



**Testimony of Thomas O. McGarity
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**Hearing on NEPA Litigation: The Causes, Effects and Solutions
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Madame Chairman, Ranking Member Udall, and Members of the Task Force, thank you for the opportunity to testify before you today. My name is Tom McGarity. I hold the W. James Kronzer Chair in Trial and Appellate Advocacy at the University of Texas School of Law. I have taught environmental law for more than 27 years at the University of Kansas and the University of Texas. I have written law review articles on the National Environmental Policy Act (NEPA), and I have advised counsel in NEPA litigation. With my Co-Author John Bonine of the University of Oregon School of Law, I wrote one of the early casebooks on Environmental Law, and that casebook provided a comprehensive overview of all aspects of NEPA litigation.

I am also the President of the Center for Progressive Reform (CPR). Founded in 2002 as the Center for Progressive Regulation, CPR is a 501(c)(3) nonprofit research and educational organization dedicated to protecting health, safety, and the environment through analysis and commentary. CPR is comprised of university-affiliated academics with expertise in the legal, economic and scientific issues related to regulation of health, safety and the environment. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR further believes that people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation and improved public access to information.

Last September, CPR published a report on the New Orleans levees in the aftermath of Hurricane Katrina, entitled "Broken Levees: Why They Failed," that is available on the CPR website at <http://www.progresivereform.org>. CPR Scholar Joe Feller of Arizona State University College of Law contributed the portion of this testimony devoted to grazing on public lands.

NEPA Litigation Plays a Critical Role in Protecting Our Shared Environment.

The very first law that President Nixon signed to initiate the “environmental decade” of the 1970s was the National Environmental Policy Act (NEPA), and that statute is frequently referred to as the “Magna Carta” of American Environmental Law. The primary vehicle through which NEPA attempts to accomplish its salutary purposes is its requirement that all federal agencies prepare environmental impact statements (EISs) for “proposals for legislation and other major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Because of NEPA’s constitution-like language and breadth of vision, the meaning of these words only became apparent after several years of litigation gave them form and content. Once the Council on Environmental Quality promulgated comprehensive implementing regulations in 1978, NEPA’s EIS requirement became part of most agencies’ “standard operating procedures,” and litigation was limited primarily to policing agency compliance with the regulations.

By the end of the 1980s, NEPA litigation had slowed down considerably, and scholars were asking whether compliance had become so routine that the statute had become a “dead issue.” Paul G. Kent & John Pendergrass, *Has NEPA Become a Dead Issue?* Temple Env. L. & Tech. J. 11 (1986). This trend changed during the George W. Bush Administration as the rate of NEPA lawsuit filings rose from a historical average of 108 cases per year to 137 in 2001 and 150 in 2002. Jay E. Austin, et. al, *Judging NEPA: A “Hard Look” at Judicial Decision Making Under the National Environmental Policy Act* (Environmental Law Institute (2005)). Even at this somewhat increased pace, however, it can hardly be said that NEPA litigation is overwhelming the federal resource agencies. Only about 0.2 percent of the federal actions generating NEPA environmental assessments result in litigation. Robert G. Dreher, *NEPA Under Siege* 15 (Georgetown Environmental Law & Policy Institute 2005).

The recent increase in NEPA filings is explained by the critical policing function that Congress meant for NEPA to perform. NEPA applies exclusively to “federal” actions undertaken by Executive Branch agencies, and it is wholly unrealistic to expect that the Executive Branch will ensure that its own agencies consistently comply with NEPA. The statute therefore envisions that private citizens who are adversely affected by federal agency actions will play a role in enforcing NEPA’s modest EIS requirement. As in most areas of environmental law, including EPA regulation under the Clean Air Act and Clean Water Act, when federal agencies press the boundaries of allowable conduct under the law, private entities can be expected to challenge unlawful conduct in court. That is precisely what has happened during the last four years as the George W. Bush Administration has at many levels attempted to reduce the role that environmental considerations play in federal agency decisions.

