

NATIONAL
SKI AREAS
ASSOCIATION



July 31, 2002

NEPA Task Force
PO Box 221150
Salt Lake City, UT
84122
FAX: (801) 517 1021

Re: **Comments on NEPA Task Force's Improvement and
Modernization of NEPA Analysis and Documentation**

Dear NEPA Task Force:

The National Ski Areas Association (NSAA) submits these comments in response to CEQ's Notice and Request for Comments published in the *Federal Register* on July 9, 2002 on the NEPA Task Force's efforts to improve NEPA analysis and documentation. NSAA is the trade association for ski area owners and operators. It represents 332 alpine resorts, accounting for 95% of the skier/snowboarder visits in the United States. Of the 134 ski areas permitted to operate on National Forest System Lands, 122 are NSAA members.

NSAA's public land resort members have a great deal of experience with the NEPA process. The U.S. Forest Service is typically the lead agency for resort NEPA processes, as almost all public land resorts operate under a special use permit (SUP) from that agency. On the basis of the collective experience of our member resorts, we submit the following comments on the shortcomings of current NEPA implementation and how the NEPA process can be improved, modernized and streamlined. We applaud the efforts of CEQ to address this important issue.

The Forest Service is Increasingly Requiring EISs

The U.S. Forest Service is requiring Environmental Impact Statements (EISs) in situations where only a couple of years ago an Environmental Assessment (EA) would have sufficed. For example, the agency recently required an EIS for Anthony Lakes ski area in Oregon for the installation of *one* new chair lift and an increase in "skiers at one time" (SAOT) from 600 to 1200. The result of this trend is increased costs and delays for ski area project proponents, and increased costs for the agency as well. In some instances, the Forest Service is recommending that an EIS be completed to reduce the chances that opposition groups will challenge the document. Although this approach may bring the desired result in some circumstances, it is an inefficient and costly precedent in the long term. The tendency to "jump" to an EIS to avoid opposition is a perfect example of the "process predicament" described in the Forest Service's June 2002 report on analysis paralysis.

EAs and CEs Have Become Longer and More Complicated Than Intended

EAs have become lengthy and expensive analyses. Gone are the days of a two alternative (Action/No Action) EA. For example, Breckenridge Resort in Colorado and Crystal Mountain in Washington prepared EAs that cost the resorts over a quarter of million dollars, respectively. The Forest Service should develop and consider alternatives in EAs only when there are unresolved conflicts, consistent with § 102(2)(e). Agencies implementing NEPA need to keep in mind that CEQ's regulations define an EA as a "concise" document which "briefly provide(s) sufficient evidence and analysis for determining whether to prepare an environmental impact statement." 40 CFR § 1508.9.

Likewise, Categorical Exclusions (CEs) have become more complicated and costly. CEs recently issued for a chairlift replacement at Timberline Lodge Resort in Oregon cost the ski area \$40,000 each, and were the equivalent of an EA. In a recent CE for Willamette Pass ski area in Oregon, the agency required exhaustive analysis to connect a parking lot and base area via a proposed gondola (a 400 foot distance across a highway) even though the affected area was previously disturbed. Willamette Pass' CE cost the resort \$30,000 and involved specialists on issues ranging from threatened and endangered species to heritage resources. This lengthy and costly analysis defeats the purpose of a CE.

The Forest Service Should Develop More Categorical Exclusions (CEs)

The Forest Service should consider further expanding CEs, and developing new categories of CEs that are more specifically geared towards resort activities. For example, activities which are similar in nature to previously approved activities and will take place in the same footprint or corridor should be covered under a CE. Examples would include: lift replacements (even with different tower locations); modifying existing trails; snowmaking pipeline installations; expansion of snowmaking to new terrain;

improving existing parking lots particularly when the resort is reducing sediment loads and managing runoff by catching oil and sediments; and replacing structures like mountain restaurants in the same footprint. These new CEs should include flexibility to avoid costly and lengthy surveys for the types of projects described above.

The Forest Service is Increasingly Requiring Supplemental EISs or New EISs

The Forest Service is increasingly requiring resorts to prepare SEISs in situations where they are not legally required. The result is again delays in the NEPA process and increased expenditures on the part of the resort and the agency—not improved decision making. For example, environmental groups have demanded SEISs in circumstances where a species is proposed for listing, or a road building suspension is put in place. The courts have repeatedly held that these types of actions, which do not result in on-the-ground changes or “new information” that was not already addressed in the EIS, do not trigger an SEIS. Ironically, SEISs are also required because delays in the initial NEPA process are so pronounced that project opponents can claim that the original analysis is stale.

