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NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
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February 6, 2006

To the House Resources Committee NEPA Task Force:

Please accept the following comments by Pacific Rivers Council (“PRC”) on the *Initial Findings and Draft Recommendations* staff report of the Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act, dated December 21, 2005.

PRC is a non-profit conservation organization whose mission is to protect and restore rivers, their watersheds, and native aquatic species. For over fifteen years PRC has participated in public and private land management planning and other federal actions affecting rivers and native aquatic species under the NEPA umbrella. Our organization has also submitted comments to your task force during previous iterations of this NEPA review (see attachment) as we are keenly interested in ensuring that the intent and role of NEPA be preserved through any proposed changes.

In our experience, problems limiting NEPA effectiveness stem primarily from the lack of good-faith compliance and implementation rather than inadequacies in the law or regulations themselves, and so there is no evident reason for amending a crucial law that remains fundamentally sound. Additionally, we question the process that lead to the Committee’s initial findings and draft recommendations; a process that appears biased toward reaching a single conclusion – that NEPA is “broken” and needs fixing.

Objectively assessing the functioning of a law after three-and-a-half decades is a legitimate undertaking, but must occur within the context of NEPA’s original purpose and need without presuming a predetermined outcome. The need that prompted NEPA’s enactment still exists and its purpose remains valid, as is evidenced by the continuing declines of freshwater habitats and species throughout the United States. Any consideration of changes to the law must take care to preserve or enhance, not undermine, NEPA’s fundamental purpose of carefully identifying and analyzing impacts to our

nation's natural environment. The current, biased process provides an unacceptable basis for recommendations to amend NEPA or revise its implementing regulations.

Please feel free to contact us with any questions or for any further information we may be able to provide to assist any sincere and objective assessment of NEPA.

Sincerely,

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I. Introduction

A. Draft findings and recommendations report is product of biased, non-credible process

It is PRC's opinion that the process that produced the Committee's draft findings and recommendations is not credible. The process shows a bias towards reducing and/or eliminating requirements for NEPA compliance without providing objectively-analyzed evidence to support a conclusion that requirements are excessive or onerous relative to the benefits of compliance and NEPA's need and purpose. Nor do these recommendations actually address the causes of any problems with NEPA or its implementation (and thus, whether the recommendations have realistic probability of solving perceived problems while still fulfilling the purpose for which NEPA was enacted). This inappropriate bias is evident throughout the document, including (but not limited to):

- The report is a product of Republican task force *staff* alone¹. It contains only a single mention acknowledging that staff, not Task Force members, produced the report and a single footnote that “[t]his report has not been officially adopted by the Committee on Resources” (pp. 1, 2), otherwise allowing the misleading impression that it is a bi-partisan majority or even consensus Task Force view (a misconception reflected in media references to it as a report of the Task Force).
- Anecdotal assertions reflecting a wide spectrum of opinion are consistently presented in the report with no critical assessment of their truth or validity. Our long experience with NEPA suggests many of these assertions are likely to be false, exaggerated, or misleading; or to misattribute the cause of an asserted effect.
- Nonetheless, despite lack of any objective, critical assessment of validity of assertions by commenters/witnesses regarding NEPA, when reaching conclusions and making recommendations, the report consistently gives credence to assertions that NEPA requirements are excessive and onerous and need to be changed; while consistently ignoring/dismissing those suggesting otherwise, or suggesting that the primary causes of any actual problems lie in NEPA compliance/implementation by agencies and applicants, not in NEPA itself or its implementing regulations. This is further specifically reflected in the fact that PRC's previously-submitted comments (appended and incorporated here in full by reference), which made specific, practical recommendations informed by our long experience with NEPA, were for all practical purposes ignored. In addition, several draft recommendations receive only inadequate or no discussion/justification at all in the report (e.g., “clarifying” cumulative impacts), reinforcing the impression they are predetermined outcomes, rather than a result of analyzing input to the Task Force.

¹ Juliet Eilperin, Washington Post, January 6, 2006, “A GOP Key to Unlocking NEPA”, p. A17: “The ***GOP staff report***, which was based on seven public hearings lawmakers held across the country . . . ”

- Consistently throughout, the report assumes as a premise the (affirmative) answer to a crucial question that's actually the fundamental topic at issue, i.e., is NEPA in need of "improving" and "updating"; and, if so, why, and how should this be accomplished? (For example, "[t]he purpose of this initial report is to present to the general public a collection of draft findings and *recommendations for improving and updating NEPA*", p. 2; .)
- There's a clear attempt to limit/circumscribe the scope of comments on the report, including the anti-democratic condescension that a comment by a citizen who takes the time and makes the effort to submit "form" comments (thereby affirming agreement with their content) is somehow "less equal" than a comment whose content is entirely unique and original. ("Computer generated, bulk or other nonspecific comments will be given their just consideration", p. 2, emphasis in original.)

Therefore, this report cannot validly form a basis for amendment of NEPA or revision of implementing regulations.

II. Major Findings of the Task Force

A. Historical context of, need for and intent of NEPA

NEPA was enacted in response to growing recognition and a public outcry that widespread, often severe and long-lasting harm was being done to the human environment and natural resources by land and water management and other federal/federally-impacted activities, with no or inadequate prior consideration of those consequences. NEPA's purpose is to end this practice by requiring a "look before you leap" approach in which the Purpose and Need of a project and analysis of its impacts is validated by the "best available science" and alternatives considered to ensure that, if so validated, it is enacted in the least environmentally harmful manner practical.

These NEPA requirements in the public interest inevitably place some burdens on federal agencies and those proposing actions with a "federal nexus" (e.g., requiring a federal permit), relative to unrestrained freedom to do whatever they wish. Humans and human institutions naturally resist being told what they can do and how, but our society long ago decided and has consistently reaffirmed that such regulation in the public interest is appropriate when reasonable, and thus it is common in many circumstances, not just under NEPA. For example, there are costs borne by restaurateurs to conform to public health regulations. These costs are simply passed on to customers in the price structure. The public benefit is clear. No one seriously questions the appropriateness of this. NEPA is no different. There is only a problem if these burdens are excessive or disproportionate to the benefits resulting from the requirements. For reasons noted, especially pervasive bias, this draft report fails utterly to demonstrate that this is the case. That affected parties don't like conforming to NEPA requirements is to be expected, but that alone is not sufficient reason to weaken the protections of NEPA, which overwhelming evidence clearly indicates are still needed and appropriate. If NEPA

compliance costs are high, so are the stakes in terms of the public's interest at risk, especially where threats to public health or impacts to publicly-owned resources (e.g., federal lands) are at issue.

B. Causes/sources of perceived “problems” with NEPA: costs, “delays”, litigation

PRC asserts based on our long and extensive NEPA experience that the most fundamental underlying cause of long and drawn-out NEPA processes, documents and related costs is **resistance on the part of entities and agencies governed by NEPA to fully accept and comply with its protective purpose and requirements of transparency and credible scientific analysis.** As noted in our previous comments (appended and incorporated by reference here), this is frequently manifested in a backwards process of developing a proposal on the basis of political, economic and/or other considerations, then – and only after a preferred course of action has substantial momentum – attempting to fit a scientific rationale to it to meet NEPA requirements instead of fully incorporating and objectively analyzing scientific and environmental impact considerations from the beginning of proposal consideration and development. This in turn creates strong incentives to deviate in significant ways from NEPA's requirement to use the “best available science” in analyzing environmental impacts of alternatives (including selective citation that ignores relevant, countervailing science and distortion/misrepresentation of cited scientific literature – see Appendix C for example), This in turn underlies most of the very small proportion of proposals appealed under NEPA and the even tinier percentage litigated.

In many important cases, actions governed by NEPA involve private use of or profit from public lands or goods. Our system still very often does not require individuals/enterprises to fully compensate society for the goods they take from or the harm they do to “the commons”, e.g., publicly owned resources, public health, “the public good”. Many “feasible” undertakings are only pseudo-feasible because they are not required to account for such costs in their bottom lines; rather, they are essentially subsidized by the public. To the extent such a dynamic is at play in the following example (we suspect it's large relative to the implied claim that it's the NEPA process, not inherent infeasibility, that renders the projects infeasible), then NEPA is functioning appropriately in the public interest.

“[A] trend [is emerging] that speaks volumes about the burden of the process. **In some cases we conclude to not develop resources that would be available to us so that we can avoid interaction with the NEPA process and the delays associated with it.**” (p. 21)

It is understandable that those finding their activities and perhaps profits thus constrained by the public interest don't like it, and seek ways to free themselves of these constraints. But the constraints were enacted for very good reasons.

