NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

October 23, 2001

VIA FACSIMILE: 202-456-6546

James L. Connaughton, Chairman
Council on Environmental Quality
Executive Office of the President
17th and G Streets NW
Washington, DC 20503

Attention: Task Force

RE: Implementation of Executive Order 13212 – Actions to Expedite Energy-Related Projects

Dear Chairman Connaughton:

This letter constitutes the response of the Southern Utah Wilderness Alliance (SUWA) and the Natural Resources Defense Council (NRDC) to the Federal Register notice published by the Council on Environmental Quality (CEQ) on August 20, 2001, asking for comments on the nature and scope of activities of the federal interagency energy task force (Task Force) established by executive order to "expedite" energy projects. 66 Fed. Reg. 43586-587.

SUWA is a non-profit environmental organization with 16,000 members. Its focus is the preservation of the last remaining wilderness-quality lands in Utah, to ensure that these lands will remain in their current scenic and pristine state for generations to come. SUWA's staff, located in Utah and in Washington D.C., has expertise in the public processes involved in environmental decision making, in the laws and regulations governing public lands management and energy development, in the impacts of activities such as energy development, and in the public policies surrounding these issues. NRDC is a national environmental advocacy organization with more than 500,000 members. Since 1970, our lawyers, scientists and other environmental specialists have been working to protect the world's natural resources and to improve the quality of the human environment. NRDC staff members have extensive expertise in all areas relating to energy production, including (but not limited to) land use planning, environmental review, and environmental and public health impacts. Both SUWA and NRDC appreciate the opportunity to provide comments on the role of the Task Force and its efforts to implement Executive Order 13212.

As you will read below, the Federal Register notice raises a number of serious issues,

www.nrdc.org

71 Stevenson Street, Suite 1825
San Francisco, CA 94105
TEL 415 777-0220 FAX 415 495-5996

NEW YORK • WASHINGTON, DC • LOS ANGELES

100% Postconsumer Recycled Paper

including how to ensure that the Task Force's activities are consistent with federal laws enacted to protect and preserve the resources of our federal lands, air, water, and public health. We look to you, as Chair of the Task Force, and the CEQ staff, to ensure that the Task Force's activities do not interfere with or override the legally required duties of federal agencies, including land management agencies, that have been charged with protecting our air, water, health and safety as well as with managing our federal public lands and resources. We look to you also to ensure that the review of energy-related activities of federal agencies is based on established fact, rather than unverified anecdotes and unsubstantiated criticism from the energy industry. As discussed below, the facts preclude characterizing federal environmental laws as "impediments" to energy decision-making. Your activities, and those of CEQ, should be focused on helping agencies strengthen, rather than undermine, protections for public health and the environment.

At the outset, we wish to stress that the situation facing the Task Force is very different than it was at the time the Executive Order was issued. At that time, there were fears of blackouts in California, natural gas prices were escalating and energy supplies were allegedly running out. Since then, gas prices have dropped, causing some energy producers to slow drilling, while oil demand has also fallen. In other words, the Task Force is not dealing with a crisis situation and, accordingly, has every reason to ensure that its activities are consistent with environmental and public health protections.

The Executive Order 13212 emphasizes the importance of "environmentally sound production and transmission of energy." 66 Fed. Reg. at 43586. It specifically states that "environmental protections" as well as public health and safety protections are to be "maintain[ed]" and, in both Sections 1 and 2, directs that actions are to be taken to expedite energy projects only "to the extent consistent with applicable laws." *Id.* Given the clear intent and language of the Order, we are concerned at the failure of the Federal Register notice to affirm unequivocally that compliance with substantive and procedural requirements will *not* be considered "impediments" by the Task Force. Equally disturbing, given the terms of the Order, is the proposal to include identification of "regulatory or legislative change" among the activities of the Task Force. *See id.* at 43587