A related and equally unfortunate trend is the requirement of a second or even third EIS by the agency. Loon Mountain in New Hampshire, Mount Ashland ski area in Oregon, and White Pass ski area in Washington have all been subject to multiple EISs for the same project. Multiple EISs are required at times in attempts to avoid challenges to the original NEPA analysis, or because the initial EIS process took so long that the analysis underlying it can no longer be considered current. The result is seemingly endless and expensive analysis--not necessarily the sound decision-making intended by NEPA.

Improve Issues Management on Scoping, Purpose & Need, and Alternatives

During public scoping of proposed actions, the Forest Service receives numerous comments that are far outside the scope of the proposal. Yet, the agency, trying to be as responsive as possible, addresses and analyzes all of these comments. In some instances, alternatives are developed to address issues raised in scoping even though the alternative proposal does not meet the Purpose and Need for the proposed action. The need for better issue management will only be heightened by the larger volume of comments the agency will receive in the future via email, from participants who may not be well versed in the project specifics. The Forest Service needs to manage issues better, specifically by dismissing issues outside the scope of the analysis early in the process, and by not developing alternatives which do not meet the stated Purpose and Need.

Cumulative Effects Analysis Requirements have Become a Moving Target and are Increasingly Burdensome; Consulting Agencies are Contributing to the Problem

The Forest Service and NEPA consulting agencies have increased the level of analysis required in the area of cumulative impacts. Challenging cumulative impacts analysis is

the new growth area for environmental groups aiming to delay ski area project approvals. Cumulative impacts analysis is an easy target for environmental groups because of the speculative and uncertain nature of the undertaking and the amount of discretion the lead agency has in deciding the appropriate scope (geographic and temporal) of the analysis. In the recent past, resorts have seen cumulative impacts analysis used as a reason for requiring SEISs (Example: Vail Mountain); as a basis for appeals (Examples: Breckenridge, Beaver Creek Resort, Crested Butte Mountain Resort); and as a basis for litigation (Examples: Alta Ski Area, Telluride Ski Resort, Loon Mountain, Vail Mountain). EPA's expansive approach to cumulative impacts analysis has exacerbated the problem.

CEQ's regulations define cumulative impacts as:

The impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions, regardless of what agency (Federal or Non-Federal) or person undertakes such other actions. 40 CFR § 1508.7.

Agencies directing NEPA cumulative impacts analysis must do a better job of deciding when enough is enough. CEQ's 1997 handbook on cumulative impacts encourages agencies to "focus on *important* cumulative issues, recognizing that a better decision, rather than a perfect cumulative effects analysis, is the goal of NEPA." *Considering Cumulative Effects* at vii. The guide also suggests in this context that agencies apply scoping principles and only "count what counts." *Considering Cumulative Effects* at v.

Courts have repeatedly held that the agency has discretion to decide the scope of cumulative impacts; that qualitative, versus quantitative analysis is sufficient in addressing speculative impacts; that sweeping, detailed analyses or an encyclopedic approach to cumulative effects are not required; and that addressing only those effects that can be meaningfully evaluated is appropriate. The courts have also recognized that balancing the volume of documentation against the delays resulting from exceedingly broad and detailed analyses is appropriate.

The Forest Service and consulting agencies need to apply the above-referenced guidance to their decision-making on cumulative effects, and reverse the trend of requiring increasingly detailed cumulative impacts analyses. The current trend of exhaustive cumulative impacts analysis is wasting time and diverting scarce resources. Project analysis should be sufficiently detailed based on the circumstances. If facts are reliable and not merely speculative, they should be considered in greater detail. It is important for agencies to realize that although you can always "do more," the point is to gather useful, reliable information that supports sound decision-making. Given the rate of change in resort communities and the evolving nature of development projects, cumulative impacts analysis is and will continue to be a challenge. When development plans can be downsized, or even entirely abandoned, it becomes apparent that a detailed look at speculative cumulative impacts can often prove unproductive. In sum,

without change, we will continue to see the volume of study diminish the utility of the process.

