying out how your facility will be designed, how it will be operated throughout its life cycle, and understanding how the property will be used at the end. So you convert it into a usable resource, whether that is commercial development sites or recreational development, whatever it may be.

So that process takes you a while to work through. Then when you get involved with the regulatory agencies in siting, it is a multi-year process. Now our folks have told me when you add NEPA on top of that, you are adding probably another year to 18 months to two years on top of the existing process out there.

The biggest burden that we have as far as timing outside of California will be based on local issues, really, based on the supportive

of the community and the amount of concern the community expresses about the location of the mine site.

You know, we try to work in a way that we are viewed as good citizens of the community, but folks aren't always happy to have the mine site or sand and gravel operation next-door. So we have to work through those issues and make our way through that.

Ms. DRAKE. Thank you very much. I yield back.

Ms. MCMORRIS. OK. You know, one of what I perceive to be the challenges of NEPA is that, when you look at the law, nearly every word of NEPA has been litigated. You know, what is the definition of significant? What is the definition of impact? You know, just on and on.

Instead of clarifying through the years, it has only making it more—In my opinion, it is more tangled, because every year there's hundreds and hundreds of cases pending across this country that are further clarifying and defining and making it more and more cumbersome.

The question is, Mr. Spainhour, if you would just answer the question as to what types of criteria are used to define major Federal action?

Mr. SPAINHOUR. Well, my understanding, it really depends on the agency you are dealing with. You know, I can—Probably the best examples I can give are projects that we have been involved in. In cases where we have planned on developing a mine site or extracting reserves from Federal property like Forest Service property, for example, that is usually going to be viewed as a Federal action.

Activities with dredge and fill permitting, those type of activities—that's usually going to be viewed as Federal action. We are involved with a project right now where we are developing a rail line, and it is under Surface Transportation Board. So we are going through the environmental impact process right now assessing that.

That's the best—I can only really give you examples I have experience with. So those are the kind of examples we deal with.

Ms. MCMORRIS. OK. Very good. At this time, I think we have completed the questions, unless you have any other questions.

I again just want to thank each of you for being here. We value your input, and we may have some further questions for you. We would submit those to you in writing and ask you to respond also in writing.

I understand that everyone has busy schedules. We do have the website up and going, and continue to ask folks to submit their comments to us. This has been a process of listening to a whole host of people all across this country as to how they interact with NEPA, and today we have heard from people representing three different states, and it is all helpful.

I would also like just again to thank my colleague, Thelma Drake, for inviting us to be here today. It has been great to be here, and if you have anything else you would like to say, I will give you that opportunity.

Ms. DRAKE. Well, Congresswoman McMorris, I would like to thank you for coming. She did drive down from Washington. So she got to see how beautiful our area is as you enter through the

Hampton Roads Bridge-Tunnel. So she will go back to Washington and talk about what a beautiful area that we have.

I would like to thank Dr. Runte and Old Dominion again for allowing us to be here. I would like to thank all of you for taking your time and for working with us as we continue to work through this process.

I don't think there is anyone in the room that doesn't support the intent of NEPA. No one would want to limit public input. We all believe that more interaction with agencies is better and that Federal agencies should be able to weigh in on projects, and we do think we should look at alternatives to projects.

So we truly support NEPA. We just feel, after 35 years, that we should be looking at what is reality. We are hearing from people, there's way too much documentation. We are hearing from other people there really isn't any. So we are sort of back and forth, and we are really trying to find that balance of how do we protect our environment and meet our needs as a great nation as well. So thank you for your part in that.

Ms. MCMORRIS. Thank you. With that, the meeting is adjourned. [Whereupon, at 2:54 p.m., the Task Force adjourned.]

[NOTE: Information submitted for the record has been retained in the Committee's official files.]