Numerous laws govern the management of federal lands and their diverse energy and other resources, including the National Forest Management Act, Federal Land Policy and Management Act, Endangered Species Act, Marine Mammal Protection Act, Coastal Zone Management Act, Clean Water Act, Clean Air Act and National Environmental Policy Act (NEPA) – to name just a few. In enacting these and other statutes, Congress imposed a variety of procedural and substantive obligations on federal land and resource management agencies to ensure that publicly-owned resources would be protected and preserved and that proposals to permit harmful activities such as oil and gas production would be

carefully considered in an open public process in which environmental implications were fully analyzed. *See, e.g.*, Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (directing that the Interior Secretary "shall" "prevent unnecessary or undue degradation of the lands" under her jurisdiction); Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1083-1092. Given the clear language of the Executive Order, these responsibilities cannot and should not be considered "impediments," notwithstanding the fact that carrying them out and making these important decisions necessarily takes time as well as staff and financial resources. Moreover, since the Executive Order expressly – and repeatedly – conditions the acceleration of production on consistency with "law and regulation," *id.* at 43586, we submit that identifying "regulatory or legislative change" is beyond the purview of the Task Force.

To comply with the presidential directive that its actions be consistent with existing laws and regulations, the Task Force must take a number of steps. First and foremost, it must define – in advance and with public participation – what will qualify as an "impediment" and what will not. In developing this definition, we urge that a clear distinction be made between impediments that can be altered and legal duties that must be carried out. In addition, as discussed more fully below, other actions that the Task Force should take to ensure that legal obligations of land management agencies are not interfered with include adoption of a set of criteria for determining which projects should and should not be expedited. As indicated above, in carrying out these actions, the Task Force must acknowledge the decisions and actions that federal agencies have already taken to facilitate energy production, including production from federal lands, as well as their implications for public health and the environment.

Notwithstanding industry claims to the contrary, the vast majority of lands in the "overthrust belt" managed by the Bureau of Land Management (BLM), a key agency within the Department of the Interior that has jurisdiction over significant amounts of the nation's publicly-owned oil, gas and coal, are available for oil and gas leasing and development.1 Not only are these lands open to oil and gas development, but extensive, ongoing exploration and development activities are taking place on them.. During the years from 1993-2000, for example, record amounts of oil and gas were produced from offshore and onshore federal lands overall.2 Coalbed methane saw a huge boom: in Wyoming's Powder River Basin, for example, BLM forecasts for exploration and production were significantly exceeded,3 with serious environmental consequences.4

---

1 *See, e.g.*, NRDC, *A Responsible Energy Policy for the 21st Century* (March 2001), at 24 (hereinafter, "NRDC, *A Responsible Energy Policy*").

2 *See, e.g.*, U.S. Department of the Interior, Office of the Secretary, "Strong Record for Energy Production on Federal Lands During Clinton Administration," January 17, 2001. Coal production was also up. *Id.*

3 NRDC, *A Responsible Energy Policy*, at 25.

Tellingly, "[t]he percentage of federal mineral production as compared to total U.S. mineral production has risen steadily for oil, gas, and coal since 1980."5 The same is true, as discussed below, for the Clean Air Act's New Source Review program. Facts such as these preclude a finding that federal laws impose consequential obstacles on energy production from federal lands or on electricity generation, and rather emphasize the need for the Task Force to strengthen the capacity of agencies to carry out their statutory obligations.

The Federal Register notice reveals that the Task Force is also contemplating carrying out another extremely problematic activity: i.e., helping federal agencies "set[] priorities, schedule[e] activities in accordance with those priorities, [and] identify[] staffing and resource needs...." *Id.* at 43587. Frankly, we question the propriety and wisdom of the task force micro-managing the day-to-day operations of our land management and public health agencies, as implied by this statement. Surely, such involvement will retard, rather than advance, agency decision-making. We are also concerned about the statement's implication that federal agencies will be expected to subordinate their non-energy responsibilities, including, for example, their duties with respect to endangered and threatened species, roadless and wilderness study areas, archeological resources, and public health safeguards to one dominant use, the expedited production of energy. Again, such an approach would be inconsistent with applicable laws and regulations and, consequently, with the plain language of the Executive Order. The Task Force must explain clearly how it will avoid this result and specifically what steps it will take to guarantee that its activities do not over-ride or compromise the planning and decision-making processes of the agencies.

