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RE: Federal Registers – Vol. 67, No. 131 / July 9, 2002 / pages 45510-45512 & Vol. 67, No. 161 / August 20, 2002 / pages 53931-53932

If we were to sum our opinion based on experiences with the National Environmental Policy Act it would be as follows: The Congress continues to struggle with issues perceived to be whether to eliminate the NEPA or eliminate avenues of appealing the process [See F. 2 & 3 page 10].

We suggest that the Task Force considers guidelines that explore ways to set attainable thresholds with guidelines for rules so everyone is on the same page when applying the NEPA. One overriding necessity will be consistency of application of regulations between the various federal agencies to ascertain legally defensible planning processes. If the threshold of guidelines is placed unreasonably high or remains ambiguously worded, we will repeat history and the litigations resulting from those past debates.

We appreciate your consideration of the remainder of this comment:

GENERAL:

This letter addresses some of our concerns for the NEPA Task Force to consider while developing “a publication highlighting case studies and any best practices that prove worthy of broad dissemination.” While you look toward guidance and regulatory changes, we suggest that histories of past [See B. page 5] and current [B. 1 page 8] on the ground processes not be overlooked. We also note that the published electronic e-mail response address is relayed through the USDA-USFS, however, our comments at times will be addressed to procedures that affect all federal agencies having effect on intergovernmental cooperation.

While evaluating the incoming information, the Task Force should take into consideration the Office of Management & Budget’s guidelines for ensuring and maximizing the “Quality, Objectivity, Utility, and Integrity of Information” disseminated to that office for their references to the Congress. [See A. page 2]

While we appreciate the extension of comment period as published in the August 20, 2002, Federal Register, we recommend that a standard 90-day comment period for actions of this particular nature (Task Force) be considered. We do not construe that recommendation to be inclusive of a broad spectrum of actions such as Categorical Exclusions, or others viewed in the course of environmental analyses, or as pertains to 40 C.F.R. §1506.2 – Elimination of duplication with State and local procedures. Thought must also be given to appeal procedural actions that have been utilized in the past to delay or foil attempts of either streamlining the NEPA or frivolously delaying the NEPA process.

There are such instances where agencies continue to re-invent the wheel regardless of new technology. The Task Force might find and review a Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping, which was sent out April 30, 1981 and signed by Nicholas C. Yost, General Counsel; Barbara Bramble of the General Counsel’s staff led the project. Although it pertained to scoping (19 pages – typewritten), it perhaps could offer insight to some of what the Task Force is attempting to accomplish today [See B. page 5]. The report was coupled to 40 Questions and Answers about the NEPA Regulations (46 Fed. Reg. 18026-18038 3/23/81).

A. Technology, Information Management, and Information Security:

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The CEQ guidelines (40 C.F.R. §1502.24) state, "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." That requirement is only as good as the individual(s) carrying it out. However, without accountability, which includes due process, any formulation of regulations for Information Security will be of no value. The lynx debate or promulgation of rules at 36 C.F.R. 294 (Roadless Area Conservation) are two of several examples that are, or will be settled in the Courts. Therein lies one problem that the Task Force must address.

During the Task Force consultation, one area of contention could be posed by the following question: *Since CEQ have published guidelines at 40 C.F.R. §1502.24, why has it determined for the Office of Budget and Management to duplicate for all agencies, the purposes, in part, set forth in §1502.24?* We venture that the reason revolves around the word "accountability" and its application to the word "integrity".

1. Where do you find data and background studies to either prepare NEPA analyses or to provide input or to review and prepare comments on NEPA analyses?

Our information to great extent is provided by electronic means through the General Accounting Office, Congressional Research Service, USGS surveys, among others. When NEPA documents are being reviewed, we rely electronically on the Federal Register and federal, state, or local Internet Websites, but many of our members and associates rely on hardcopy documentation sent via US Postal Service as discussed under A. 5, page 4.

Professional organizations, which we know to have peer review policies in effect (to retain the integrity of those scientific or other documents produced by them), are a source of our information while commenting on significant federal actions.