Litigation is not cheap, and private entities and public interest groups generally employ it only as a last resort. Although the pace of NEPA litigation has increased somewhat during the last four years, there is no evidence that any of this increased litigation is “frivolous” as some critics claim. According to an empirical study undertaken by the Environmental Law Institute, the overall success rate of NEPA plaintiffs in federal district court during this period was 44 percent, a rate that is “roughly consistent with long-term historical averages.” Jay E. Austin, et. al, *supra*, at 8. Likewise, the success rate in courts of appeals was 31.8 percent, which is also roughly consistent with the historical rate. *Id.*, at 9.

An effectively enforced NEPA provides a powerful vehicle for local citizens to become informed about and influence the outcome of decisions made by remote decision makers in Washington, D.C. For example, it appears that a large proportion of the successful NEPA claims in the Northwest during the past several years have involved claims by local groups against decisions by federal agencies that are in large part driven by policies made in Washington, D.C. In other words, NEPA litigation in the Northwest is not thwarting local desires, and it is in fact facilitating local demands for environmental protection against local federal decision makers who are taking their orders from policymakers in the Nation's Capitol.

NEPA Litigation Did Not Cause the New Orleans Levees to Fail

Soon after the damage to New Orleans became apparent after Hurricane Katrina, NEPA critics initiated a concerted campaign to blame the damage on NEPA litigation brought against the Corps of Engineers in 1976 challenging the adequacy of the environmental impact statement that the Corps had prepared for a proposed "barrier" project aimed at protecting Lake Pontchartrain from Hurricane storm surges. The historical record of the project and the litigation does not, however, support this radical contention.

The 1977 NEPA Litigation and Subsequent Developments

Because New Orleans is situated in the delta formed at the mouth of the Mississippi River, it has always maintained a flood control system in place to protect it from the risks of flooding from the river to the south, Lake Pontchartrain to the north and Lake Bourne and the Gulf of Mexico to the east. The city is protected from Lake Pontchartrain and Lake Bourne by an interconnected series of levees that extends along the lakes. Another series of levees provides protection to Eastern New Orleans and St. Bernard Parish, which are located to the north and east of New Orleans, from Lake Pontchartrain on the north and from Lake Bourne and the Gulf on the east.

Because New Orleans is below sea level and rapidly sinking, rainwater that flows into the city must be removed with huge pumps that force the water to move along three man-made canals, called "outfall canals," to Lake Pontchartrain. The canals are lined with levees and concrete floodwalls that prevent the water from spilling into the city. In addition to the drainage canals, the Corps of Engineers constructed two large shipping canals through the city to permit ocean-going vessels to move from the Mississippi River through the city to Lake Pontchartrain or the Gulf of Mexico. The Industrial Canal slices north/south across the city between the river and the lake at the point where they are closest to each other. The Mississippi River-Gulf Outlet (MRGO) canal bisects the Industrial Canal and travels to the Gulf of Mexico.

In 1965, Congress authorized the Lake Pontchartrain and Vicinity Hurricane Protection Project (LPVHPP) to provide hurricane protection to the Greater New Orleans metropolitan area. To implement this statute, the Corps of Engineers studied two major options -- the "high level" option and the "barrier" option. Under the "high level" option, the Corps would raise all of the existing levees to a height that would prevent flooding that could result from the "standard project hurricane," a simulated hurricane that would hit New Orleans once every 200 to 300 years. This mythical hurricane was roughly equivalent to a fast moving category 3 storm on the Saffir-Simpson hurricane scale. In practice this would have resulted in raising the levees from between 9.3 and 13.5 feet above sea level to between 16 and 18.5 feet above sea level. United States General Accounting Office, Cost, Schedule, and Performance Problems of the Lake

Pontchartrain and Vicinity, Louisiana, Hurricane Protection Project (PSAD-76-161 (August 31, 1976) [hereinafter cited as 1976 GAO Report], at 3.

Under the “barrier” option, the Corps would have constructed levees along the far eastern edge of Lake Pontchartrain where it flows into Lake Bourne and the Gulf of Mexico through two relatively narrow channels at the Rigolets and Chef Menteur Pass. The Corps would have constructed huge structures at the two passes that would have allowed water to flow back and forth between the lakes but could be closed as a hurricane approached. The Corps believed that the levees and the barrier structure would prevent the storm surge preceding a hurricane from crossing from Lake Bourne into Lake Pontchartrain. Like the high level option, the barrier option was designed to protect against the standard project hurricane.