The Federal Register language quoted in the paragraph above also raises the possibility that serious misallocations of resources could occur as the result of Task Force activities. For example, resources needed for activities that are crucial and/or statutorily required, such as those relating to endangered species and mandatory land use planning activities, could be diverted to energy production. Again, the Task Force must ensure that this outcome does not occur and must explain to the public what steps it has and will take to prevent it.

The Federal Register notice clearly suggests that a process will be established for "prioritizing and ... expediting" energy projects, and that the process will include industry "nominations", but is totally silent on how the process will operate, what, if any, criteria will be used to determine which projects are accelerated, and what the role of the public

---

4 *See, e.g.*, Darin, Thomas F. and Amy W. Beatie, "Debunking the Natural Gas 'Clean Energy' Myth: Coalbed Methane in Wyoming's Powder River Basin," 31 ELR 10566, 10574-581.
5 U.S. Department of the Interior, Bureau of Land Management, "Oil & Gas Activity on Public Lands (Wyoming & The United States" (March 2000), at 2.

will be. This process – including specifically the way in which nominations will be transformed into actual priorities – must be fleshed out and must be transparent. In particular, we submit that, if industry is permitted to nominate areas/projects that should be expedited, then the public should be permitted to identify areas/projects that should *not* be.6 At least for nominations that become priorities, the identification of "nominators" – e.g., industry, agency, member of the public – should also be a mandatory part of the process.

As for the criteria for acceleration, we urge that these be developed with public involvement. The presence or absence of controversy about a particular project would appear to be a relevant factor. If local opinion is to be factored in, care must be taken to ensure that local opposition to development, as is the case with recent oil and gas proposals in federal waters off the coast of Florida and in Wyoming's Bridger-Teton National Forest,7 is given appropriate weight. The kind of project and its associated impacts also would be useful criteria. While oil and gas development typically is accompanied by a suite of serious environmental impacts,8 other kinds of production such as wind energy often have less extensive on-the-ground effects. Whether the proposed project would be located in a wild forest or frontier area of the OCS, rather than in a place where development is already occurring is clearly relevant. Whether the project is proposed for an area where other energy projects are already being fast tracked, as is the case in many parts of the Rocky Mountain West, is also an important factor to take into account.

Another appropriate criterion would be whether or not the necessary pre-requisites for environmentally sound energy production – such as adequate land use plans and environmental reviews – have been completed. Indeed, in our opinion, the single best way to increase the speed and efficiency of federal agency decision-making in compliance with applicable laws is to provide the agencies with adequate budgets and staff to carry out their responsibilities. The BLM, which, as noted above, has jurisdiction over significant energy resources, recently issued a report documenting the lack of budgetary resources to satisfy its obligations and to meet demands on its resources, including energy proposals from leases, to drilling permits, to inspection, enforcement and monitoring of production activities.9 Nor is the lack of funds and staff the sole problem plaguing the BLM's oil and gas program: on the contrary, the agency is failing to comply with many key

---

6 Appendix 1 to this letter is a partial list of public land areas with such unique and special non-energy resources that energy development should not be allowed.

7 *See, e.g.*, Carlton, Jim, "Wyoming Tourism-Related Businesses Ask Bush to Halt Area Drilling Plans," *Wall Street Journal*, August 28, 2001, at A4.

8 *See, e.g.*, NRDC, *A Responsible Energy Policy*, at 25, 26-27.

9 *See* U.S. Department of the Interior, Bureau of Land Management, *Report to the Congress – Land Use Planning for Sustainable Resource Decisions* (February 2000).

environmental statutes, including NEPA, FLPMA and the Clean Water Act, and with their goals for public participation as well as for protection of water, air, natural resources and public health.10 We hope that your task force will look into these funding deficiencies as well as into opportunities to help agencies like the BLM meet their statutory responsibilities.