“Raising The Bar” Due to Fear of Appeals

Fear of appeals, as opposed to sound decision-making, is what is driving many of the unfortunate trends mentioned above, such as requiring EISs, lengthier EAs, multiple EISs, SEISs, and a seemingly unlimited scope to cumulative impacts analysis. Driven by this fear, agencies attempt to “cover all the bases” in search of a consensus they will never reach. The fact is, in many cases an appeal will be filed regardless of how detailed or voluminous the environmental analysis is. Agencies must stop letting fear of appeals dictate how much, and which type, of information they will require in the NEPA process.

For many ski areas, NEPA-based appeals are virtually inevitable as the agenda of environmental groups is stop any further resort development, improvement or expansion. In some instances, appeals are a legitimate way to dispute substantive issues, and are raised by individuals who are openly and genuinely participating in the NEPA process. More commonly, however, appeals are brought as a way to delay or stop a project, often by individuals who did not participate in substantive discussions of the proposed action. Since opponents to ski area improvement and expansion now have potentially seven “bites at the apple,” (front loading, scoping, public hearings, pre-decisional comment period, SEIS, appeal, litigation), we should not lengthen the process any further by increasing information or analysis requirements.

Staffing Issues

The makeup, training, and expertise of staff teams working on ski area NEPA issues can be greatly improved. Inter-Disciplinary Team (IDT) members (including USFS and other agency staff) can use their personal no-growth, anti-recreation agendas to delay the NEPA process. As a result of these personal agendas, the agency that IDT members supposedly represent can have multiple voices. The “specialists” (e.g. biologists, hydrologists) on the team often make repeated and last minute calls for additional studies and analyses that further delay the process. IDT leaders are not provided the leadership training they need to steer the process. Overall, team members do not have the requisite recreation/resort expertise—particularly given the high rate of employee turnover and reassignment. As other agencies increase their role in the NEPA process, the need for better expertise on ski resort development and our unique issues becomes more pronounced. Training, directives, and shifts in resources are needed to address these staffing issues and improve the implementation of the NEPA process.

NEPA Analysis is Redundant: We Conduct New Studies and Analysis of Issues that Have Already Been Adequately Addressed

Redundancy is a problem in the NEPA process both from the standpoint of not applying "tiering" enough, and our inability to share information successfully from region to region. Agencies need to tier more from Forest Plan and Master Development Plan analyses, such that site specific analysis is more streamlined and incorporates information already gathered in these earlier stages. Agencies need to address "landscape" issues at the appropriate level, such as the forest plan level, and incorporate these analyses into project level decisions. This would allow the agency to focus more on *what is new*.

Additionally, the Forest Service and consulting agencies could do a better job at using existing analyses, from different projects and even from different regions, to support new decisions or at least provide a starting point on unfamiliar issues. A centralized, web-based system of information that is easily accessible to project analysis teams could help increase efficiency, reduce redundancy, and address the education problem noted above. It could help with the cross-pollination of information among the various agencies addressing resort NEPA. It would reduce the time and resources spent by the agency and resorts in addressing commonly analyzed issues. Examples of the types of resort issues that could be covered in the database include wildlife mitigation, demand, utilization and capacity issues, and air quality modeling. It could also include case studies of creative problem solving or successful collaboration on complicated issues among resorts, opposition groups, and government agencies.

Not only should NEPA decision documents be included in this database, but also the *underlying studies that were done in the analysis*. For example, if a ski area in Vermont develops mitigation for black bears, or a ski area in Colorado develops mitigation strategies for lynx habitat, that information should be readily accessible and shared from region to region. Again, this would allow agencies to focus more on what is new.

Eleventh Hour Comments by Consulting Agencies Are Delaying the Process

Consulting agencies need to make their views known on significant issues earlier in the process. Increasingly, consulting agencies are weighing in at the eleventh hour on issues that should have been addressed earlier in their comments on the draft environmental analysis. In some cases, the cause is lack of communication and coordination within the agency--or personal agendas--resulting in a "changed course" for the agency at the last minute. Other times, the agency will not make its views clearly known until the end of the process even though it has been involved from the very beginning. Failure to make NEPA a priority is another cause of delay, particularly among U.S. Department of the Interior agencies, which can stall the NEPA process significantly through delayed release of Biological Evaluations or Assessments or similar reports. Finally, delays can be attributed to the lead agency's failure to require

consulting agencies or entities to subscribe to project schedules for scoping, comment periods, and other steps in the process. These trends undermine the NEPA process and cause unnecessary delays.

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I thank you for consideration of these comments. The ski industry looks forward to improved implementation of the NEPA process.

Sincerely,



Michael Berry
President