The Corps initially decided to implement the barrier option. Work on the barrier structures and levees running from New Orleans to the those structures, however, was greatly delayed because landowners opposed to the project demanded high prices for the property that the Corps needed for those levees, thereby forcing the Corps to exercise its power of eminent domain. 1976 GAO Report, *supra*, at 16.

In 1976, a coalition of local fishermen and an environmental group called Save Our Wetlands sued the Corps of Engineers alleging that the final environmental impact statement (FEIS) for the project was inadequate. On December 30, 1977, a federal judge issued an injunction preventing the Corps from conducting any work on the barrier project until it had prepared an adequate FEIS. The injunction was subsequently modified to permit continued construction of the levees between the lake and the City of New Orleans.

The lawsuit temporarily prevented the Corps from working on the barrier option, but the Corps abandoned this option for other reasons. When the injunction sent the Corps back to the drawing board, it reconsidered the costs and benefits of the barrier and high level options in light of the increased cost that it had been encountering because landowners were insisting on protecting their property rights. At the same time, the Corps was encountering strong opposition to the barrier plan from local citizens who did not want to pay a very high price for a project that might endanger the vitality of Lake Pontchartrain and from representatives of areas on the Lake Bourne side of the barrier who would have been at greater risk of flooding during hurricanes.

The intense public opposition was in evidence in congressional hearings conducted in New Orleans the week after the injunction issued. Hearings on Hurricane Protection Plan for Lake Pontchartrain and Vicinity before the Subcommittee on Water Resources of the House Committee on Public Works and Transportation, 95th Cong., 2d Sess. (1978) [hereinafter cited as 1978 House Hearings]. A spokesperson for the League of Women Voters argued that the Corps had never undertaken a study of the cost to taxpayers of maintaining the urbanization of wetlands that the project envisioned, and she noted that the voters of New Orleans had defeated proposals to participate in the financing of the barrier project on three separate occasions, but had voted to approve a similar project without the barriers the previous year. *Id.* at 11. An informal poll conducted by Representative Robert Livingston indicated that a substantial majority of the New Orleans citizens either opposed the project (38.5 percent) or favored discontinuation until the studies could be completed (23.6 percent). *Id.* At 12. A state legislator from St. Tammany Parish, part of which was on the Lake Bourne side of the barrier project, warned that the project

would put his parish at risk when the gates were closed because it would deflect the surge from Lake Bourne into St. Tammany parish. Id. at 47-48.

By 1982, the New Orleans district of the Corps of Engineers had changed its mind. It now favored the high level plan “because it would cost less than the barrier plan” and “have fewer detrimental effects on Lake Pontchartrain’s environment.” United States General Accounting Office, *Improved Planning Needed by the Corps of Engineers to Resolve Environmental, Technical and Financial Issues on the Lake Pontchartrain Hurricane Protection Project* (GAO/MASAD-82-39) (August 17, 1982), at 2. The Corps did not make a final decision on how to proceed until 1985 when it decided to implement the high level plan because by then it was considerably less expensive. The high level plan of 1985 was substantially completed prior to Hurricane Katrina.

Why the Levees Failed

The water that flooded New Orleans did not flow over the high level levees situated between Lake Pontchartrain and the city. Instead, it appears that the surge flowed up the 17th Street and London Avenue canals and breached the floodwalls lining those canals. In addition, although the Corps enhanced the levees protecting Eastern New Orleans and St. Bernard Parish as part of the high level plan, these areas were not protected from the “end around” exposure that occurred during Hurricane Katrina. The hurricane surge entered Lake Bourne from the Gulf of Mexico and proceeded up the MRGO canal to the Industrial canal in the heart of New Orleans. The surge destroyed most of the levees and flood walls along the MRGO canal in St. Bernard parish as it pushed up the narrowing canal from Lake Bourne to the conjunction of the MRGO canal with the Industrial canal. The levees and floodwalls along these two “outlet” canals were probably breached by the storm surge traveling up the MRGO canal from the Gulf of Mexico. This storm surge would not have been prevented by the barrier project, and it may well have exacerbated that surge.

