

Facing the Future:
**Recommendations on the White House
Council on Environmental Quality**

A Report to the President-Elect

**The Conclusions of a Colloquium held at Mt. Vernon, Virginia
October 2008**

Sponsored by the Henry M. Jackson Foundation

**Hosted by the Tulane University Law School,
Institute on Water Resources Law and Policy**



PREFACE

“We recommended a focal point for environmental policy in the White House. That is what we said in 1968 ... and it is still true.”

Russell M Train, Chair, President’s Council on Environmental
Quality, 1970 – 1973

This report is the outgrowth of a colloquium on the role of the Council on Environmental Quality in the next Administration, held at Mt Vernon, Virginia in October 2008. Participants include former leaders and senior staff of several federal environmental agencies including CEQ, EPA and the Department of Justice, former directors of state programs in California, Pennsylvania, Massachusetts and Florida, and representatives from private industry, environmental organizations and academia. They also include past CEQ Chairs under Presidents Nixon, Carter, George H.W. Bush, and Clinton. The report reflects the political spectrum over time, the consideration of divergent points of view, and a remarkable consensus on what can and should be done.

FACING THE FUTURE:

Recommendations on the White House Council on Environmental Quality

This is a report on how the new President can exert immediate environmental leadership through the White House Council on Environmental Quality (CEQ), one of the most effective instruments of environmental policy in the United States. Established by Congress under the leadership of Senator Henry Jackson and Congressman John Dingell, the Council has been the President's environmental voice and advisor, and the primary vehicle for advancing coordinated positions in support of the policies of both the White House and federal legislation.

- CEQ is an existing tool available to the President to assert environmental leadership.
- CEQ plays an essential role in federal environmental management.
- CEQ is the only voice dedicated to the environment in the White House.
- CEQ speaks for the President in settling environmental disputes among all the agencies of the federal government.

Created by the National Environmental Policy Act of 1969 (NEPA) (Attachment A) the Council has established a considerable track record of achievements (Attachment B), is an accepted part of White House operations, and needs no further authority from Congress to assist the President in meeting his challenges.

This report identifies this potential in four parts: Presidential Actions, Climate Change, Leadership Opportunities, and Staffing.

I. PRESIDENTIAL ACTIONS

An incoming Administration sets its tone and priorities at the outset, and this is particularly true today. To many Americans, and to much of the world which has expressed deep disappointment with recent US environmental policies, the President's position on the environment, writ large, is a major concern. Opportunities now exist to link environmental solutions with economic development, employment and other national priorities. To make this link, the President will want to act personally, directly and at an early time.

Recommendations:

- **Presidential leadership through an Address to the Nation, an Environmental Message to Congress, or a National Conference on the Environment stating the President's policy goals and instruments to achieve them, including legislation, rulemaking, executive orders and other actions, with timelines to accomplish them where appropriate.**

Past presidents have used several vehicles to stake out new environmental policy, from the Conservation Conference of Theodore Roosevelt to the Environmental Addresses and Messages to Congress of Presidents Nixon and Carter. Whatever the vehicle, the fact of an opening message sets an important stage.

■ **The early nomination of a CEQ Chair to assist him in this message and its implementation.**

The President will want a senior staff member and close advisor to spearhead his environmental policy, ideally a person of national credibility and stature. This relationship and stature are keys to the success of both the Council and the President's policies.

■ **The strengthening of CEQ to provide full-service assistance to the President.**

See Section IV below.

II. CLIMATE CHANGE

The nation's response to climate change will be the most visible sign of the Administration's commitment to environmental and energy security. Climate change is widely accepted by the American people as an urgent problem. It is also an opportunity for positive environmental and economic change.

This change will cut across many federal sectors and programs. Several agencies and programs deal with pollution controls, others with energy production and still others with transportation. Economic offices have an important role in designing efficient strategies, while yet other agencies have roles in mitigating the effects of climate change. All of these players will require coordination by an entity that speaks for the President of the United States. Nothing short of that will work.

CEQ is a ready instrument for the task. Created by statute, it can be put to work at once. It will of course need to work closely with other White House and federal agencies, a role with which it is already accustomed. While there are a number of possible arrangements for White House coordination of climate change, it is important that the Council, as the President's chief environmental advisor, either assume or be part of this leadership. This role, for the President's primary spokesman on the largest environmental issue of our time, seems indispensable. A contrary arrangement could fragment White House policy. Two White House voices on the environment, one on climate change and the other on everything else, would be at the least confusing. There is no logical division between climate change policy and environmental policy. The two are joined at the hip, and should be considered coherently and together.

