

CQ402

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<b>Phone:</b>		<b>Date:</b>	September 19, 2002
<b>Re:</b>	NEPA Comments	<b>CC:</b>	

Attached for your review is the American Loggers Council response to your request for input on the NEPA process. Please call if you have any questions or comments.





# ***The National Voice for Professional Loggers***

CQ40Z

NEPA Task Force  
PO Box 221150  
Salt Lake City, UT 84122

September 19, 2002

Dear Chairman Connaughton:

The American Logging Council applauds the CEQ for establishing the National Environmental Policy Act (NEPA) Task Force and providing them with the decision "to seek ways to improve and modernize NEPA analyses and documentation."

Much of the litigation that arises when federal agencies such as the US Forest Service attempts to implement projects on the ground stems from special interest groups' allegations that all NEPA processes and procedures have not been properly followed.

While guidance documents have been written in an attempt to clarify NEPA regulations, those documents do not appear to hold up in a court of law, and have been ignored by the courts. What has not been accomplished in the legislature, primarily because of political motives, must be done administratively to ensure that we have healthy viable forests on our public lands. The 6 million+ acres that we have seen go up in smoke so far this year, are a good indication that the system is in need of repair.

## **Recommendations:**

### **Emergencies – Alternative Arrangements**

Members from our organization have met with various representatives from the US Department of Agriculture, including Mark Rey and Dave Tenny and suggested that there be an alternate NEPA procedure to address the occurrences of natural and caused events such as wildfires, wind, rain and ice storms, insect infestations, flooding and similar catastrophic events that dictate prompt authorization of responsive actions to restore, protect, preserve, enhance, and/or control a variety of important habitats, resources and conditions.

An example of this type of performance is found in the response to damage from a windstorm that moved through the National Forests and Grasslands in Texas. Damaged were 103,000 acres of the Sabine, Angelina, and Sam Houston National Forests. Rather

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than go through the protracted planning associated with traditional NEPA compliance, an assessment of the damage was made and a request for an alternative form of compliance was filed with the Council on Environmental Quality (CEQ). The storm occurred on February 10, 1998. The recovery project using an alternate NEPA compliance procedure was approved by CEQ on March 10, 1998. A copy of a proposed template for authorizing alternative arrangements for compliance with CEQ and NEPA regulations is attached.

### **Suggestions for Categorical Exclusions**

CEQ should base their decisions for categorical exclusions solely on peer reviewed science and the expected level or degree of adverse effects. Subjectivity should not enter into the determination of whether an action or class of actions is eligible for categorical exclusion.

### **Time Limits**

CEQ should provide rules and guidance to set general time limits for NEPA document preparation either by category of document (e.g. programmatic EIS, project EIS, programmatic EA, project EA, tiered EA, etc.) or by type of action. Such guidance should suggest more specific time limits if an action involves the removal of a natural resource such as timber that would be subject to deterioration and lose its overall quality and value. Those time limits should be set on a more regional basis where natural conditions would dictate the amount of time a resource could stay on the ground before it was deemed useless.

### **Suggestions for Programmatic EISs**

At a minimum, programmatic EISs should be prepared only on those programs which the courts recognize as Federal actions subject to judicial review. CEQ should excuse from NEPA "programmatic" documentation pre-decisional planning or other documents that cover such broad geographical areas and so many unknown projects as to be unsusceptible or poorly susceptible to NEPA-related environmental analysis.

At a minimum, the CEQ should require that agencies develop (subject to CEQ approval) NEPA compliance strategies that result in a maximum of one layer of "programmatic" NEPA compliance above the project level.

### **Suggestions for Tiering**

As recommended above, to make tiering both acceptable and workable, the CEQ should require that no more than two NEPA documents be prepared for or applicable to any federal project or other agency action.

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CEQ should require that the EA for any project subject to a programmatic NEPA document not be a stand-alone document or repeat any analysis from the programmatic NEPA document.

CEQ should insist that the programmatic NEPA document be considered timely for tiering purposes for a significant period after its completion. At a minimum, CEQ should establish a strong presumption of timeliness, with a heavy burden of proof to show that a programmatic NEPA document is too outdated to permit tiering.

### **EIS Contents**

CEQ should consider eliminating the required analyses of "connected actions" and "cumulative effects."

The CEQ should also address the geographical scope of the effects analysis in NEPA documents.

### **Environmental Assessments**

If the CEQ determines that EAs should be maintained (we do not believe that NEPA should require the preparation of EAs, only EISs under NEPA regulations) as a NEPA compliance tool, then the project EA's should not be detailed statements as required in an EIS on major federal actions, but be simplified as to their contents. The EA should not be an EIS, but rather a public document that "briefly provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement of a finding of no significant impact." 40 C.F.R. Sect. 1508.9 (a) (1)

The CEQ should provide rules and guidance that EA's need only be made available to the public but not subject to public comment as it is not currently required for EISs by NEPA or for EAs by CEQ's rules.