The Limited Impact of the 1977 NEPA Litigation

The lawsuit brought by local fishermen and a local environmental group was entirely justified, because the EIS filed by the Corps was clearly inadequate. The court found that “the picture of the project painted in the FEIS was not in fact a tested conclusion but a hope by the persons planning the project that it could in fact be constructed so as to meet the environmental objectives set out in the FEIS.” *Save Our Wetlands v. Rush*, Civ. No. 75-3710, Slip Opinion (E.D. La. 1977). The court noted that the Corps’ chief engineer for the New Orleans Division had requested further model studies because the draft EIS relied on studies that were undertaken more than a decade earlier for an obsolete version of the project. The chief engineer feared that the flow of water between the lakes, which was critical to maintaining the integrity of marine life in Lake Pontchartrain, was far less in the new version of the project than in the earlier version. The requested model studies were initiated, but they had not been completed when the FEIS came out, and the Corps continued to rely upon the obsolete studies. Id. at 5.

More importantly, the biological analysis undertaken in the FEIS relied entirely on a single telephone conversation with a single marine biologist who was asked to speculate on the impact of the project on marine organisms using the inter-lake flow rates predicted by the obsolete model. The Corps of Engineers official who was responsible for preparing the EIS expressed

reservations about the statements on the effects of the structures on marine life in the lake, and he suggested that the conclusion that the project “would not” have a significant impact on lake biology should be changed to “should not.” He was, however, overruled. The court further noted that the assessment of the benefits of the project included the benefits of further urban development on wetlands that would be reclaimed from the lake after the project was completed, but it failed to take into consideration the fact that the area had also been designated as a protected wetland. A Corps economist pointed this out and asked that the analysis be changed, but he was overruled. *Id.* at 6.

Finally, the court concluded that in light of “the problems of which the Corps was aware with respect to the possibility of significantly decreased tidal flow through the structures,” the analysis of alternatives in the FEIS was inadequate. The court concluded that the FEIS “precludes both the public and the governmental parties from the opportunity to fairly and adequately analyze the benefits and detriments of the proposed plan and any alternatives to it.” *Id.*

The court therefore enjoined further work on the barrier structures aspect of the project until the Corps had completed an adequate FEIS. It stated in no uncertain terms, however, that its opinion and order should “in no way be construed as precluding the Lake Pontchartrain project as proposed or reflecting on its advisability in any manner,” and it stressed that “[u]pon proper compliance with the law with regard to the impact statement, this injunction will be dissolved and any hurricane plan thus properly presented will be allowed to proceed.” *Id.* at 7.

Although some recent commentators have stated unequivocally that the court’s injunction prevented the barrier project from going forward, the injunction should have delayed the barrier option only for as long as it took the Corps to remedy the problems that the court had identified in the EIS. The court would have lifted the injunction as soon as the Corps simply updated the EIS with adequate hydrologic modeling, conducted a more thorough biological assessment, and considered a few reasonable alternatives. In the process of responding to the EIS, however, the Corps reevaluated the “high level” alternative and decided to adopt that approach instead. The court did not force the Corps to adopt what by then had become the least expensive option because of the vigor with which local residents had asserted their property rights.

In any event, it is now becoming clear that Hurricane Katrina destroyed as much as 90 percent of the levees protecting St. Bernard parish south of the Industrial Canal and that the same surge probably caused the breaches in the floodwalls along the Industrial canal. The barrier plan that the Corps was considering at the time of the litigation would not have prevented the surge from moving from Lake Bourne over the levees and through the funnel of the MRGO canal into the heart of New Orleans, and it might well have exacerbated that surge.

Finally, academic engineers who have been studying the New Orleans levee breaches are coming to the conclusion that the reason that the floodwalls along the 17th Street and London Avenue outlet canals failed is that they were poorly designed and constructed. R. B. Seed, et al., Preliminary Report on the Performance of the New Orleans Levee Systems in Hurricane Katrina on August 29, 2005, November 2, 2005. It appears that at least some of the floodwalls were built on weak soils, were not adequately anchored and may have been designed without an adequate margin of safety. Ralph Vartabedian & Stephen Braun, System Failures Seen in Levees, Los Angeles Times, October 22, 2005. An engineer who has been working on a National Science Foundation-funded study of the levee breaches has even suggested that malfeasance may have

been involved as well. John Schwartz, 'Malfeasance' Might Have Hurt Levees, Engineers Say, New York Times, November 3, 2005, at A22. The 1977 NEPA litigation obviously had nothing at all to do with the flawed design and construction of those floodwalls.