Recommendations:

- **A lead role for CEQ in the coordination of national policy towards climate change.**
- **An Executive Order (1) directing all federal agencies to identify, within 90 days, programs and activities that, as currently administered, contribute to climate change, and to identify alternatives that would reduce these impacts and promote better environmental stewardship, and (2) directing all federal agencies to assess the extent and manner in which climate change may affect their missions and the resources they manage, and to develop plans and strategies within one year for avoiding, adapting to or minimizing such impacts to the fullest extent possible. The Executive Order should direct CEQ to review the agencies' reports on their contributions to climate change and their plans for addressing climate change impacts, and to make appropriate recommendations to the President.**

There is no silver bullet for climate change. The programs and activities of many federal agencies relate to the issue, either in the promotion of activities that produce greenhouse gases or in the treatment of its effects. The new President should begin by surveying the federal family to see which activities relate to the problem and which are available to effectuate change. The federal government is now operating on a pre-climate change format, indeed in some cases a pre-environmental policy format, and the path to modernizing it starts with identifying these problems and opportunities. The President should also ensure that federal agencies have properly focused on the potential impacts of climate change to their missions and the resources, such as federal lands, that they manage, and are developing plans and strategies to avoid, adapt to or minimize such impacts to the fullest extent possible.

- **CEQ collection and analysis of state, local and private efforts relating to climate change, and policy recommendations to the President for his information and consideration.**

Most of the initiatives currently responding to climate change are taking place at the state, local or private enterprise level. For example California's S.B. 375, just enacted, focuses state efforts and funding on links between transportation, housing and climate change. Wal-Mart has, likewise, instituted far reaching policies. These efforts and their results could greatly inform the federal government on national approaches. Assembling, analyzing and preparing options based on these experiences are a classic CEQ function, and one very much needed at present at the federal level.

III. LEADERSHIP OPPORTUNITIES

Apart from the coordination role on climate change described above, CEQ has additional roles that will help further harmonize the federal establishment on this issue and address related issues that are equally critical, and global.

Recommendations:

- **Reestablish the role of CEQ as the President’s spokesperson on environmental policy.**

When senior White House staff meet at 7:00 in the morning, CEQ is the only voice on the environment. This is a critical voice to maintain.

- **The issuance of guidance to ensure that climate change impacts are fully evaluated in environmental impact reviews under Section 102(2) (C) of NEPA.**

For almost thirty years CEQ and its regulations have prescribed the procedures for federal agency environmental impact review. Climate change impacts are relatively new to this program, and have not been well incorporated to date. CEQ should identify how these impacts should be included in the environmental review process, as guidance for all federal agencies. A first step in dealing with climate change is recognizing the impacts of federal actions and seeking ways to avoid or mitigate them.

- **The issuance of an Executive Order and regulations to implement Section 102(1) of NEPA calling for federal agencies to harmonize their actions with the policies of Section 101.**

This section of NEPA calls for federal agencies, “to the fullest extent possible,” to administer their programs in accordance with NEPA’s policies, which, in today’s language, focus on sustainability and “the widest range of beneficial uses” without undue degradation of the environment. Although this section carries an explicit statutory command, there is little consistency or guidance on its implementation. Heightened by the urgency of conforming federal decisions to the phenomenon of climate change, Section 102(1) guidance will be an effective tool to advance not only disclosure of environmental impacts but consistent responses to them as well.

- **Creation of inter-agency, private sector and environmental task forces on climate change related issues, including: risk assessment, water scarcity, biodiversity, and ocean management.**

CEQ has the capacity to develop coordinated policies on issues that transcend single agency jurisdiction, beyond precursors to climate change. One set deals with mitigation of climate change impacts, or “adaptation,” raising a suite of development and risk related problems and opportunities for change, particularly in coastal high hazard areas and regions facing water shortages. Another set deals with issues that, independent of

climate change, have reached critical proportion, including the health and viability of the world's oceans, biodiversity, and a more effective approach towards persistent and bio-accumulative chemicals. While implementing actions may be taken by other agencies, or even by Congress, CEQ's role here is to coordinate new policy responses.

- **Joint review, with the Office of Management and Budget, of budget impacts and environmental opportunities associated with federal subsidies affecting energy and resource development and environmental protection.**

Federal programs provide significant subsidies for activities that could contradict the President's policies on climate change, energy security and sustainable development. Savings in this area could advance both the President's economic and environmental priorities. These same subsidies also offer potential incentives to achieve primary environmental and economic goals. CEQ and OMB, joining their expertise, should advise the President on these conflicts and opportunities.

- **Coordination, with the Department of Justice, of government positions on the interpretation of NEPA.**

Federal agencies may and do interpret NEPA differently, often to protect other statutory missions. The Department of Justice is primarily responsible for representing these agencies in court and presenting the government's legal positions.