The CEQ also should set criteria for the "convincing statement of reasons" why no EIS is required that the Ninth Circuit requires of a FONSI. The present CEQ guidance – "briefly presenting the reasons why an action...will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared" – is apparently insufficient for at least some courts. 40 C.F.R. Sect. 1598.13

CEQ should provide complete direction on the full contents of FONSI's.

### **New Information – Supplemental Documents**

The continuing duty to supplement environmental documents for "new information" both during and after the original NEPA process slows the process and disrupts implementation of approved actions.

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After an EIS is complete, the CEQ regulations require a supplement to the EIS when there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. 1502.9.

Supplementation has also been extended to EAs, even though there is no regulatory requirement for such supplementation. Because EAs are not required by the regulations, it makes sense to clarify that there is no requirement for a supplemental EA.

CEQ should tighten the definition of "new information" that requires a supplemental EIS, and define the circumstances when an ongoing project or program must be halted until a supplemental EIS is completed.

The CEQ regulations should be amended to create a two step process for agencies to decide whether to prepare a supplemental EIS for an ongoing project or program. First, the regulations should establish a reliability threshold for new information, so that agencies are not continually forced to consume time and resources reviewing unreliable or unimportant information, and so that courts cannot interminably delay projects or programs to force an agency to do so. Second, the regulations should require an agency to prepare a supplemental EIS on a project or program only if the agency makes three findings:

- 1) The new information presents clear evidence that the project or program will have materially more harmful effects on the environment than disclosed in the original EIS for the project or program,
- 2) The agency lacks the authority to modify the project or program to substantially mitigate for the newly-disclosed effects unless it prepares a supplemental EIS; and,
- 3) The value of the supplemental EIS is likely to exceed the cost of preparing the document.

Ongoing projects or activities should only be halted while the supplemental EIS is being prepared if the agency finds:

- 1) the activity will cause serious and irreparable harm before the supplemental EIS is completed, and
- 2) it would not be more cost effective to mitigate any such harm through other means.

The regulations should provide that only specific activities meeting these two criteria shall be halted, and other ongoing portions of a project or program may continue at the discretion of the agency.

We hope to see some movement in the direction that the CEQ takes in revising the NEPA guidelines that will not only benefit the health of our forests, but also to re-establish the credibility of the various agencies within the federal government to the American public.

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The US Department of Agriculture and the US Department of the Interior must be given reasonable guidelines from this administration to ensure the health and sustainability of our natural resources. The guidelines must be concise and clearly defined in order to avoid the litigation that has been a result of the broadness of interpretation of the current NEPA regulations and guidelines.

Please feel free to contact me if you should have any questions or comments regarding these suggested revisions and thoughts pertaining to you request for comments.

Sincerely,



Daniel J. Dructor  
Executive Vice President

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Authorizing Alternative Arrangements for  
Compliance with CEQ and NEPA Regulations

The continuing occurrence of natural and caused events such as wildfires, wind, rain and ice storms, insect infestations, flooding and similar catastrophic events dictate prompt authorization of responsive actions to restore, protect, preserve, enhance, and/or control a variety of important habitats, resources and conditions.

A catastrophic (fire, storm, etc.) occurred on the (name national forest) on (date(s)) resulting in the following: (description of damage, resulting threats, etc. and proposed project actions).

To mitigate the damage and reduce further loss or threat to habitats, water quality and other beneficial elements of the damaged and threatened area, the (name national forest) must take prompt action. Based on consultation with the agency and review of the circumstances, CEQ has concluded that the situation extant on (name national forest) constitutes an emergency situation for the purposes of compliance with CEQ NEPA regulations and hereby approves the following alternative arrangements:

1. Preparation of an Environmental Assessment (EA) on the tree removal aspect of the project will be completed before the start of related project work. A thirty-day comment period will be provided before issuing a Decision Notice.
2. An interdisciplinary team will be established by the (forest) to assist the project director with decisions related to the removal of any significant number of trees.
3. The (forest) will provide for formal and informal consultation with appropriate agencies on issues related to the Endangered Species Act.
4. The (forest) will maintain a record of mitigation decisions implemented during the project's execution to permit post project monitoring.
5. The (forest) will establish a compliance team to assist the project leader in quality and standard assurance.
6. The (forest) will report to CEQ any changes in the project area that may require changes in these alternative arrangements.
7. The removal of trees will be limited to those already down, dead, or in a condition that their mortality is highly probable, and will avoid the cutting of undamaged live trees except for instances of worker safety and environmental necessity including the prevention or stabilization of damage to fisheries habitat, abating soil erosion or it's potential, or restoring natural hydrologic regimes. "Leave tree" cutting must be in accordance with the standards recommended by the interdisciplinary team or approved by the project leader.

/signed/

Chairman, Council on Environmental Quality