NEPA Has Not Unduly Interfered with the Proper Issuance of BLM and Forest Service Grazing Permits

The controversy that has recently arisen over NEPA requirements related to grazing on public lands has focused on the application of NEPA to the issuance and renewal of BLM and Forest Service grazing permits. Some NEPA critics have argued that NEPA's application to grazing permits is unnecessary or redundant and that NEPA litigation has forced ranchers off of their grazing allotments. This criticism has resulted in proposals to exempt grazing permits from NEPA altogether. A careful examination of the facts and the law, however, reveals that these criticisms are misdirected and that proposals for wholesale exemptions are entirely unjustified.

The Importance of Grazing Permits

The critical decisions that determine whether livestock grazing on public lands will be conducted in a responsible or a destructive manner are contained in the grazing permits issued by the Forest Service and the BLM. Each permit specifies – either in the permit itself or in an allotment management plan (AMP) incorporated in the permit – where, when, how many, for what length of time, what type, and under what terms and conditions livestock will graze. These specifications are not mere administrative details. The terms and conditions of grazing permits determine whether native plant communities will flourish or be replaced by invasive weeds, whether fish and wildlife habitat will be improved or degraded, and whether streams will run clear and cold or be turned warm and muddy. Furthermore, grazing permits affect large areas of land. The average grazing permit covers about 8,000 acres of public land, and the largest permits each cover several hundred thousand acres

Other plans, programs, and decisions of the BLM and the Forest Service affect livestock grazing only insofar as they are implemented through the terms and conditions of these individual grazing permits. In particular, BLM and Forest Service land use plans should constrain grazing permits by specifying where grazing will be permitted, setting environmental standards that permits must meet, or providing guidelines to which permits should conform. However, most BLM and Forest land use plans are written in very broad and general terms, deferring specific determinations about locations and levels of livestock grazing to subsequent decisions on individual permits. Moreover, even where land use plans contain more specific decisions about grazing, these decisions are not effective on the ground unless and until they are incorporated in the terms and conditions of individual grazing permits, and they sometimes are omitted.

The Need for Site-Specific Information

Sound decision making about the terms and conditions of a grazing permit requires site-specific information about the lands covered and the resources affected by the permit. General guidelines and prescriptions cannot be applied to individual grazing allotments as boilerplate in a cookie-cutter fashion. The acceptable level, locations, and timing of grazing on a particular allotment depend on many site-specific factors including climate, elevation and topography, the types and conditions of soils and vegetation on the allotment, the history of grazing on the allotment, the

numbers and locations of water sources, the types of fish and wildlife on the allotment and their habitat needs, the location and condition of streams and associated riparian areas, and other resources and uses of the allotment (such as archaeological sites or recreation) that may be affected by livestock grazing,

The critical role of grazing permits in determining the environmental impacts of grazing on the public lands, and the need for site-specific information in making decisions about those permits, was recognized by the court in *Natural Resources Defense Council (NRDC) v. Morton*, which held that a national programmatic environmental impact statement (EIS) did not provide the information needed for decisions about individual permits. *NRDC v. Morton*, 388 F. Supp. 829, 838-39 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied* 427 U.S. 913 (1976). The court ordered the BLM to prepare EISs “which discuss in detail the environmental effects of the proposed livestock grazing, and alternatives thereto, in specific areas of the public lands.” *Id.* at 841. It did not, however, order the BLM to prepare a full-fledged EIS for each grazing permit, leaving that to BLM’s reasoned discretion. *Id.*

The Inadequacy of Broad-Scale EISs that Are Not Site-Specific

After the court’s decision in *Morton*, the BLM prepared approximately 150 EISs. The average EIS covered over 1 million acres of land and included over 100 different grazing allotments. Most of these EISs were prepared in connection with land use plans and purported to address the environmental impacts of all public land uses, not just grazing. The Forest Service, under the mandate of the National Forest Management Act, also prepared EISs in connection with its land use plans. These EISs, like those of the BLM, each typically cover an area of a million acres or more, including scores of grazing allotments.