The Department, in the past, has at times coordinated the positions it takes with CEQ, and at other times not. Given its special oversight role for the implementation of this program, this consultation and coordination with CEQ should, again, become the norm.

IV. STAFFING

CEQ staffing has varied over time, depending on the priorities of the President and Congress, from a low of thirteen to a high of seventy. Under President G. W. Bush the Council has had a staff of twenty-four, which has been inadequate to provide basic advice, responses to conflicts and supervision of NEPA. Meanwhile, environmental protection has increased exponentially in scope and complexity.

It will also become increasingly difficult to manage this office, given its new complexities, without the appointment of a Deputy Director, long authorized by statute but never implemented. As CEQ's role heightens, and reaches international forums as well, a Deputy will be necessary to mind the store.

CEQ sits at the axis of tremendous movements in the environment, the economy and society. It has great potential to help the White House respond. The strength of its staff will largely determine how effective this help is.

Recommendation:

- **Significantly increase CEQ staffing levels, including the appointment of a Deputy Director.**

IV. CONCLUSION

“It is the conclusion of this report that as the nation ends one century and begins another, the CEQ has never been more needed. The easy environmental problems are resolved. Now the more difficult business begins.”

Boyd Gibbons, *CEQ Revisited, the Role of the Council on Environmental Quality*, 2000

We are in the midst of the second great environmental crisis. The first rose in the 1960's and resulted in a remarkable new statute and an equally remarkable new office, the Council on Environmental Quality. They have proven their worth. We are now facing a crisis that dwarfs the previous one, with many of the old problems yet unsolved. CEQ was intended to be a leading part of the solution, and it should be now as well. These recommendations will assist towards that end, serving the White House in exactly the way Congress intended and the American people will support.

Respectfully submitted:

Dinah Bear
Attorney
CEQ General Counsel, 1981-1991; 1993-2007

Ray Clark
Senior Partner, The Clark Group
CEQ Senior Policy Analyst and Associate Director 1992- 1999

William M. Cohen
Adjunct Professor of Law, American University
Counsel, Perkins Coie
Chief, General Litigation Section, Environment and Natural Resources Division, Department of Justice 1986-2000

Mark S. Davis
Director and Senior Research Fellow, Tulane University Law School, Institute on Water Resources Law and Policy

Michael R. Deland
CEQ Chair 1989-1993
Regional Administrator, Region 1 U.S. Environmental Protection Agency 1983-1989

Robert Dreher
Vice-President for Conservation Law, Defenders of Wildlife
Deputy General Counsel U.S. Environmental Protection Agency

George Frampton
Partner, Boies, Schiller & Flexner LLP
CEQ Chair 1998-2001
Assistant Secretary of the Interior for Fish, Wildlife, and Parks 1993-1997

Oliver A. Houck
Professor of Law, Tulane University School of Law
General Counsel, National Wildlife Federation, 1971-1981

Thomas C. Jensen
Partner, Sonnenschein Nath & Rosenthal LLP
CEQ Associate Director for Natural Resources 1995- 1997

Nathaniel S.W. Lawrence
Senior Attorney, Natural Resources Defense Council

Kathleen McGinty
CEQ Chair 1993- 1998
Secretary, Pennsylvania Department of Natural Resources

Rodger Schlickeisen
President and CEO, Defenders of Wildlife

James Gustave Speth
Dean, Yale School of Forestry and Natural Resources
CEQ Member and Chair 1977-1981

David Struhs
Vice President Environmental Affairs, International Paper
CEQ Chief of Staff 1989-1993
Secretary, Florida Department of Environmental Protection
Commissioner, Massachusetts Department of Environmental Protection

James Strock
Principal, James Strock & Co., Scottsdale AZ
Secretary for Environmental Protection, State of California 1991-1997
Assistant Administrator for Enforcement, U.S. EPA 1989-1991

Russell E. Train
CEQ Chair 1970 -1973
Administrator, U.S. Environmental Protection Agency 1973-1977
Undersecretary, U.S. Department of the Interior 1969-1970

James T.B. Tripp
General Counsel, Environmental Defense Fund

Brooks B. Yeager

Executive Vice President for Policy, Clean Air Cool Planet

Deputy Assistant Secretary for Environment and Development, U.S. Department of State, 1999-2000

Deputy Assistant Secretary for Policy and International Affairs, U.S. Department of Interior 1993-1999

Nicholas C. Yost

Partner, Sonnenschein Nath & Rosenthal LLP

CEQ General Counsel 1977-1981

Affiliations listed are for identification purposes only. Any views, findings, conclusions or recommendations expressed in this report do not necessarily represent those of the affiliated organizations.