“Delays” to NEPA process

We note that, in yet more evidence of a biased process and draft report, even the use of the word “delay” presupposes the conclusion that NEPA process takes longer than is warranted by the resulting benefits/protections or by NEPA’s overall purpose. Yet this has certainly not been demonstrated by credible evidence in the draft report; nor, even if “delay” is real, has it been demonstrated what the underlying causes are of such delay or that the draft recommendations actually address those causes.

For example, discussion of the Colville National Forest salvage project involves more circular argument by presuming salvage is appropriate and should have proceeded rapidly when this in fact remains the subject of intense scientific debate, with an emerging consensus that salvage logging is rarely if ever ecologically justified while risking extensive ecological harm. Although clearly not the intent of the person telling the story, this scenario again proves that NEPA works. Salvage logging has grave environmental consequences that are not necessarily prevented by other environmental laws. While agency personnel and industry refer to the time needed to conduct an adequate NEPA analysis as “delay”, the time taken is actually deliberative and necessary.

The report refers to the fact that the “reopening” of the NEPA process is another form of delay; it cites supplemental EISs being prepared after a decision point has been reached. While this supplemental process indeed pushes a final decision further into the future, it is not a fault in NEPA causing the delay. For example, after almost 10 years of public process, the Sierra Nevada Forests Plan was completed in 2001 and the NEPA process drew to a close. However, timber interests persuaded the Bush administration and Forest Service to rewrite the Plan to increase logging output three-fold, which necessitated a supplemental EIS process to consider the effects of this increased logging. This example demonstrates that the supplemental EIS process is not the problem; if agencies were not so quick to change course after a publicly-informed decision is made, the need for a supplemental EIS process would be eliminated.

Agency Resources

It is suggested that one way to offset the cost of NEPA compliance is to ask project proponents to volunteer to pay some costs of NEPA documents. But this creates a “fox tending the hen house” problem parallel to drug companies paying for safety testing, and is clearly an inappropriate solution to the issue of cost.

III. Draft Recommendations

Group 1 - Addressing Delays in the process

Recommendation 1.1

NEPA already defines “major federal actions” as “major federal actions significantly affecting the quality of the human environment”. 42 USC § 4332, Sec. 102 (2) (C). The choice by Congress not to more specifically define such terms as “significantly” is common in environmental law and arguably reflects an appropriate recognition that a one-size-fits-all definition is neither possible nor wise. The draft recommendation to shift focus from significance of environmental impact to the amount of “planning, time, resources, or expenditures” required is wrongheaded and contrary to the intent of NEPA, and would likely be counterproductive to its purpose. Any proposed change must retain, not weaken, this fundamental purpose, and so must be carefully worded to make sure that seemingly lesser federal actions with major environmental consequences (such as fuel reduction projects) undergo proper NEPA analysis.

Recommendation 1.2

As drafted, this recommendation is likely to be both unworkable and counterproductive and to reduce needed flexibility, which often serves and is invoked by project proponents/applicants, not just by the public or opponents. It is clear from examination of many actual timelines of NEPA projects (e.g., DellaSala et al. 2006) that much/most “delay” is on the part of project proponents/applicants/agencies, not due to public comment requirements, appeals or litigation. Seeking to force analysis into rigid timeframes regardless of appropriateness, need or complexity is contrary to the need and intent of NEPA.

Recommendation 1.3

This recommendation has most of the same problems as Recommendation 1.2. It seeks to replace needed flexibility with rigidity without any documentation that the existing flexibility is the source of any perceived problem. There is no discussion of the need for this change earlier in the report, so we can only assume that the change is being proposed to make the Categorical Exclusion (CE) loophole bigger. If anything, CE regulations should be tightened to ensure that federal actions with significant environmental impact are properly analyzed.

Recommendation 1.4

This recommendation, which is in no way supported by logical rationale in the report, would encode in NEPA a standard already in NEPA-implementing regulations. The report acknowledges that standards are already in place (e.g., 40 CFR 1502.9(c)), then asserts that “there is a perception – and some evidence – that there is no consistent application of these standards”, but no such evidence is provided. Thus, this recommendation appears to seek to solve a problem that may not exist, on the sole basis of unverified “perception” that it is a problem, without providing any credible evidence that the purported problem is real.

Group 2 - Enhancing Public Participation

It is crucial to recognize that NEPA comments are the ONLY non-litigation citizen involvement path that is guaranteed to the public. Recommendations aimed at reducing or limiting such participation or de-valuing particular kinds of input (e.g., form letters) are contrary to the need for and intent of NEPA.

Recommendation 2.1

Decisions under NEPA typically involve use of public lands (often including taxpayer-subsidies of private profits) or impacts to public resources (e.g., fish and wildlife habitat, water quality). Where federal lands are involved, every American citizen is an equal owner. There is zero basis for assuming local entities are automatically better qualified to evaluate environmental impacts of proposed actions or to objectively weigh costs against benefits. In fact, there is good reason to expect the opposite in many situations, and this is confirmed by experience: there is sometimes a local bias towards sacrificing environmental protection in favor of perceived local/economic benefit (e.g., logging and timber mill jobs). The contention that the citizen-owners of public lands “are not directly affected by [a given] proposal” involving federal activities on public lands and impacts to public resources is absurd on its face, and clearly illustrates the inappropriate bias in the production of this draft report, which we noted earlier. Further, citizen groups, both local and regional or national, are often the only advocates for imperiled species and ecosystems likely to be impacted by actions proposed under NEPA, whose needs are likewise subject to sacrifice to perceived local economic or other benefits if local issues and concerns are “weighted” as proposed by this recommendation. There is no rational basis for this recommendation.

Recommendation 2.2

We reiterate, as in our comments on Recommendations 1.2 and 1.3 that the problem this recommendation seeks to solve is primarily a result of resistance by project proponents/agencies to full compliance with the letter and spirit of NEPA, coupled with the tendency to attempt to fit add-on scientific rationales to proposals whose elements have already been largely shaped and set based on other considerations. In our experience, extreme length of NEPA documents quite often reflects an attempt to create an impression of thoroughness, and thus of scientific adequacy where there is none, i.e., to conceal scientific inadequacy by burying it in an avalanche of pages (often including very extensive redundancy).

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

Recommendation 3.1

We have previously recommended improved intergovernmental and interagency cooperation to enhance NEPA effectiveness (see appended previous comments incorporated here by reference). We note that NEPA already provides for this and

contains no impediment to such improvement, thus there is no need to amend the Act to accomplish it; this again appears more a problem of implementation than a problem with the law.

Recommendation 3.2

We do not oppose this recommendation in principle, but emphasize that such state reviews must be fully “functionally equivalent” to NEPA in reality, i.e., neither weaker nor employing lesser levels of scientific/technical information and expertise. Discussion of this topic in the “findings” section raises serious concerns in this regard, however, in that it draws unwarranted conclusions from assertions which, even if true, have obvious potential alternative explanations, e.g.:

In the context of oil and gas permitting, the state of Texas has environmental procedures similar to NEPA yet the process of a permit takes only 25-35% of the time it take a Federal agency such as the Bureau of Land Management. **This demonstrates that there is [sic] some efficiencies that are absent from the Federal process.** (p. 15, emphasis added)

An obvious alternative explanation would be that Texas just doesn’t do as good, thorough or adequate assessment of environmental impacts, and the state’s reputation as one of the most polluted/polluting makes it quite reasonable to suspect that this may indeed be the more likely explanation of its “efficiencies”.

Clearly, with the wide ranging number of environmental laws, there is bound to be some overlap. It was recommended the effect of this overlap be studied to determine if it is merely redundant analysis that does not plainly lead to better analysis. (p. 17)

Recommendation of such a study by an objective, non-partisan entity with appropriate expertise at its disposal (e.g., GAO, CRS) is appropriate. Recommendation of changes to NEPA without confirmation from such an objective study that 1) such redundancy indeed exists and is a significant problem and 2) changing NEPA (rather than laws overlapping with it) is the most reasonable solution to it is unwarranted.

Group 4 - Addressing Litigation Issues

This group of recommendations provides a prime illustration of this draft report’s pervasive bias, noted previously, towards predetermined conclusions. The draft report acknowledges that only 0.2% of the 50,000 EISs filed each year end in litigation. Yet, despite this strong evidence that litigation is not a major cause of any NEPA cumbersomeness or ineffectiveness, Task Force staff nevertheless drafted recommendations to “fix” what the evidence provided in the report strongly suggests “ain’t broke”, i.e., to erect additional obstacles to litigation (couching them in the Orwellian guise of a “citizen suit provision”, which would suggest to a casual reader the

intent to enhance, rather than hamper citizens' ability to sue). With one exception, each part of Recommendations 4.1 and 4.2 either duplicates requirements already in place (e.g., standing, exhaustion of administrative remedies) or creates such new obstacles.