Because these BLM and Forest Service EISs cover such large areas and include so many grazing allotments, they generally do not contain detailed, site-specific information about individual grazing allotments. In substance, if not in form, these area-wide EISs resemble the national, programmatic EIS that the court found inadequate in *NRDC v. Morton*. Subsequently, another court, in *NRDC v. Hodel*, 624 F. Supp. 1045 (D. Nev. 1985), found that such a broad-scale, generalized EIS is adequate to support a land use plan, where the land use plan itself is a broad, programmatic document that does not make specific decisions about grazing management on individual grazing allotments. However, these broad-scale EISs do not provide the information necessary to support decisions about individual grazing permits.

The severe lack of information in the broad-scale EISs prepared in connection with land use plans was starkly revealed in an administrative appeal, *National Wildlife Federation v. BLM*, which concerned the BLM’s Comb Wash grazing allotment in Utah. The allotment includes five canyons that contain world-famous scenery, fragile riparian wildlife habitat, and thousands of archaeological sites. Under a BLM permit, these canyons were also grazed by cattle, even though they contained only a very small amount of forage – about 10 percent of the allotment’s total. Testimony at the hearing in the case documented that, in the narrow, confined space of the canyons, the cattle were destroying riparian vegetation, causing severe soil erosion, trampling archaeological sites, polluting the streams, and covering campsites with manure and urine.

The Interior Board of Land Appeals (IBLA) found that the BLM’s EIS, prepared in connection with a land use plan covering 1.8 million acres and including over seventy grazing allotments,

had no information at all about the resources in the five canyons or the impacts of grazing on those resources. The board ordered the BLM to discontinue grazing in the canyons, while allowing grazing to continue on the remaining 90 percent of the Comb Wash allotment, until an adequate EIS was prepared. In response to the IBLA's decision, the BLM prepared an environmental assessment (EA), in which the BLM itself concluded that grazing in the canyons made no sense given the small amount of forage there and the severe damage that grazing was causing.

The Comb Wash case determined, in accordance with the holding of *NRDC v. Morton*, that a BLM decision to issue or renew a grazing permit requires a NEPA document (EA or EIS) with sufficient site-specific information to support a reasoned and informed decision about grazing on the allotment involved. The case did not hold that one EIS is required for each permit. The required information may be incorporated (though it usually is not) in an EIS prepared in connection with a land use plan. Alternatively, an EIS may be prepared for a group of grazing allotments. If the environmental impacts of grazing on a particular allotment are not significant, then an environmental assessment (EA) will suffice. Finally, once the impacts of grazing on a particular allotment are adequately analyzed, absent material changes in circumstances, the analysis need not be repeated each time the permit is renewed.

The Impact of NEPA Litigation

Although NEPA was enacted in 1969, the BLM and the Forest Service did not begin performing site-specific environmental analyses (EAs or EISs) on their grazing allotments until the 1990s. There are still thousands of grazing allotments on which such analyses have never been done. For this reason, assertions that NEPA analyses in connection with permit renewals are somehow "redundant" or "repetitive" are misinformed.

Despite the lack of NEPA compliance with respect to many allotments, grazing continues on more than 99.9 percent of those allotments. Although litigation, and the threat of litigation, played a role in prompting the BLM and the Forest Service to begin performing the badly-needed environmental analyses, litigation has not stopped grazing from continuing pending completion of those analyses.

Some critics of NEPA have invoked the specter of hundreds or thousands of ranchers being kicked off of their grazing allotments because of litigation over the BLM's or the Forest Service's failure to comply with NEPA, but this hypothetical horror story has no basis in fact. In the thirty-five years since the enactment of NEPA, there have to my knowledge been only three cases in which livestock were ordered out of an area in connection with NEPA litigation. In all three cases, the agency not only failed to comply with NEPA, but there was also proof that livestock grazing was causing very serious damage to valuable natural resources. There has never been a case in which livestock have been removed solely because of the agency's failure to comply with NEPA. Moreover, of the three cases, in one cattle were ordered removed from only 10 percent of the grazing allotment in question, and in another a settlement was reached between the plaintiffs and the rancher that allowed cattle to remain on the land despite the court's order. Thus, there has been only *one* case in which an entire grazing allotment was shut down, even temporarily, on NEPA grounds, and in that case the plaintiffs offered the affected rancher an alternative area to graze his cattle.