Finally, the Task Force's focus on "impediments to federal agencies' completion of decisions about energy-related projects" and "efforts to streamline energy permitting decisions" should not ignore a basic reality of our system of environmental laws: the vast majority of permitting decisions under the Clean Air Act and Clean Water Act, for example, are made by State and local agencies in the first instance. The Task Force should not develop or encourage policies or changes in legal requirements that will undermine the ability of these entities to protect their local and regional environments and the health of their communities. Nor should the Task Force interfere with, or encourage interference with, the exercise of these local land management and public health responsibilities with respect to any nominated energy project. Lastly, if a state or local permitting project is not proceeding as expeditiously as the Task Force would like, due to the responsible local agency's views about how the project should proceed or if the local entity is failing to comply with its legal obligations, *federal* agencies should not use such circumstances as an excuse to short circuit their review responsibilities, all in the name of following the Executive Order's acceleration directive. State and local agencies, as well as federal agencies, have important roles and responsibilities that must not be subordinated to any one imperative such as energy production.

Because this administration has already devoted considerable attention to the Clean Air Act's New Source Review program (NSR), the remainder of these comments address that critically important program. As discussed above, we urge CEQ to limit any review of NSR to established facts, because – irrespective of unverified anecdotes and unsubstantiated criticism emanating from the energy industry11 – the facts preclude NSR's characterization as an "impediment[] to federal agencies' completion of decisions about energy-related projects." 66 Fed. Reg. at 43587. CEQ should tailor its activities to strengthening, rather than undermining, this vital component of the Clean Air Act's regime for protecting public health and the environment. At least six factors counsel support for – and strengthening of – NSR.

---

10 *See, e.g.*, Darin, Thomas F. and Amy W. Beatie, *supra*, n. 4, 31 ELR at 10581-596 (detailing the agency's failures to comply with FLPMA, NEPA and the Clean Water Act).

11 For examples of industry's unverified, self-serving anecdotes, *see* NRDC, "Comments on the NSR 90-Day Review Background Paper," July 27, 2001, at 6-7.

Under NSR, the Environmental Protection Agency (EPA), State, and local agencies have issued pre-construction permits expeditiously and often. EPA's "NSR 90-Day Review Background Paper" is clear on this point: "Based on an EPA review of about 900 permits since 1997, the average time needed to obtain a major NSR or PSD permit, across all industries, is approximately 7 months from receipt of the complete permit application."12 EPA calculates that "[i]n recent years, permitting times have been reduced for all source types." Specifically, average permitting time has been reduced by two months over the past four years.13 Focusing on the electricity generation industry, EPA notes that 274 permits have been issued for such facilities since 1995.14 Due to the increased frequency of permitting for electric generators in recent years, the pollution control technology and related issues for this sector are well understood and have resulted in straightforward permitting practices, a situation that is expected to continue.

*The operation of NSR has not appreciably limited the ample amount of electricity generated in this country.*15 Industry consultants, investment analysts, and even the conservative Cato Institute estimate that so much new electricity generating capacity will come on line in the next five years that the country will experience an "electricity glut."16 As NRDC has previously commented, "[a]ny account of the impact of NSR on capacity additions will need to reconcile assertions that NSR hinders capacity-expanding investments with the fact that [] plans for new capacity are proceeding apace even in the midst of EPA's current NSR enforcement policy."17 Energy market analysts believe that environmental regulations such as NSR have, in comparison to other factors, only a minor impact on capacity expansion and utilization in this country.18 Most experts also agree that blame for the recent decline in domestic oil refining cannot be laid at the doorstep of