When timely and up to date census type information on demographic, or social and economic impacts or effects are needed in combination with the natural or physical environment (§§ 1508.8 & 1508.14), we go directly to the locality being impacted or potentially impacted for information so that information can be used as a base comparative to U.S. Census Bureau surveys or federal agency studies. We can cite examples of NEPA process that utilized national or state data erroneous of current conditions in the regions effected, which delay the NEPA process during Cooperating Agency activities under 40 C.F.R. §§ 1501.6 & 1508.5. These would be in relation to comments under B. *Federal and Intergovernmental Collaboration*, page 5.

2. What are the barriers or challenges faced in using information technologies in the NEPA process?

One barrier of concern to us is that very few of the public involved has the material capacity to utilize new technologies at this time. Many rural area residents, being dependent on the federal lands, are at great disadvantage because of this, including those who may benefit under the original intent of Executive Order 12988 – Civil Justice Reform.

Misunderstandings occur regularly between federal agencies and participating public or separate governmental entities. At times, we have found the information available during the draft stage of environmental impact statements to be less than thorough even though voluminous. For example: During the simultaneous promulgation of the USFS rules beginning OCT 1999 at 36 C.F.R. §§ 212, 217, 219, 261, 294, & 295, mapping and map overlays were and are non-existent. In this same instance, technology allowed the placement of such a great amount of conflicting information (non-credible or accredited data) that the public, federal, state and local agencies were thoroughly

confused in the way the USFS developed those regulatory updates. The integrity or believability of the process suffered drastically because of this, and technologies were available at the time through GIS that were not fully applied that could have alleviated this problem to some extent. C0453

The above instance regarding the USFS was a **barrier** to the States, Tribes, local governments and the majority of the public, and should be reflected as a **challenge** to the CEQ -- a challenge that has not been satisfactorily addressed to date. In our opinion this can be accounted for through several decades of litigious action by groups or individuals earning their livings merely by suing the federal government and getting paid for it, win, lose or draw, for simple administrative mistakes not intentional, but due primarily to the morass of conflicting District Court rulings, and federal agency inconsistencies regarding CEQ guidelines in relation to the NEPA.

What factors should be considered in assessing and validating the quality of the information?

Any assessment might begin with something as elemental as -- Who? What? Why? Where? When? How?

The CEQ could begin validating the level of public comment by factoring in repetitive comment of national interest. Often times, lead agencies will receive pre-formatted, pre-fabricated identical comments that can add into the tens of thousands. The Task Force should identify these identical comments as one comment, having the same bearing as any other single thought comment on the outcome of any particular NEPA process. Mass public opinion does not of itself make for "validating the quality of the information", and generally serves no purpose other than to perpetuate analysis paralysis based on philosophical or ideological premise unassociated with long-term management protocols. To be USFS specific, in light of the National Forest Management Act, sometimes forgotten is the Forest Service Organic Administration Act of 1897 giving the current intent and long-range management of our forests. If this, or in the case of any Act of the Congress, is ignored, the quality of information being assessed could be in direct conflict with any future desired condition of forest or rangelands as mandated by law.

3. *Do you maintain databases and other sources of environmental information for environmental analyses?*

Not in the context of this question.

Are these information sources standing or project specific?

Please describe any protocols or standardization efforts that you feel should be utilized in the development and maintenance of these systems.

From our point of view, standardization would include protocols that not only are readily available or convertible, but secure from information tampering of scientific study or complete removal from archives, electronic or otherwise, prior to being reviewed.

4. *What information management and retrieval tools do you use to access, query, and manipulate data when preparing analyses or reviewing analyses? What are the key functions and characteristics of these systems?*

We would like to address the issue of manipulating data: There appear to be instances that "predetermination" of processes can be accomplished by manipulating data to effect a desired outcome, known or unknown. This appearance, real or by perception, can impair the integrity of scientific environmental documents and the human dimension of the physical aspect necessary to peer reviewed documentation. Taking the above question to include the security context, key functions and characteristics of

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these systems should be reliant on secure or protected documents accessible for review so the actual means for manipulating data (falsely) after the fact, would entail the works of several collaborators.