The exception – restricting litigation settlements – risks creating an unworkable “solution” and a troublesome new, steep, slippery and potentially dangerous slope; it also inappropriately mandates primacy to economic over ecological considerations. As parties to the Bitterroot National Forest Burned Area Recovery settlement, which could well be the model for what this recommendation seeks to preclude, we view such settlements as far from an ideal outcome of a public process governed by NEPA, but this process was imposed on us, not sought by us. As elsewhere, we assert that this was largely a result of agency actions not in conformity with NEPA requirements. “[A]greements that forbid or severely limit activities for businesses that were not part of the initial lawsuit” and “the business and individuals that are affected by the settlement” (the latter rightfully including every American citizen-owner in the case of public lands decisions) are certainly unworkably broad.

As we've noted elsewhere, we find unconvincing agency complaints that they have to take excessive amounts of time to produce excessively long NEPA documents to “bullet-proof” them against fear of litigation. This argument is circular, presuming that appealed/litigated projects were sound, but nevertheless needed “bullet-proofing”, when this clearly is often not the case. For the most part, litigation occurs and prevails because NEPA requirements are not followed in good faith, not because documents are too short or produced too quickly. The documents don't have to be bullet-proof — the projects do. If the projects weren't so egregious, the public wouldn't have to use the NEPA process to forestall the projects. As also already noted, in our experience the underlying cause of agencies' and others' perception of this need is their reluctance to fully comply in good faith with NEPA, apply the best available science throughout the process, and constrain activities accordingly.

In some cases, litigation impacts numerous federal decisions. But these cases are successful in stopping a federal action only because there are legal grounds to do so – in other words, litigation under NEPA successfully stops projects that do not adequately consider their environmental consequences. In that respect, NEPA is working as it should. It is also crucial to note in this context that litigators have a very high bar to get over in order to prevail, given the deference to agency “expertise” afforded by NEPA and the courts (even though agency personnel performing analyses and making decisions may often have far less relevant training and experience than some commenters – e.g., independent scientists – objecting to analyses or conclusions). In practice, this means that agencies/proponents must have failed quite clearly and egregiously to fulfill their NEPA obligations in order for litigants to prevail under the Act.

Recommendation 4.2 is unclear to the point of incomprehensibility, thus making informed comment on it impossible. It is unclear what the underlined substance of the

recommendation means and also how the following description relates to, clarifies, or expands on it. This recommendation should thus be dropped or clarified.

Group 5- Clarifying Alternatives Analysis

Recommendation 5.1

We actually would have no objection to this if all costs (including those not readily “monetizable”, e.g., biodiversity, many ecosystem services) to all bearers of those costs (including species/ecosystems, taxpayers and citizen-owners of public lands) were explicitly and exhaustively defined and accounted for. We note that such a requirement and accounting would preclude many private and federal agency activities (e.g., mining, public lands grazing, timber sales) that currently occur under NEPA, which are only “feasible” due to heavy subsidy by taxpayers. The question of socioeconomic consequences is already part of the NEPA analysis.

Recommendation 5.2

This seems reasonable in theory, but in practice would risk exacerbating a common existing problem in which agencies tend to shape Purpose and Need analyses and fit “scientific” rationales to them such that only a predetermined preferred alternative is deemed to meet the Purpose and Need. “No action” alternatives frequently serve as “straw men” for just this purpose. Given that the recommended course of action is already standard procedure in our experience, this looks like another “solution in search of a problem” and hardly seems to rise to a level of significance requiring NEPA amendment.

Recommendation 5.3

We could endorse this recommendation with the stipulations that 1) avoiding rather than mitigating for harm should be explicitly identified and mandated as the first priority whenever feasible; and 2) that timing of mitigation is a crucial factor, and deferral (of limited, explicit duration) of mitigation is only permitted if credible analysis indicates that consequences of deferral are insignificant.

Group 6 – Better Federal Agency Coordination

Recommendation 6.1

We could endorse improved collaboration/consultation throughout NEPA analysis. We note, however, that the number of interactions between agency staff and the public doesn’t matter if the interactions are only used to make people “feel included” and to convince them that the agency is making the right decision, a not-uncommon practice. The public input must actually be taken into consideration and influence the design and choosing of alternatives. For this, it must begin early (specifically including scientific

consideration/consultation), while a proposal is first being considered and then taking shape, not be deferred until after a proposal is largely determined and set, as is often the case. It is also imperative that legal/regulatory/scientific “sideboards” constraining potential options (e.g., requirement that a take permit associated with a Habitat Conservation Plan must meet a “no jeopardy” test) be clear to all participants from the outset. Otherwise, parties can enter collaboration/consultation under the misconception that as long as all or a majority agree on something, it is acceptable – only to become embittered upon learning that this is not the case after investing themselves in the process. Requiring consultation isn’t enough; increased interactions do not necessarily lead to reduced administrative appeals or litigation – and thus reduced “delay”.

Recommendation 6.2

Designating and giving special authorities to a lead agency (as is currently done) makes obvious sense. However, insufficient information/justification is provided in the draft report to allow for meaningful evaluation of this recommendation’s validity (for example, it is unclear what is meant by ‘[lead agencies’] authorities should be applied “horizontally” to cover all cases’ or what ‘appropriate elements of 40 CFR 1501.5 would be codified in statute.’ Clearly, then, it is not currently a valid recommendation for legislative amendment of NEPA.

Group 7 - Additional Authority for the Council on Environmental Quality

Recommendation 7.1

This recommendation seriously risks merely adding an additional layer of bureaucracy to the process. Given the volume of NEPA analysis likely to come before such an ombudsman, the highly likely outcome would seem to be a new potential bottleneck. If the point of amending NEPA and its regulations is to reduce “delay,” this recommendation likely runs counter to that goal. At any rate, such an ombudsman’s authority should not replace, preclude or supersede existing appeal and litigation options.

Recommendation 7.2

Like so much of the draft report, this recommendation relies on a circular argument concluding its premise (i.e., that NEPA costs are disproportionately or unacceptably high relative to the Act’s purpose and benefits of compliance) without presenting any credible evidence or analysis to demonstrate that this is in fact the case; if so, what its fundamental cause is; or that the proposed recommendation realistically addresses the cause and so would be likely to solve the perceived problem. Thus, like nearly all the draft report’s recommendations, it is highly premature and not a valid basis for amending NEPA.

Group 8 - Clarify meaning of “cumulative impacts”

Recommendation 8.1

Cumulative impacts should be interpreted as widely as possible to account for the myriad effects caused by federal actions at different but interrelated spatial and temporal scales. It is unclear what this recommendation means, what its purpose is, or why it is allegedly needed. It is very easy, however, to envision cases for which an agency's methodology for assessing existing conditions would be inapplicable, inadequate or inappropriate for assessing past cumulative impacts.

Recommendation 8.2

This isn't the real issue with cumulative effects. The problem is that federal agencies don't even adequately consider the effects of concrete and planned proposed actions or their combined effects. Further, in practice, cumulative impacts are already interpreted restrictively, e.g., activities are considered "reasonably foreseeable" only if proposals for them have reached at least the scoping stage. Seeking to restrict even further what potential future impacts should be assessed during cumulative impacts analysis is wrongheaded and contrary to the need for and intent of NEPA.

IV. Conclusion

In summary, we find this draft report and recommendations to be a pervasively biased product that cannot serve as any credible basis for amending NEPA or revising its implementing regulations. Moreover, we do not believe that the remedies proposed by the report will be effective; nor are they needed. On the whole, these recommendations propose to fix problems which either 1) do not exist or 2) are not actually "problems" but rather proof that NEPA is an effective law. These recommendations largely run counter to the intent of NEPA, and therefore should not be considered solutions to any perceived problems. We instead urge the committee to look for ways to encourage the good faith implementation of NEPA and application of the best available science throughout the process, to ensure that the net public benefit of this law is maximized.