ACKNOWLEDGMENTS

This report is a publication of the Tulane Institute on Water Resources Law and Policy, Tulane Law School, 6329 Freret Street, New Orleans, Louisiana. We are grateful to the Henry M. Jackson Foundation for its support of this project.

Copyright 2008

Project Directors

Mark S. Davis, Director and Senior Research Fellow, Tulane University Law School, Institute on Water Resources Law and Policy

Ann Yoachim, Program Manager, Tulane University Law School, Institute on Water Resources Law and Policy

CEQ Colloquium Moderator

Nicholas C. Yost, Sonnenschein, Nath and Rosenthal

Senior Editor

Oliver A. Houck, Professor of Law, Tulane School of Law

ATTACHMENT A: THE NATIONAL ENVIRONMENTAL POLICY ACT THE CREATION AND DUTIES OF THE COUNCIL ON ENVIRONMENTAL QUALITY

The President's Council on Environmental Quality was created in 1969 by the National Environmental Policy Act (NEPA), which prescribed America's environmental policy generally and outlined broad-scale mechanisms to achieve it. This was not a single-mission statute. Senator Henry Jackson, one of the Act's primary sponsors, called it a "policy for people," and the statute that emerged sought to maintain conditions that would "fulfill the social, economic and other requirements of present and future generations of Americans." NEPA was a law that would put it all together.

Title Two of NEPA established CEQ. Rejecting the notion of an environmental "czar," Congress opted to vest primary compliance responsibilities with the traditional agencies and reserved for the Council an over-arching White House policy role.

The two most relevant provisions are:

Sec. 202 (42 USC § 4342)

"There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment."

Sec. 204 (42 USC § 4344)

"It shall be the duty and function of the Council --

1. to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 [42 USC § 4341] of this title;
2. to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;
3. to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the

extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

4. to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;
5. to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;
6. to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;
7. to report at least once each year to the President on the state and condition of the environment; and
8. to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.”

ATTACHMENT B: THE HISTORIC ROLE OF CEQ

Over the years the Council has served a series of Presidents in various roles, including:

- The drafting of four, annual environmental messages in which President Nixon proposed seminal pollution control programs and created new agencies such as the Environmental Protection Agency (EPA) and National Oceanic and Atmospheric Administration (NOAA) to carry them out
- Researching and convening workshops to implement the use of economic incentives in environmental policy
- Producing detailed annual reports on environmental phenomena and trends that, in retrospect, appear uncannily prescient. A section of its first report entitled “Man’s Inadvertent Modification of Weather and Climate” identified seven ways in which humans were changing climate, including “Carbon Dioxide – An Earth Warmer?” and the “Greenhouse effect.” The date was 1970.
- Publishing further reports that brought first attention to the deforestation of the tropics (1978), and the loss of biological diversity (1980), both of which have become clear and present dangers in our time, as well as such unaddressed domestic issues as grazing and mining on public lands.
- Significant involvement in major international developments, including the US delegation to the UN Conference on the Human Environment in Stockholm, Sweden, a subsequent UN convention to phase out the dumping of wastes at sea, the Montreal Protocol, the international effort to ban commercial whaling, and a mutual accord with Canada to clean up the Great Lakes.
- Publishing detailed regulations on NEPA’s environmental impact assessment process, issuing subsequent guidance to facilitate and streamline the process and overseeing agency compliance.
- Mediating inter-agency conflicts under NEPA and other environmental laws, including major federal water projects, airports, highways, forest management plans and other flash points.
- Mediating the implementation of the Northwest Forest Plan among multiple agencies, disciplines and states, leading to sustainable management in the region.
- Coordinating federal interpretations of law relating to NEPA with the US Department of Justice and federal mission agencies.

- Assisting Presidential declarations establishing the National Monuments and Recreation Areas such as the Staircase-Escalante National Monument in Utah (President Clinton) and the Papahānumokuākea Marine National Monument of Hawaii (President G. W. Bush).

Beyond these more public actions, CEQ has played an almost daily role in helping to bring, in the words of one former participant, “coherence and resolution to what is inherently a not-so-civil war among jealous duchies.” The Council has been a primary agent of change, the very change Congress sought to accomplish in NEPA. It has also been the President’s agent in putting his stamp on this change, and coordinating it throughout the federal establishment.

Recently, however, there is evidence that the Council has been used to undermine the statutory environmental protection responsibilities of other federal agencies. There is also a perception that the Council has been used to gainsay the scientific conclusions of federal agencies on climate change and other issues. These practices should not be tolerated nor continued.