The following are the specifics of the three cases:

1. *National Wildlife Federation v. BLM*, 140 IBLA 85 (1997). This is the Comb Wash case, in southeastern Utah, discussed above. After finding serious ongoing damage to soils, vegetation, riparian areas, water quality, wildlife habitat, and recreational sites, an administrative law judge ordered cattle temporarily kept off of 10 percent of one grazing allotment, while allowing grazing to continue on the remaining 90 percent. Later, the BLM, of its own accord, decided that grazing in the sensitive area affected by the judge's decision made no sense.

2. *Greater Yellowstone Coalition v. Bosworth*, 209 F. Supp.2d 156 (D.D.C. 2002). This case concerned the Horse Butte Allotment on the Gallatin National Forest in Montana, adjacent to Yellowstone National Park. Bison from the park were being shot as they entered the allotment in order to avoid the possibility that they might transmit brucellosis to the 147 cattle that grazed there. The Forest Service had committed to complete a NEPA analysis by 1998 to address the impacts of grazing on the allotment, including the killing of bison. As of 2002, the NEPA analysis had still not been completed. In order to prevent further killing of bison, the court enjoined grazing on the allotment for one season, pending the completion of the analysis.

3. *Western Watersheds Project v. Bennett*, Civ. No. 04-0181-S-BLW (D. Idaho 2005). This case concerned grazing on the BLM's Jarbidge Resource Area in Nevada. The court found that not only had the BLM failed to comply with NEPA, but also that grazing in the area was causing violations of the BLM's Standards for Rangeland Health, was violating standards in the applicable land use plan, and had contributed to an 85 percent decline in the population of sage grouse. The court enjoined grazing on 28 allotments covering 800,000 acres. After the court entered its order, and before any livestock were removed, the plaintiffs and the affected ranchers reached a settlement that allowed grazing to continue on the allotments.

Congressional Action

Even though agency failures to comply with NEPA have led to removal of cattle in only a couple of cases, many ranchers nonetheless feared that their operations could be threatened by litigation. To address this concern, Congress has since 2000 included riders in annual appropriations legislation specifying that, when a grazing permit expires before the agency completes its processing of a new permit in compliance with NEPA and other applicable laws, a new permit shall be issued with the same terms and conditions as the expiring permit. The 2003 appropriations rider extended the effect of this provision through 2008. Hence, any claim that NEPA has delayed grazing permit renewals cannot be based on fact.

Pending Amendments to the BLM's Grazing Regulations

Amendments to the BLM's grazing regulations that were proposed in 2003 and are expected to be promulgated in 2006 would delete the specific requirements in the current regulations for consultation with concerned citizens when the BLM issues, modifies, or renews a grazing permit. The justification given for the proposed deletion of these requirements is that they are redundant with the requirements of NEPA, which guarantees public participation in the issuance, modification, and renewal of grazing permits. Any legislation that would exempt grazing permits from NEPA would therefore directly contradict the rationale for these regulatory changes, and it

would have the effect of completely excluding the public from critical grazing management decisions.

Conclusions

It is clear beyond cavil that the 1977 *Save Our Wetlands* lawsuit did not cause the levees in New Orleans to fail during Hurricane Katrina. The Task Force should therefore refuse to lend any credence at all to those who would invoke the suffering of the citizens of New Orleans to advance their own unrelated agendas with this wholly discredited myth. Similarly, contrary to the expressed fears of the livestock industry, NEPA litigation has very rarely forced a cessation of livestock grazing on public lands. Existing legislation provides for renewal of grazing permits pending NEPA compliance. Legislation exempting grazing permits from NEPA is therefore unnecessary, and it would in fact be detrimental to the desirable goal of public participation in critical grazing management decisions.

NEPA has “unquestionably improved the quality of federal agency decision-making in terms of its sensitivity to environmental concerns.” Dreher, *supra*, at 4. By performing the critical function of policing agency compliance with the NEPA’s modest analytical requirements, private litigation is ensuring that federal agency decision making continues to be sensitive to environmental concerns. That is what the American public expects and Congress should not undermine that expectation by amending this bulwark of American environmental law.