Literature cited

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Appendix A: PRC's August, 2002 NEPA Task Force comments

August 23, 2002

Chairman James L. Connaughton
Council on Environmental Quality
C/O
NEPA Task Force
PO Box 221150
Salt Lake City, UT 84122

Re: Request for Comments on National Environmental Policy Act Task Force (67 FR 45510)

VIA ELECTRONIC SUBMISSION

Dear Chairman Connaughton:

Pacific Rivers Council respectfully submits the following comments regarding the July 9 Federal Register notice outlining the National Environmental Policy Act ("NEPA") Task Force and its solicitation of comments on "ways to improve and modernize NEPA analyses and documentation and to foster improved coordination among all levels of government and the public." (67 FR at 45510.) Pacific Rivers Council ("PRC") is a non-profit conservation organization whose mission is to protect and restore rivers, watersheds, and their native aquatic species. PRC has offices in Eugene and Portland, Oregon, Polson, Montana, and Damascus, Virginia. For over a decade PRC has proven to be one of the most effective advocates of a whole watershed approach to land management in both national and regional planning efforts.

PRC has extensive experience working with NEPA processes and analyzing the resultant documents. We have provided information for and commented on environmental analysis documents produced by federal land and wildlife management agencies--the US Forest Service, Bureau of Land Management, US Fish and Wildlife Service, and National Marine Fisheries Service in particular. Our experience in assessing these processes and documents has enabled us to identify certain weaknesses that repeatedly surface and, in our opinion, hamper the efficient and effective application of NEPA. We address these weaknesses in the following comments, linking them to the study areas set out in the Federal Register notice to the extent that we are able, and drawing upon specific examples to better illustrate the points we raise.

However, before continuing any further we must emphatically state that NEPA—despite its flaws—is one of the most important laws enacted in the continuing effort to protect and restore the unique and diverse natural systems of this nation. NEPA established an open and public approach to federal actions that has led to better-informed decisionmaking overall. As is true with any law, the ensuing years of implementation reveals that there is room for improvement, but the underlying tenants of NEPA remain as legitimate today as they were in 1972.

Study Area A: Technology, Information Management, and Information Security

1. The Science Disconnect Problem

In many of the EISs we review, repeatedly we have identified a gap between what the best available science indicates is an ecologically appropriate management approach and what the responsible agency actually proposes. Sometimes the preferred alternative even contradicts the recommendations of agency scientists. Other times, the analysis contained within an EIS relies on information that is not readily available to the general public, and so interested parties cannot evaluate the applicability of the underlying assumptions. And more often than not the analyses of different topic areas within an EIS are presented in a piecemeal fashion, so that the end result is a set of recommendations that is entirely disconnected not only from the best available science but also from the analytical underpinnings of the EIS itself. For example, many national forest EISs contain goals and desired future conditions that described a functioning landscape with natural watershed processes and biological integrity, but more often than not the preferred alternative does not describe adequately *how* management would achieve this vision nor what ecosystem improvements would be made during the life of the plan. In other words, there are no explicit linkages between ecological goals and the standards and guidelines necessary to achieve them. The end result is an EIS that lacks the necessary linkages between stated ecological goals (supported by the best available science) and management direction (standards and guidelines) to successfully implement a scientifically sound management plan.

Two examples of the science disconnect problem can be found in the development of the Interior Columbia Basin Ecosystem Management Project (“ICBEMP”) and the Sierra Nevada Framework for Conservation and Collaboration (“Sierra Framework”). In the case of the ICBEMP Draft EIS, scientific conclusions reached by federal agency scientists on the Science Integration Team (“SIT”) were ignored, misrepresented, misunderstood, and even misapplied. For instance, the Aquatic SIT Report identified road-related problems as a major contributor to the decline in status of fish species and stream condition. It concluded that the importance of existing refugia (i.e., aquatic species strongholds) and roadless areas to recovery of aquatic species would be difficult to overstate. The Report found a correlation between low road density and high quality

habitats and between increasing road density and declining aquatic habitat conditions. It also found that increases in sedimentation are unavoidable even using the most cautious road building methods. The preferred alternative, however, did not incorporate these findings. It did not adopt standards to require a reduction in road density in subwatersheds that support fish refugia, nor did it adopt standards prohibiting new road construction in areas important for recovery of vulnerable fishes. Moreover, the preferred alternative explicitly allowed for an increase in road density in the least disturbed sub-watersheds; provided no direction regarding decreasing road density in moderately roaded subwatersheds; and allowed construction of new roads through the few remaining areas of high quality habitat in the most degraded subwatersheds. We documented many other science disconnect problems with the ICBEMP Draft EIS that followed a similar pattern. The ICBEMP effort ultimately stalled, partly because of problems like the one described above, and partly because of a lack of political will to complete the regional planning process.

The Sierra Framework planning process also languished for many years because of the large gap between the best available science and what was being recommended in the plan. The problem was so severe that on September 4, 1996, then Under Secretary of Agriculture James R. Lyons convened a Federal Advisory Committee of scientific and planning experts to review the Draft EIS (at that time called the California Spotted Owl DEIS) in light of findings of a congressionally sponsored scientific report detailing the ecological and social status of the Sierra Nevada (the Sierra Nevada Ecosystem Project Report or “SNEP”). The Committee found numerous discrepancies between the SNEP Report and the Draft EIS despite the fact that they were being drafted simultaneously and shared many of the authors (i.e., federal agency scientists). Unfortunately, many of the Committee’s findings and recommendations were ignored in drafting the next iteration of the EIS, and many SNEP findings still were ignored, misapplied, or maligned. For example, the Committee recommended that the Forest Service develop a spatially explicit analysis at the appropriate scale of the potential effects of road development associated with the alternatives on aquatic resources, hydrologic connectivity, refugia, roadless areas, and other ecosystem values, as well as cumulative effects analysis in relation to existing road network (including non-Forest Service roads). No such analysis was developed for the Draft or Final EIS, and the Framework was finalized in 2001 still lacking a comprehensive approach to addressing forest road impacts on aquatic systems.

2. Information Availability

As stated above, environmental analyses often are based on information that is not readily available to the public. Very often, upon receiving a draft NEPA document, we must carefully comb through the document and identify studies and other primary information sources that only are contained within the administrative record, and then request these studies or data from the responsible agency. The recent trend of copying the administrative record onto a CD-ROM has helped alleviate some of the frustration involved in this process. It would be even more helpful for agencies to identify this information at the incipient stages of the NEPA process, and to make it available

electronically (e.g., via the world wide web), so that interested parties can help identify information gaps as soon as possible. This would likely improve agency efficiency and help reduce the risk of lengthy revisions and/or administrative or legal challenges because important information was not considered.

Study Area B: Federal and Inter-governmental Collaboration

A pervasive problem in NEPA decisionmaking is a lack of coordination or outright conflict between federal agencies and/or between them and state or local agencies. As discussed above, often the science/research arm of an agency is not involved with important management planning endeavors at an early enough stage or is involved only peripherally, which can lead to contradictory recommendations and scientifically and legally vulnerable NEPA decisions. Additionally, intra-agency conflicts can draw-out and confuse NEPA processes and frustrate all parties concerned. While these problems often have more to do with how agencies are structured and funded, we feel that improved coordination within and between agencies is not only possible but necessary to realize the full potential of environmental planning and protection under NEPA.

Study Area C: Programmatic Analysis and Tiering

Programmatic analysis and tiering can prove invaluable if the analysis is consistent with principles of ecological and biological processes. The spatial (geographic) and temporal scale of an environmental analysis is predicated upon which species and resources are present in the planning area, and what activities are proposed. Wide-ranging species, such as Pacific salmon and steelhead, require large-scale planning to address the multitude of impacts they face throughout their life histories at the regional, basin, sub-basin, and stream-reach scales. Endemic species, such as the Yosemite toad (found in a limited area of the Sierra Nevada), require smaller scale analysis but may also benefit from programmatic analysis when certain impacts are pervasive across a region. For example, grazing of wet meadows impacts large portions of federal lands in the Sierra Nevada and is one of the primary factors in habitat loss and overall decline of the Yosemite toad. But wet meadow grazing also impacts the viability of the willow flycatcher, degrades water quality, increases soil loss, and aids in the conversion of native plant communities to invasive exotics. Thus, activities that occur over a wide area can have a disproportionate impact on a species, suite of species, or habitat type, that may not be adequately addressed at the small-scale (i.e., project level).

Likewise, tiering can play an important role in environmental planning processes *if* the overarching programmatic analysis is done properly and *if* it is employed to verify the appropriateness and accuracy of the larger scale programmatic analysis and not simply to validate it. All too often tiered analyses are seen as an “easy out”—instead of making a good faith effort to evaluate and ground-truth the underlying assumptions of the

programmatic analysis, site-level analysis utilize the original document as a stamp of approval for going forward with a given project. A recent example of this is the proposed Bitterroot National Forest Burned Area Recovery Project Final EIS and the accompanying Biological Opinion (BO) issued by the Fish and Wildlife Service.