5. ***What are your preferred methods of conveying or receiving information about proposed actions and NEPA documents...? Explain the basis for your preferences.***

Our preferred method of receiving NEPA documentation is through the US Postal Service, especially as relates to scoping, draft and final EIS. Daily monitoring of the Federal Register is helpful but contact by mail from agencies remains our preferred method of receiving information about proposed actions. The many federal agency websites are, at times, very cumbersome to navigate because different agencies have differing methods of webpage setups.

During the course of gathering information, once the NOI is out and a process is underway, email, fax and phone are our preferred method of conveying information or while seeking clarification; but we still rely on USPS Certified return mail to make certain federal comment is actually received by the agency conducting the action. One of the reasons we prefer USPS, is a recent example of USFWS not getting a post in the Federal Register in a timely fashion concerning an August 2002 formal hearing on critical habitat for the preble's meadow jumping mouse and apparently having to conduct the hearings anyway because local media were sent notices.

We have experienced certain federal agency discretion in deciding who the field office considers "interested public". Regardless of our preferred methods of contact, the system breaks down if the responsible officials cannot, or are not held accountable if the public, local or state government have accomplished what is required of them, but then are ignored or sometimes delayed by the agency or field office. Delayed informational data has occurred during instances covered under B. (page 5) to local governments operating as cooperating agencies.

6. ***What information management technologies have been particularly effective in communicating with stakeholders about environmental issues and incorporating environmental values into agency planning and decision making (e.g., web sites to gather public input or inform the public about a proposed action or technological tools to manage public comments)?***

What objections or concerns have been raised concerning the use of tools (e.g., concerns about broad public access)?

7. ***What factors should be considered in balancing public involvement and information security?***

Other than 40 C.F.R. § 1507.3 (c) for classified proposals either by Executive Order or statute, software security devices exist for electronic documents. However, security is also of concern to intergovernmental cooperation in relation to Instruction Memorandum No. 2002-149 of April 18, 2002, attachment #3 to the memorandum, point #11 - "Does the agency release predecisional [sic] information (including working drafts) in a manner that undermines or circumvents the agreement to work cooperatively before publishing draft or final analyses and documents? ...Agencies must be alert to situations where state law requires release of information." [See B. page 5]

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B. Federal and Inter-governmental Collaboration

If NEPA/CEQ history is not taken into account now, the process will continue its bumpy trail for each generation of new, often times, conflicting law and resulting regulation.

The following synopsis of intergovernmental cooperation is not only written to illustrate a point to the CEQ's Task Force about re-inventing the wheel, but also for others to review from a different perspective, based on historical relevance in relation to present day discussion – a.k.a. *some things never change*:

Cooperation, Communication, and Consistency?

The **January 30, 2002** Memorandum for the Heads of Federal Agencies from James Connaughton regarding Cooperating Agencies in implementing the procedural requirements of the NEPA, references the same subject from Acting Chair George T. Frampton, Jr.'s Memorandum of **July 28, 1999** because, "Despite previous memoranda and guidance from CEQ, some agencies remain reluctant to engage other Federal and non-federal agencies as a cooperating agency". Both documents refer to 40 C.F.R. §§ 1501.6 & 1508.5.

However, in a previous letter (non-memoranda) dated August 11, 1997, and in response to a letter of **June 25, 1997**, by the Honorable U.S. Senator Craig Thomas (WY), Kathleen A. McGinty, then Chair of CEQ, wrote the following:

August 11, 1997

... "As you may know, the [CEQ] is now engaged in a comprehensive reinvention of NEPA among all federal agencies to improve understanding and implementation of our nation's flagship environmental policy. We are focusing on the original goals of the Act and the clear direction it provides. For example, section 101(a) states. "*The Congress...declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.*" Frankly, considering NEPA's mandate and authority granted in federal regulation to allow state and local cooperation through agreement, cooperator status for state and local governments should occur routinely. ...

... "I am optimistic that we will improve the understanding of NEPA and the effective implementation of the intent of the Act among all federal agencies and state and local government officials."