---

12 EPA, "NSR 90-Day Review Background Paper," June 22, 2001, at 7.
13 *Id.*
14 *Id.* at 9.
15 *See* Clean Air Task Force, *et al.*, "Comments on Review of Interpretation, Implementation & Enforcement of Clean Air Act New Source Review Programs," July 24, 2001, at 45-50.
16 *See* PA Consulting Group, "The President's 2001 US Energy Blueprint: What does it mean for the utility industry?" May 25, 2001; Nelson Schwartz, "Is Dick Cheney the New Hillary?" *Fortune*, June 11, 2001, at 37; Jerry Taylor, "Just Say 'No' to the Energy Plan," *Cato Dailys*, May 19, 2001; Joe Thomas, James Chapman, and Alastair Ford, "Energy Production – Powering Ahead," *Investors Chronicle*, July 13, 2001, at 20-22. These sources are cited in NRDC, "Comments on the NSR 90-Day Review Background Paper," July 27, 2001, at 3-4.
17 NRDC, "Comments of the NSR 90-Day Review Background Paper," July 27, 2001, at 3.
18 *See, e.g.*, "Economists Tell Senate Committee that FERC May need More Economic Expertise to Monitor Power Markets Effectively," *Foster Electric Report*, June 20, 2001 (comments by Severin Borenstein); "Power Companies and Regulators Must Take Steps to Avoid Spread of California Power Virus," *Business Wire*, April 24, 2001; Charles J. Cicchetti and Colin M. Long, "Politics as Usual: A Roadmap to Backlash, Backtracking and Re-Regulation," *Public Utilities Fortnightly*, October 1, 2000, at 34.

environmental regulation.19 In any event, industry is being disingenuous when it claims that the NSR permitting process is too complex, for much of the complexity stems from the myriad loopholes that industry has managed to carve into the process.

NSR protects public health and the environment. Pollutants from power plants are associated with serious health impacts, including asthma attacks, heart attacks, adverse birth impacts, and premature death. As the Clean Air Task Force has noted, "[a]t a time when 140 million Americans are living in areas where the air is unhealthy to breathe, when tens of thousands of Americans die prematurely from power plant pollution each year, and when ozone smog is causing millions of asthma attacks each year, EPA must take seriously its obligation to preserve and strengthen [] public health protections" such as those contained in the NSR provisions.20 EPA estimates that approximately 400,000 tons of SO_2 and 822,000 tons of NO_x emissions are avoided annually as a result of just the PSD program of NSR in areas of the country that are already attaining national air quality standards.21 As long as they are enforced, the NSR provisions "hold out the promise of continual improvement in air quality even as the economy expands and electricity demand is met through new generation capacity."22 In addition to protecting public health, NSR stands to generate significant ecological benefits by reducing the acid rain and nitrogen saturation afflicting the country's forests and costal waters.23 This is not to mention the increased visibility that the program can help bring about in our national parks and other treasured federal lands.24

Public participation is not an impediment to an expeditious NSR permitting process. History has shown that the effectiveness of environmental regulation in this country increases with the ability of the public to act as a watchdog over the enforcement and administration of environmental and public health protections. Public participation is a time-honored and valuable element of environmental law and policy in our democracy. And public participation has not injected undue delay or complexity into the NSR program or other environmental programs. Clearly, public participation in the NSR permitting process – as well as the decisionmaking processes of the federal land management agencies – should be enhanced rather than restricted.

---

19 *See sources cited in* NRDC, "Comments on the NSR 90-Day Review Background Paper," July 27, 2001, at 4-6.

20 Clean Air Task Force, *et al.*, "Comments on Review of Interpretation, Implementation & Enforcement of Clean Air Act New Source Review Programs," July 24, 2001, at 5.

21 EPA, "NSR 90-Day Review Background Paper," June 22, 2001, at 9.

22 *See* Clean Air Task Force, *et al.*, "Comments on Review of Interpretation, Implementation & Enforcement of Clean Air Act New Source Review Programs," July 24, 2001, at 27.

23 *See id.* at 30-35.

24 *See id.* at 39-45.

On behalf of NRDC and SUWA, we thank you for considering these comments. If you have any questions about our views, or if we can help in any way, please feel free to contact either of the signatories to this letter at the numbers set out below.

Sincerely,

Johanna H. Wald
Director, Land Program
415-777-0220

John Walke
JHW
Director, Clean Air Project
202-289-6868