The proposed Burned Area Recovery (“BAR”) Project would have allowed salvage logging on 41,000 acres within the Bitterroot National Forest in Montana. The project, as originally designed, would have caused prolonged degradation of habitat in bull trout streams already stressed (in the short term) by the fire. This unacceptable risk to federally-listed bull trout was due in large part to the Biological Opinion (BO) issued by the Fish and Wildlife, and which was tiered to a programmatic BO for the larger Columbia River Distinct Population Segment (DPS) of bull trout that encompasses the project area. Although the BO conceded that the Columbia River bull trout DPS is highly fragmented and that the upper Columbia River portion of the DPS is nearly extirpated, the Service illogically concluded that the project would not jeopardize the Columbia River bull trout DPS. Yet the bull trout BO for the Bitterroot BAR project lacked any analysis of the claim that loss of local populations does not compromise the recovery of the DPS as a whole—in place of thoughtful analysis, it refers back to the programmatic BO for the entire Columbia River DPS as justification for signing off on a project that would have devastated local bull trout populations.

2. The Unfulfilled Promise of Cumulative Effects Analysis

Programmatic analysis and tiering can be further hampered by inadequate cumulative effects analysis. The Bitterroot National Forest BAR provides a good example for this problem too. The Bitterroot BAR Final EIS acknowledged that there would be significant cumulative effects without in fact providing a cumulative effects analysis. The FEIS divided the Bitterroot National Forest bull trout population into four distinct geographic regions (Blodgett, Skalkaho-Rye, East Fork Bitterroot, and West Fork Bitterroot). It then divided each geographic region into smaller drainages so that each region encompassed dozens of streams. The FEIS then discussed potential impacts to individual stream segments (and by association bull trout subpopulations) but at no point did the FEIS analyze cumulative impacts for each of the 4 subregions, the greater BAR project area, the Bitterroot National Forest, or the Columbia River DPS. Although the FEIS recognized the potential of negative cumulative effects to fisheries within the planning area, it concluded that the cumulative effect of sediment on bull trout habitat and populations would likely be insignificant in all streams, despite contradictory information within the FEIS and the BO.

Unfortunately, incomplete, inadequate, or inexistent cumulative effects analyses are all too common in the NEPA documents we review. This problem has long plagued agencies responsible for preparing NEPA documents, despite recognition by scientists, the courts, and the CEQ itself. In fact, in 1997 the CEQ issued a report titled “Considering Cumulative Effects Under the National Environmental Policy Act” and concluded that consideration of cumulative effects is essential for evaluating and

modifying alternatives to avoid adverse environmental impacts and developing appropriate mitigation and monitoring plans. The CEQ report specifically addresses the “scale” issue as follows:

Many times there is a mismatch between the scale at which environmental effects occur and the level at which decisions are made. Such mismatches present an obstacle to cumulative effects analysis. For example, while broad scale decisions are made at the program or policy level (e.g., National Energy Strategy, National Transportation Plan, Base Realignment and Closure Initiative), the environmental effects are generally assessed at the project level (e.g., coal-fired power plant, interstate highway connector, disposal of installation land). Cumulative effects analysis should be the tool for federal agencies to evaluate the implications of even project-level environmental assessments (EAs) on regional resources. (Id. at 4.)

The report goes on to discuss a study that evaluated 89 EAs published in the Federal Register in 1992 and found that for the 22 EAs that actually identified the potential for cumulative impacts, five took conclusions from a previous document, one provided for “future” analysis, and only 3 actually discussed cumulative impacts for all affected resources. (Id. at 6.)

Clearly, incorporating cumulative impacts analysis into every NEPA decisional document is not only required by the act itself (40 CFR § 1508.7) but is necessary to achieve an accurate depiction of potential impacts at both the project and programmatic levels.

Study Area D: Adaptive Management/Monitoring and Evaluation Plans

In theory, PRC agrees that adaptive management is a valuable tool for adjusting agency action to management outcomes that were unforeseen or inaccurately predicted. In another 1997 report (“The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years”) the CEQ summarizes the consensus on the appropriate trigger for adaptive management as follows: “where resources are not likely to be damaged permanently and there is an opportunity to repair past environmental damage, and adaptive environmental management approach may be the best means for an agency to meet its specific and NEPA missions.” (Executive Summary, p. x.) In other words, adaptive management should not be an open-ended experiment of “wait and see” conducted across large areas, but rather a carefully designed experiment that ameliorates rather than invites risk.

The ability to design appropriate adaptive management programs so far has been hampered by a lack of current, quality baseline environmental data. For example, the Northwest Forest Plan has a prominent adaptive management component that so far has failed to speed up the project planning process because of a lack of data. Specifically, the plan included guidelines for surveying for certain animal and plant species before

designing projects that could impact the identified species, and yet the plan contained no real mechanism for completing the surveys in a timely yet thorough manner. Conservationists were forced to challenge multiple projects that the Forest Service planned to initiate without survey data, which led to a legal settlement agreement. These legal challenges could have been avoided if the necessary funding and implementation provisions had been built into the Northwest Forest Plan, and if adaptive management principles truly were integrated at the project planning level. As it stands, the conservation community is still waiting to see a successful adaptive management plan in action.

Study Area E: Categorical Exclusions

In November of 2001, PRC submitted comments on the Forest Service's proposed changes to its categorical exclusions regulations (National Environmental Policy Act Documentation Needed for Certain Special Use Authorizations [FR 66:183:48412-48416]). We feel that the points raised in our comment letter have broad applicability, and so they are paraphrased below.

With regard to the Forest Service's regulations, categorical exclusions (CE) policy, CEs include a class of activities that take place on national forest lands but that do not undergo environmental analysis or meaningful public comment. The proposed policy change, as described in the Federal Register announcement, goes to great lengths to persuade readers that the agency merely is attempting a streamlining of the National Environmental Policy Act (NEPA) review process. Yet the very existence of the CE policy is redundant. NEPA already allows for an abbreviated environmental review of those activities that do not pose a significant impact (Finding of No Significant Impact or FONSI). A more efficient way to streamline the process would be to eliminate the CE exemption altogether.

Many of the activities that currently are authorized under the CE policy do in fact create environmental impacts. Perhaps individually the impacts are not significant, but the cumulative effects are unknown because *no environmental analysis is required*. The high potential for significant impacts, particularly cumulative impacts, is of particular concern with regard to the "extraordinary circumstances" section of the proposed policy,² which

² Extraordinary circumstances (as defined in sec. 30.5) occur when a proposed action would have a significant effect on the resource conditions set out in the following paragraphs 2a through 2g. The responsible official may issue a categorical exclusion even when one or more of the resource conditions listed in paragraphs 2a through 2g are present, only if the official determines on a case-by-case basis that the proposed action would not have a significant effect on these resource conditions and thus an instance of extraordinary circumstances does not exist for that proposed action. The resource

includes roadless areas, high-risk sites, areas that support at-risk species, Native American sites, and other invaluable resources. Furthermore, the allowed activities are inappropriate for other ecologically sensitive areas that are not included in the current or proposed extraordinary circumstances list, such as riparian (streamside) areas, watersheds that serve as refugia for imperiled aquatic species, and uninventoried roadless areas.

Finally, the proposed changes are in response to a study that determined the current CE policy was resulting “in higher administrative costs to the agency and delayed service to the customer.” We believe that those individuals benefiting from the utilization of public resources should have to follow the same rules and regulations that were put in place to protect the needs and interests of the agency’s other customers (i.e., the species that inhabit our national forests and grasslands). Better outcomes for our national forest ecosystems are more likely if the US Forest Service does an environmental analysis and involves the public as directed under the National Environmental Policy Act.

Conclusion

PRC agrees that implementation of NEPA is often complex, but so is the natural environment in which we function. The Task Force, in seeking ways to “improve and modernize NEPA,” must keep this complexity in mind when evaluating current environmental analysis procedures. The past 30 years of implementing NEPA, combined with our growing understanding of ecological processes, has taught us that rarely are important decisions about the health and well being of human, animal, and plant communities arrived at quickly and with little effort.

