

**American Lands Alliance – American Rivers – Defenders of Wildlife  
Earthjustice – Saveourenvironment.org – The Lands Council  
The Ocean Conservancy – The Wilderness Society**

Mr. Horst Greczmiel  
Associate Director for NEPA Oversight  
Council on Environmental Quality  
722 Jackson Place, N.W.  
Washington, D.C. 20503

March 30, 2007

Dear Mr. Greczmiel:

Thank you and the Council for compiling the Citizen's Guide to NEPA, and for this opportunity to comment. This guide will be of use to members of all of our organizations to use NEPA effectively and responsibly. Overall, the Guide does an excellent job of laying out the basics of NEPA and providing more detail, or pointers to further information, in the appendices. In particular, we are appreciative of the final section, "What If Involvement Isn't Going Well." It provides constructive advice on how to raise issues, with administrative and judicial remedies as the last resort.

However, we are concerned that the guide makes legal statements concerning the responsibility of citizens to offer comments in a timely fashion and to exhaust administrative appeals that are too strong, and could lead citizens to think that the courts will never allow them to challenge the sufficiency of an agency's NEPA analysis if they have failed to raise their concerns in timely comments or administrative appeals. Although a failure to provide timely comments may affect the willingness of the courts to consider citizens' views in a subsequent challenge, the Supreme Court recognized in *Public Citizen* that "the agency bears the primary responsibility to ensure that it complies with NEPA," and that courts may therefore consider late-raised issues involving "obvious" flaws in the agency's analysis. Nor is there a general responsibility to exhaust administrative appeals. The Administrative Procedures Act makes clear that agency action otherwise final may be challenged in court regardless of the availability of an administrative appeal except where such exhaustion is expressly required by statute or by an agency regulation that suspends the effectiveness of the agency's decision during the appeal. 5 U.S.C. Sec. 704. See *Darby v. Cisneros*, 113 S.Ct. 2539, 2543-45 (1993).

We agree, however, that it is appropriate to warn citizens of the risk that untimely participation or failure to exhaust administrative remedies may limit their rights in subsequent judicial review. We ask, therefore, that you revise the last sentence in the box captioned "Public Comment Periods" to read:

"And the Supreme Court has held in two NEPA cases that if a person or organization expects courts to address a concern or evaluate an alternative, the issue must have been

raised to the agency at a point in the administrative process when it can be meaningfully addressed (*unless the issue involves a flaw in the agency's analysis that is so obvious that there is no need for a commentator to point it out specifically*).

Similarly, we ask that you revise the last sentence of Section I under "What If Involvement Isn't Going Well?" to state:

"Or if you, or your organization, later go to court to argue that a certain alternative should have been analyzed in the NEPA document, the judge may find that the court can't consider that information because you should have raised your concern earlier (*unless the issue involves an obvious flaw in the agency's analysis*).

Finally, we ask that you revise Section V under "What If Involvement Isn't Going Well?" to read:

"Finally, of course, there are both administrative and judicial remedies available. A few federal agencies, such as the Bureau of Land Management and the Forest Service, have an administrative appeals process. Each process is specific to that agency. *If an appeal is available, you may find it beneficial to invoke it to try to resolve your concerns with the agency's decision without the need for a legal challenge. Moreover, a statute or agency regulation may require you to exhaust such an appeal procedure before seeking judicial review. Citizens who believe that a federal agency's actions violate NEPA may seek judicial review (after any required administrative appeals) in federal court under the Administrative Procedures Act.* If you are represented by a lawyer, you should consult with him or her about appropriate options or about communication with federal agencies."

Finally, we have a few other suggestions for improving the Guide.

(1) While the text nicely defines each term, it would be helpful to make a conspicuous statement at the beginning of the section "Implementing the NEPA Process" that many of the terms discussed are also defined in Appendix E. An alternative would be to include sidebars in each subsection with the corresponding definition from Appendix E accompanying the appropriate discussion.

(2) In a few cases, examples would be very helpful in fleshing out the terms. An example of a project meriting a Categorical Exclusion would be helpful, as would an example of a Purpose and Need and corresponding Reasonable Alternatives.

(3) In the description of Supplemental EIS, it should also be mentioned that an SEIS may result from a court's decision that an EIS was inadequate.

(4) In Record of Decision, the Guide should also state that, as the final agency action, the ROD is generally the component of the process that may be the subject of administrative appeal and judicial challenge.

(5) In the “How to Comment” section, the guide suggests starting participation by understanding the agency's purpose and need. In fact, one can challenge an agency’s characterization of need, and certainly should consider doing so during scoping if appropriate.

Thank you again for the opportunity to comment on this much-needed guide to NEPA.

Sincerely,

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