In going back to **March 23, 1981**, the CEQ's Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations were published in the federal register. Then on **April 30, 1981**, General Counsel Nicholas C. Yost issued a memorandum for General Counsels, NEPA Liaisons and Participants in Scoping under the subject of, "Scoping Guidance" [46 F.R. 25461]. Page 15 of his typewritten document states at: D. Lead and Cooperating Agencies – "Some problems with scoping revolve around the relationship between lead and cooperating agencies. Some agencies are still uncomfortable with these roles. The NEPA regulations, and the 40 Questions and Answers about the NEPA Regulations, ... describe in detail the way agencies are now asked to cooperate on environmental analyses."

A few other points that were addressed in this **1981** memorandum were: A. Public input is often only negative; B. Issues are too broad; C. Impacts are not identified.

Then, in **July 1983**, a memorandum from then CEQ Chairman, A. Alan Hill, referenced Guidance Regarding NEPA Regulations:

"The [CEQ] regulations implementing the [NEPA], were issued on November 29, 1978. These regulations became effective for , and binding upon, most federal agencies on November 30, 1979.

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"As part of the Council's NEPA oversight responsibilities it solicited through an August 14, 1981, notice in the Federal Register public and agency comments regarding a series of questions that were developed to provide information on the manner in which federal agencies were implementing the CEQ regulations. On July 12, 1982, the Council announced the availability of a document summarizing the comments received from the public and other agencies and also identifying issue areas which the Council intended to review. On August 12, 1982, the Council held a public meeting to address those issues and hear any other comments which the public or other interested agencies might have about the NEPA process. The issues addressed in this guidance were identified during this process.

"There are many ways in which agencies can meet their responsibilities under NEPA and the 1978 regulations. The purpose of this document is to provide the Council's guidance on various ways to carry out activities under the regulations."

The **July 1983** document began by reviewing scoping in a fashion that would identify that "issues of little significance do not consume time and effort"... "reduce unnecessary paperwork and time delays"... identify "issues which are germane to any subsequent action" ... early identification of "significant issues...and avoidance of possible legal challenges."

It suggested that a "review team concept" [interdisciplinary] would benefit "timely and effective preparation of the EIS...and elimination, or at least reduction of, the need for additional environmental studies subsequent to the approval of the EIS."

It went on to say that if the agencies and public followed the Council's guidance, that scoping "may also have the effect of reducing the [sic] frequency with which proposed actions are challenged in court on the basis of an inadequate EIS. Through the techniques identified in this guidance, the lead agency will be able to document that an open public involvement process was conducted, that all reasonable alternatives were identified, that significant issues were identified and non-significant issues eliminated, and that the environmental public involvement requirements of all agencies were met, to the extent possible, in a single "one-stop" process."

So, what's the point? This history goes on and on...history repeating itself, just different players. The Congress has failed in its duty to American citizens to clarify its legislative intent. The Courts have defined for CEQ nearly every question that history wrought concerning the National Environmental Policy Act, and without Congressional or Presidential aid to clear the air (no pun intended) by revoking or amending conflicting Acts without furthering the gridlock present today, the Court will continue to set policy from the bench rather than judge the constitutionality of policy set by the Congress.

Should Congress not remedy the particular recurring failures of legislative action, we suggest that the Task Force begin their process with reviewing all of the historical documents to date relating to the original intent of the NEPA, specifically and initially to the phrase or facsimile of "significant federal action" relative to "insignificant and significant issues"[See E. page 10]. Compounding the entire process is the Endangered Species Act trumping everything positive about the NEPA process, because nothing can be an insignificant issue if NEPA is only construed to be applicable to the biologic environment contrary to 40 C.F.R. §§ 1508.14 and 1508.8.

Other than removing the consideration of worse case scenario aspects of previous time, the office of CEQ has burdened the process time and again to the point of gridlock between agencies, usually based on federal or U.S. Supreme Court cases that seem to stem from the Endangered Species Act, Clean Water Act, or Clean Air Act.

On another occasion on **January 12, 1993**, a CEQ memorandum (informational only?) to Heads of Federal Departments and Agencies from Michael R. Deland, summarized that, "This memorandum provides guidance to the federal agencies on incorporating pollution prevention principles, techniques, and mechanisms into their planning and decisionmaking processes and evaluating and reporting those efforts in documents prepared pursuant to the National Environmental Policy Act."