Respectfully,

conditions to be considered in determining if extraordinary circumstances exist are: (No change to the following paragraph 2a:)

- a. Steep slopes or highly erosive soils. (Proposed revision to paragraph 2b, as follows:)
- b. Threatened, endangered, proposed, and sensitive species or their designated or proposed critical habitat. (No change to the following paragraphs 2c-2g:)
 - c. Flood plains, wetlands, or municipal watersheds.
 - d. Congressionally designated areas, such as wilderness, wilderness study areas, or National Recreation Areas.
 - e. Inventoried roadless areas.
 - f. Research Natural Areas.
 - g. Native American religious or cultural sites, archaeological sites, or historic properties or areas.

Deanna Spooner

Public Lands Director
Pacific Rivers Council
deanna@pacrivers.org

Appendix B: PRC's June, 2005 NEPA Task Force comments

June 22, 2005

Chairman James L. Connaughton
Council on Environmental Quality

C/O

NEPA Task Force

Re: Written Testimony to the Committee on Resources, United States House of
Representatives: The Role of NEPA in the States of Arizona, California, Nevada

VIA WRITTEN SUBMISSION

Dear Chairman Connaughton:

Pacific Rivers Council respectfully submits the following comments to be entered into the record for the hearing by the NEPA Task Force on the Role of NEPA in the States of Arizona, California, and Nevada held on Saturday June 18th, 2005 in Lakeside, Arizona. Pacific Rivers Council ("PRC") is a non-profit conservation organization whose mission is to protect and restore rivers, watersheds, and their native aquatic species. PRC has offices in Eugene and Portland, Oregon, and Polson, Montana. For over fifteen years PRC has proven to be one of the most effective advocates of a whole watershed approach to land management in both national and regional planning efforts.

PRC has extensive experience working with NEPA processes and analyzing the resultant documents. We have provided information for and commented on environmental analysis documents produced by federal land and wildlife management agencies--the US Forest Service, Bureau of Land Management, US Fish and Wildlife Service, and National Marine Fisheries Service/NOAA-Fisheries in particular. Our experience in assessing these processes and documents has enabled us to identify certain weaknesses that repeatedly surface and, in our opinion, hamper the efficient and effective application of NEPA. We address these weaknesses in the following comments, linking them to the study areas set out in the Federal Register notice to the extent that we are able, and drawing upon specific examples to better illustrate the points we raise.

However, before continuing any further we must emphatically state that NEPA—despite its perceived flaws—is one of the most important laws enacted in the continuing effort to protect and restore the unique and diverse natural systems of this nation. NEPA

established an open and public approach to federal actions that has lead to better-informed decisionmaking overall. As is true with any law, the ensuing years of implementation reveals that there is room for improvement, but the underlying tenets of NEPA remain as legitimate today as they were in 1972.

Study Area A: Technology, Information Management, and Information Security

1. The Science Disconnect Problem

In many of the EISs we review, we have repeatedly identified a gap between what the best available science indicates is an ecologically appropriate management approach and what the responsible agency actually proposes. Sometimes the preferred alternative even contradicts the recommendations of agency scientists. Other times, the analysis contained within an EIS relies on information that is not readily available to the general public, and so interested parties cannot evaluate the applicability of the underlying assumptions. And more often than not the analyses of different topic areas within an EIS are presented in a piecemeal fashion, so that the end result is a set of recommendations that is entirely disconnected not only from the best available science but also from the analytical underpinnings of the EIS itself. For example, many National Forest EISs contain goals and desired future conditions that described a functioning landscape with natural watershed processes and biological integrity, but more often than not the preferred alternative does not adequately describe *how* management would achieve this vision nor what ecosystem improvements would be made during the life of the plan. In other words, there are no explicit linkages between ecological goals and the standards and guidelines necessary to achieve them. The end result is an EIS that lacks the necessary linkages between stated ecological goals (supported by the best available science) and management direction (standards and guidelines) to successfully implement a scientifically sound management plan.

Two examples of the science disconnect problem can be found in the development of the Interior Columbia Basin Ecosystem Management Project (“ICBEMP”) and the Sierra Nevada Framework for Conservation and Collaboration (“Sierra Framework”). In the case of the ICBEMP Draft EIS, scientific conclusions reached by federal agency scientists on the Science Integration Team (“SIT”) were ignored, misrepresented, misunderstood, and even misapplied. For instance, the Aquatic SIT Report identified road-related problems as a major contributor to the decline in status of fish species and stream condition. It concluded that the importance of existing refugia (i.e., aquatic species strongholds) and roadless areas to recovery of aquatic species would be difficult to overstate. The Report found a correlation between low road density and high quality habitats and between increasing road density and declining aquatic habitat conditions. It also found that increases in sedimentation are unavoidable even using the most cautious road building methods. The preferred alternative, however, did not incorporate these

findings. It did not adopt standards to require a reduction in road density in subwatersheds that support fish refugia, nor did it adopt standards prohibiting new road construction in areas important for recovery of vulnerable fishes. Moreover, the preferred alternative explicitly allowed for an increase in road density in the least disturbed sub-watersheds; provided no direction regarding decreasing road density in moderately roaded subwatersheds; and allowed construction of new roads through the few remaining areas of high quality habitat in the most degraded subwatersheds. We documented many other science disconnect problems with the ICBEMP Draft EIS that followed a similar pattern. The ICBEMP effort ultimately stalled, partly because of problems like the one described above, and partly because of a lack of political will to complete the regional planning process.

The Sierra Framework planning process also languished for many years because of the large gap between the best available science and what was being recommended in the plan. The problem was so severe that on September 4, 1996, then Under Secretary of Agriculture James R. Lyons convened a Federal Advisory Committee of scientific and planning experts to review the Draft EIS (at that time called the California Spotted Owl DEIS) in light of findings of a congressionally sponsored scientific report detailing the ecological and social status of the Sierra Nevada (the Sierra Nevada Ecosystem Project Report or “SNEP”). The Committee found numerous discrepancies between the SNEP Report and the Draft EIS despite the fact that they were being drafted simultaneously and shared many of the authors (i.e., federal agency scientists). Unfortunately, many of the Committee’s finding and recommendations were ignored in drafting the next iteration of the EIS, and many SNEP findings still were ignored, misapplied, or maligned. For example, the Committee recommended that the Forest Service develop a spatially explicit analysis at the appropriate scale of the potential effects of road development associated with the alternatives on aquatic resources, hydrologic connectivity, refugia, roadless areas, and other ecosystem values, as well as cumulative effects analysis in relation to the existing road network (including non-Forest Service roads). No such analysis was developed for the Draft or Final EIS, and the Framework was finalized in 2004 still lacking a comprehensive approach to addressing forest road impacts on aquatic systems.

3. Information Availability

As stated above, environmental analyses often are based on information that is not readily available to the public. Very often, upon receiving a draft NEPA document, we must carefully comb through the document and identify studies and other primary information sources that only are contained within the administrative record, and then request these studies or data from the responsible agency. The recent trend of copying the administrative record onto a CD-ROM has helped alleviate some of the frustration involved in this process. It would be even more helpful for agencies to identify this information at the incipient stages of the NEPA process, and to make it available electronically (e.g., via the world wide web), so that interested parties can help identify information gaps as soon as possible. This would likely improve agency efficiency and

help reduce the risk of lengthy revisions and/or administrative or legal challenges because important information was not considered.

Study Area B: Federal and Inter-governmental Collaboration

A pervasive problem in NEPA decisionmaking is a lack of coordination or outright conflict between federal agencies and/or between them and state or local agencies. As discussed above, often the science/research arm of an agency is not involved with important management planning endeavors at an early enough stage or is involved only peripherally, which can lead to contradictory recommendations and scientifically and legally vulnerable NEPA decisions. Additionally, intra-agency conflicts can draw out and confuse NEPA processes and frustrate all parties concerned. While these problems often have more to do with how agencies are structured and funded, we feel that improved coordination within and between agencies is not only possible but necessary to realize the full potential of environmental planning and protection under NEPA.

Study Area C: Programmatic Analysis and Tiering

Programmatic analysis and tiering can prove invaluable if the analysis is consistent with principles of ecological and biological processes. The appropriate spatial (geographic) and temporal scale of an environmental analysis is predicated upon which species and resources are present in the planning area, and what activities are proposed. Wide-ranging species, such as Pacific salmon and steelhead, require large-scale planning to address the multitude of impacts they face throughout their life histories at the regional, basin, sub-basin, and stream-reach scales. Endemic species, such as the Yosemite toad (found in a limited area of the Sierra Nevada), require smaller scale analysis but may also benefit from programmatic analysis when certain impacts are pervasive across a region. For example, grazing of wet meadows impacts large portions of federal lands in the Sierra Nevada and is one of the primary factors in habitat loss and overall decline of the Yosemite toad. But wet meadow grazing also impacts the viability of the willow flycatcher, degrades water quality, increases soil loss, and aids in the conversion of native plant communities to invasive exotics. Thus, activities that occur over a wide area can have a disproportionate impact on a species, suite of species, or habitat type, that may not be adequately addressed at the small-scale (i.e., project level).

Likewise, tiering can play an important role in environmental planning processes *if* the overarching programmatic analysis is done properly and *if* it is employed to verify the appropriateness and accuracy of the larger scale programmatic analysis and not simply to validate it. All too often tiered analyses are seen as an “easy out”—instead of making a good faith effort to evaluate and ground-truth the underlying assumptions of the programmatic analysis, site-level analysis utilize the original document as a stamp of approval for going forward with a given project. A recent example of this is the

Bitterroot National Forest Burned Area Recovery Project Final EIS and the accompanying Biological Opinion (BO) issued by the Fish and Wildlife Service (USFWS).

The proposed Burned Area Recovery (“BAR”) Project would have allowed salvage logging on 41,000 acres within the Bitterroot National Forest in Montana. The project, as originally designed, would have caused prolonged degradation of habitat in bull trout streams already stressed (in the short term) by the fire. This unacceptable risk to federally-listed bull trout was due in large part to the Biological Opinion (BO) issued by USFWS, which was tiered to a programmatic BO for the larger Columbia River Distinct Population Segment (DPS) of bull trout that encompasses the project area. Although the BO conceded that the Columbia River bull trout DPS is highly fragmented and that the upper Columbia River portion of the DPS is nearly extirpated, the Service illogically concluded that the project would not jeopardize the Columbia River bull trout DPS. Yet the bull trout BO for the Bitterroot BAR project lacked any analysis of the claim that loss of local populations does not compromise the recovery of the DPS as a whole—in place of thoughtful analysis, it refers back to the programmatic BO for the entire Columbia River DPS as justification for signing off on a project that would have devastated local bull trout populations, and may in fact have contributed to extirpation of one such population (Rye Creek) that survived the fires.

2. The Unfulfilled Promise of Cumulative Effects Analysis

Programmatic analysis and tiering can be further hampered by inadequate cumulative effects analysis. The Bitterroot National Forest BAR provides a good example for this problem too. The Bitterroot BAR Final EIS acknowledged that there would be significant cumulative effects without in fact providing a cumulative effects analysis. The FEIS divided the Bitterroot National Forest bull trout population into four distinct geographic regions (Blodgett, Skalkaho-Rye, East Fork Bitterroot, and West Fork Bitterroot). It then divided each geographic region into smaller drainages so that each region encompassed dozens of streams. The FEIS then discussed potential impacts to individual stream segments (and by association bull trout subpopulations) but at no point did the FEIS analyze cumulative impacts for each of the 4 subregions, the greater BAR project area, the Bitterroot National Forest, or the Columbia River DPS. Although the FEIS recognized the potential of negative cumulative effects to fisheries within the planning area, it concluded that the cumulative effect of sediment on bull trout habitat and populations would likely be insignificant in all streams, despite contradictory information within the FEIS and the BO.

Unfortunately, incomplete, inadequate, or non-existent cumulative effects analyses are all too common in the NEPA documents we review. This problem has long plagued agencies responsible for preparing NEPA documents, despite recognition by scientists, the courts, and the CEQ itself. In fact, in 1997 the CEQ issued a report titled “Considering Cumulative Effects Under the National Environmental Policy Act” and concluded that consideration of cumulative effects is essential for evaluating and

modifying alternatives to avoid adverse environmental impacts and developing appropriate mitigation and monitoring plans. The CEQ report specifically addresses the “scale” issue as follows:

Many times there is a mismatch between the scale at which environmental effects occur and the level at which decisions are made. Such mismatches present an obstacle to cumulative effects analysis. For example, while broad scale decisions are made at the program or policy level (e.g., National Energy Strategy, National Transportation Plan, Base Realignment and Closure Initiative), the environmental effects are generally assessed at the project level (e.g., coal-fired power plant, interstate highway connector, disposal of installation land). Cumulative effects analysis should be the tool for federal agencies to evaluate the implications of even project-level environmental assessments (EAs) on regional resources. (Id. at 4.)

The report goes on to discuss a study that evaluated 89 EAs published in the Federal Register in 1992 and found that for the 22 EAs that actually identified the potential for cumulative impacts, five took conclusions from a previous document, one provided for “future” analysis, and only 3 actually discussed cumulative impacts for all affected resources. (Id. at 6.)

Clearly, incorporating cumulative impacts analysis into every NEPA decisional document is not only required by the act itself (40 CFR § 1508.7) but is necessary to achieve an accurate depiction of potential impacts at both the project and programmatic levels.

Study Area D: Adaptive Management/Monitoring and Evaluation Plans

In theory, PRC agrees that adaptive management is a valuable tool for adjusting agency action to management outcomes that were unforeseen, uncertain or inaccurately predicted. In another 1997 report (“The National Environmental Policy Act: A study of Its Effectiveness After Twenty-Five Years”) the CEQ summarizes the consensus on the appropriate trigger for adaptive management as follows: “where resources are not likely to be damaged permanently and there is an opportunity to repair past environmental damage, and adaptive environmental management approach may be the best means for an agency to meet its specific and NEPA missions.” (Executive Summary, p. x.) In other words, adaptive management should not be an open-ended experiment of “wait and see” conducted across large areas, but rather a carefully designed experiment that ameliorates rather than invites risk. Risks due to uncertainty should be minimized by using conservative (i.e., protective) assumptions unless and until limited-scale adaptive management monitoring experiments have demonstrated that less-rigorous protections can adequately conserve the resource in question.

The ability to design appropriate adaptive management programs so far has been hampered by a lack of current, quality baseline environmental data. For example, the

Northwest Forest Plan has a prominent adaptive management component that so far has failed to speed up the project planning process because of a lack of data. Specifically, the plan included guidelines for surveying for certain animal and plant species before designing projects that could impact the identified species, but the plan contained no real mechanism for completing the surveys in a timely yet thorough manner. Conservationists were forced to challenge multiple projects that the Forest Service planned to initiate without survey data, which lead to a legal settlement agreement. These legal challenges could have been avoided if the necessary funding and implementation provisions had been built into the Northwest Forest Plan, and if adaptive management principles truly were integrated at the project planning level. As it stands, the conservation community is still waiting to see a successful adaptive management plan in action.

Study Area E: Categorical Exclusions

In November of 2001, PRC submitted comments on the Forest Service's proposed changes to its categorical exclusions regulations (National Environmental Policy Act Documentation Needed for Certain Special Use Authorizations [FR 66:183:48412-48416]). We feel that the points raised in our comment letter have broad applicability, and so they are paraphrased below.

With regard to the Forest Service's categorical exclusions (CE) policy, CEs include a class of activities that take place on national forest lands but that do not undergo environmental analysis or meaningful public comment. The proposed policy change, as described in the Federal Register announcement, goes to great lengths to persuade readers that the agency merely is attempting a streamlining of the National Environmental Policy Act (NEPA) review process. Yet the very existence of the CE policy is redundant. NEPA already allows for an abbreviated environmental review of those activities that do not pose a significant impact (Finding of No Significant Impact or FONSI). A more efficient way to streamline the process would be to eliminate the CE exemption altogether.

Many of the activities that currently are authorized under the CE policy do in fact create environmental impacts. Perhaps individually the impacts are not significant, but the cumulative effects are unknown because *no environmental analysis is required*. The high potential for significant impacts, particularly cumulative impacts, is of particular concern with regard to the "extraordinary circumstances" section of the proposed policy,³ which

³ Extraordinary circumstances (as defined in sec. 30.5) occur when a proposed action would have a significant effect on the resource conditions set out in the following paragraphs 2a through 2g. The responsible official may issue a categorical exclusion even when one or more of the resource conditions listed in paragraphs 2a through 2g are present, only if the official determines on a case-by-case basis that the proposed action

allows discretionary CE even of the specified roadless areas, high-risk sites, areas that support at-risk species, Native American sites, and other invaluable resources. Furthermore, the allowed activities are inappropriate for other ecologically sensitive areas that are not included in the current or proposed extraordinary circumstances list, such as riparian (streamside) areas, watersheds that serve as refugia for imperiled aquatic species, and uninventoried roadless areas.

Finally, the proposed changes are in response to a study that determined the current CE policy was resulting “in higher administrative costs to the agency and delayed service to the customer.” This implied restrictive interpretation of “customer” to mean only those seeking to extract narrowly defined economic benefit from publicly owned resources is invalid. Limiting/preventing degradation of public resources is at least equally valid “service to the customer”, and often more consistent with the agency’s mission. We believe that those individuals benefiting from the utilization of public resources should have to follow the rules and regulations that were put in place to protect the needs and interests of the agency’s other customers (i.e., the species that inhabit our national forests and grasslands). Better outcomes for our national forest ecosystems are more likely if the US Forest Service does an environmental analysis and involves the public as directed under the National Environmental Policy Act.

Conclusion

PRC agrees that implementation of NEPA is often complex, but so is the natural environment in which we function. The Task Force, in seeking ways to “improve and modernize NEPA,” must keep this complexity in mind when evaluating current environmental analysis procedures. The past 30 years of implementing NEPA, combined

would not have a significant effect on these resource conditions and thus an instance of extraordinary circumstances does not exist for that proposed action. The resource conditions to be considered in determining if extraordinary circumstances exist are: (No change to the following paragraph 2a:)

- a. Steep slopes or highly erosive soils. (Proposed revision to paragraph 2b, as follows:)
- b. Threatened, endangered, proposed, and sensitive species or their designated or proposed critical habitat. (No change to the following paragraphs 2c-2g:)
- c. Flood plains, wetlands, or municipal watersheds.
- d. Congressionally designated areas, such as wilderness, wilderness study areas, or National Recreation Areas.
- e. Inventoried roadless areas.
- f. Research Natural Areas.
- g. Native American religious or cultural sites, archaeological sites, or historic properties or areas.

with our growing understanding of ecological processes, has taught us that rarely are important, valid decisions about the health and well being of human, animal, and plant communities arrived at quickly and with little effort.

Respectfully,

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Appendix C: Example of serious misrepresentation of cited scientific literature

(excerpt of letter to Bitterroot National Forest, January 18, 2006)

A major underpinning of the purported Purpose and Need for this proposal is the notion that forest stand conditions in the area are “uncharacteristically” dense, and therefore at risk of “uncharacteristically severe” wildfire. The basis for this argument is analyses that purport to show moderate-to-severe departures of stand conditions from some estimate of natural variability (i.e., “historic condition” “range of natural variability”, “common natural variability”). Thus, determination of baseline condition against which this purported departure is estimated is a fundamental, crucial issue on which validity of the Purpose and Need and proposed activities are wholly dependent.

We and others have repeatedly attempted to call the Forest’s attention to the importance of this issue and the scientific inadequacy of the Forest’s rationale for its choice of baseline at each stage of the public process (public DEIS comments; FEIS, including response to DEIS comments; FEIS objection; and our recent letter documenting inadequacy of response to objection).

Despite these attempts, the Forest has never significantly deviated at any stage from simply repeating this rationale, quoted from the FEIS:

3.2.3 HISTORIC CONDITIONS

Natural resource managers increasingly rely on the “range of natural variation” or “historic condition” to develop plans that guide management within the range of ecological and evolutionary conditions appropriate for an area. This information is used to understand the past conditions and processes and provides context and guidance for managing ecological systems today and the disturbance-driven spatial and temporal variability that is a vital attribute of nearly all ecological systems. For the Interior Columbia Basin Ecosystem Management Project, **Hann et al. (1997) used the last 2000 years as the appropriate temporal depth. A time period of 200 years will be used in this project and *is appropriate based on studies showing the vegetation in this area was in relative equilibrium with the microclimate and Native American uses during that time (Schoonmaker & Foster, 1991 as cited in Landres et al., 1999).***

Within the natural range variability, there are extreme or rare events that define these bounds. As managers, we

recognize these extreme and rare events, however we do not manage for them. We wish to manage for the “common natural variability” that is associated with these ecosystems. This provides an ecological reference point, and gives us the ability to evaluate ecosystem change, as well as meet Forest Plan standards and socially desirable conditions (Morgan et al., 1994). [FEIS p. 3.2-6, emphasis added]

This citation of Schoonmaker-Foster-Landres, intended to support the claim of “relative equilibrium” during the past 200 years, is incorrect. The claim of "relative equilibrium" in fact contradicts the fundamental premise of the MEF proposal, i.e., purportedly increasing departure from “range of natural variation”/“historic condition”/“common natural variability” **during** the past 200 years (and absent “Native American uses” throughout most of that time), and the cited source in fact contradicts the claim that this is an appropriate period.

What Landres et al. (1999) actually wrote:

For the Interior Columbia Basin Ecosystem Management Project, for example, **Hann et al. (1997) used the last 2000 yr as the appropriate temporal depth, based on studies showing the vegetation in this area was in relative equilibrium with the macroclimate and native Americans during that time (Schoonmaker and Foster 1991).** [Landres et al. 1999, p. 1181, emphasis added; document attached in electronic .pdf format]

So, the Forest does not merely imply, but *deceptively states explicitly* that a 200-yr analysis period “is appropriate based on” Schoonmaker and Foster (1991, as cited in Landres et al. 1999) “showing the vegetation *in this area* was in relative equilibrium with the *microclimate* and Native American uses *during that time*” [i.e., the preceding 200 years]; when in fact Landres et al. (1999) cited Schoonmaker and Foster (1991) in support of Hann et al.’s (1997) use of 2000 years as the “appropriate temporal depth, based on studies showing the vegetation in this area was in relative equilibrium with the *macroclimate* and native Americans *during that time*” [i.e., the preceding 2000 years]. While changing “macro” to “micro” may well be a simple, innocent error, it contributes to the false impression created by this passage that Schoonmaker and Foster (1991) analyzed conditions and reached conclusions relating to this specific project area of the Bitterroot National Forest within the past 200 years, rather than a much broader region within the past 2000 years. *The cited source directly contradicts the claim it is cited to support.*

In fact, Schoonmaker and Foster (1991) "emphasizes [interdependence of contemporary ecology and paleoecology] with examples drawn mainly from eastern North America and western Europe" (Introduction, pp. 205-206), and examination of this source (admittedly not exhaustive) reveals no evidence supporting the claimed "relative equilibrium" for any portion of western North America.

This misrepresentation of the cited scientific literature is not trivial, but rather a fatal flaw, given that the justification of Purpose and Need for this proposed project is based on the contention that purported moderate-to-severe landscape-scale departure from "historic condition", "range of natural variation" and/or "common range of variability" has created risk of "uncharacteristically severe" fire – a contention which appears to propagate directly from this unjustified decision to truncate both the analysis period and the actual range of variation within it (by excluding "extreme or rare events" from consideration). (We were initially highly skeptical of this claim, particularly for the mixed-conifer old growth stands proposed for fuel reduction treatments – which we judged to be probably well within any true "range of natural variation" – on the basis of our site visits to a number of them in May and June, 2005.) The Forest has misrepresented crucial scientific information in purported justification of the proposed project. The FEIS should be withdrawn.

Similarly, though not the specific issue addressed here, the Forest Service quite commonly promotes the mistaken impression to the public that Fire Regime Condition Class (FRCC) measures departure from the "natural range of variability" when, in fact, it only purports to estimate departure from the *central tendency* of the range of variability [Hann et al. 2003, revised 2005]. While this fact is minimally acknowledged, the FEIS fails to disclose that landscape-scale departure of only 34% from this central tendency estimate – virtually certain to be well within any true measure of actual range of natural variation in many situations and/or at specific locations within the landscape – is judged to indicate "moderate" departure, i.e., FRCC 2, purportedly justifying fuel reduction treatments. If disclosed, this information raises serious doubts about the claim that this and many other areas of the West are outside "natural range of variation." Hence this represents yet another serious failure to disclose important, relevant information requested by the public.

Why this matters

The Forest asserts based on results of modeling that the proposed fuel reduction treatments are needed due to landscape-scale moderate-to-severe "departure" from natural conditions across the project area, and proponents of such projects generally promote the notion that they are needed because forests are outside the "range of natural variation". Yet the Forest's choice of analysis period and its truncation of the variability it considers directly conflict with the sources cited in support of these choices; its citation of at least one source seriously misrepresents its content; and although the Forest minimally acknowledges that it is modeling departure from central tendency, *not* from range of

natural variation, it fails to disclose or credibly justify the relatively small departure classified as "moderate" and purportedly justifying fuel treatments. Thus the Forest's rationale of Purpose and Need for the project fails every requirement to use best available science, to rationally explain its reasoning in support of the proposal, and to respond meaningfully and substantively to public comments.