CQ422

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To: <ceq_nepa@fs.fed.us>
cc:
Subject: My comments are attached.

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CQ422

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

Re: *Federal Register* Notice and request for comments, July 9, 2002

Please accept these comments on behalf of the Diane Dillard, Boise Paper Solutions, St. Helens, Oregon. As such, Boise is directly affected by Federal environmental and land management policies including but certainly not limited to the National Environmental Policy Act (NEPA). I also personally own about 300 acres of timberland in Columbia and Clatsop County in Oregon.

Our experience with NEPA has been largely with management of forests by the Forest Service and Bureau of Land Management. The NEPA decisions by these agencies directly affects our company and the management of these public lands is generally governed by two-tiered planning process under the National Forest Management Act and the Federal Land Policy and Management Act, which presents unique and difficult planning and implementation issues. **The NEPA process as it applies to federal land management planning and resource management is broken**. Projects take too long to complete and are easily challenged for failure to meet the Council on Environmental Quality (CEQ) regulations.

The Federal Register notice requests ways to improve and modernize NEPA analyses and documentation and requests examples of current best practices and specific opportunities to enhance the NEPA process. However, the nature and scope of the task force assignment should be expanded to clearly include amendment of the CEQ regulations. Otherwise, identifying "case studies" and "best practices" and implementing NEPA under the current regulations will be an exercise in futility.

These comments are organized according to the major headings posited in the above referenced *Federal Register* notice.

A. *Technology, Information Management, and Information Security.*

In general, we believe CEQ is placing too much emphasis on technology and information management. Our experience is that Federal agencies possess tremendous technological capabilities including Internet access, networking, integrated databases, natural resource environmental effects models, Geographic Information Systems (GIS), etc.

Despite these technologies, or perhaps because of them, the NEPA process has been more cumbersome—not less. Furthermore, CEQ should concern itself with its role as mandated in NEPA and subsequent executive orders. Specifically, CEQ can help improve NEPA by recommending changes to NEPA and revising its regulations at 40 C.F.R. 1500-1508, as explained in Section F of these comments.

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B. ***Federal and Inter-governmental Collaboration.***

In general, collaboration is problematic to say the least. Though it's in vogue today, by its very nature it's time consuming.

An acute problem with collaboration is there are no guarantees. Many individuals, interest groups, and other parties suffer from "participatory fatigue" due to excessive public involvement and collaboration and this is exacerbated when the final product is never implemented.

If collaboration is to be successful, there must be a higher degree of certainty that a proposal or modification will be implemented. While environmentally destructive proposals certainly should not be implemented, the vast majority of projects have undergone years of analysis and mitigation to minimize environmental effects and are derailed not because of environmental impacts, but because of ideological opposition. Outside parties that chose not to participate or simply don't like the outcome, must face a higher threshold to challenge actions completed through collaboration.

Furthermore, collaboration must start by clearly stating the bounds and by all parties involved "buying in" up front. Too often parties have nothing to lose and thus aren't sincere and genuinely interested in collaborating because it means compromise is necessary.

C. ***Programmatic Analysis and Tiering.***

CEQ regulations embrace a sound principle of "tiering" that was designed to streamline the implementation of projects by allowing the preparation of a programmatic EIS to be followed by subsequent EISs or EAs that would be more narrow in scope and would not have to repeat the environmental analysis contained in the programmatic EIS. 40 C.F.R. § 1508.28. In practice, agencies have created too many layers of environmental analysis, which delays the site-specific environmental analysis necessary to ultimately support taking action. Because the programmatic documents take years to prepare, by the time the environmental document is finally prepared for the project, the information in the programmatic EIS is outdated and cannot be used in the project level environmental document. The project level environmental document must then stand on its own analysis, or update and repeat the inadequate or outdated analysis in the programmatic EIS.

D. ***Adaptive Management/Monitoring and Evaluation Plan.***

Adaptive management is a good concept but its track record is weak at best. We all know decisions are made with available information. We can't afford to wait for complete information because it's never complete. But, unfortunately, NEPA review presumes complete knowledge in a deterministic sense.

Every decision made has uncertainty and is based on limited knowledge. One problem with adaptive management is that an adjustment in one action may lead to adjustments made elsewhere. That is adaptive management occurs not in one area but across both spatial and temporal scales. It's difficult to conceptualize how one proposed action's environmental impact analysis can ever be structured to take this into account for these multi-dimensional changes.

E. *Categorical Exclusions.*

An agency should be allowed to rely on its long established expertise in deciding what actions can be categorically excluded. A large and lengthy data intensive study should not be required to create a new categorical exclusion and the CEQ should set an acceptable level of minimal information needed to establish a categorical exclusion so the courts will not second guess the agency decisions and conclude that a decision to categorically exclude an action will always require an EIS.

If an agency is establishing a similar categorical exclusion that already exists in another agency the detail of analysis to justify the categorical exclusion should be less. The agency could obtain and incorporate any information used to establish the existing categorical exclusion.

The process to establish categorical exclusion should be simple and prompt.

F. *Additional Areas for Consideration.*

Since its enactment by Congress in 1969, NEPA has dominated the environmental decision-making process of federal agencies. The statute itself is short, merely directing preparation of a "detailed statement" for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). This brief direction gave rise to the environmental impact statement ("EIS") that lies at the heart of the NEPA process.

The Act also established the CEQ as an agency within the Executive Office of the President to advise the President and coordinate environmental decisions among federal agencies. In addition to the duties specifically listed in the Act, CEQ is responsible for adopting and amending regulations under NEPA. While Congress did not provide CEQ with regulatory authority, in 1977 President Carter granted CEQ authority to issue regulations through Executive Order 11991, 42 Fed. Reg. 26967 (May 24, 1977). CEQ thereafter adopted regulations ("CEQ regulations") providing agencies with guidance on how to implement NEPA, outlining when an agency must prepare an EIS, and detailing the steps to be followed in the actual preparation of the document. 40 C.F.R. § 1500-1517.7.

These regulations created an intricate procedural scheme that goes far beyond the bare words of the statute. They require agencies to follow a rigid, burdensome process for deciding whether an EIS is required for a project, including preparation of a separate

document called an environmental assessment ("EA") that over the years has become more and more like an EIS. The EA and accompanying Finding of No Significant Impact ("FONSI") have become the dominant form of NEPA compliance: According to CEQ, since 1985 federal agencies have prepared approximately 500 EISs annually, while about 50,000 EAs are prepared each year. *The National Environmental Policy Act - the Study of its Effectiveness After 25 Years*. Council on Environmental Quality, (Jan. 1997) at p. 19. Two-thirds of all EISs are prepared by just four agencies -- Forest Service, Bureau of Land Management, Department of Transportation, and Army Corps of Engineers.

The CEQ regulations also vastly lengthened the time required to complete NEPA compliance by requiring agencies to prepare and publish a draft EIS, to accept, review and respond to public comments on the draft EIS, to publish a final EIS (sometimes with a second public comment opportunity) and then, at least 30 days later, to publish a decision on a project (called a record of decision) restating the major findings of the EIS. As a consequence of this required sequence of steps, few EISs are completed in less than 24 months.

The regulations also require agencies to expand NEPA analysis on a proposed action to study all other actions that may be "connected" to the proposed action; to analyze a large geographic range encompassing such connected actions; and to consider all "cumulative effects" of past, present and reasonably foreseeable future actions by private, state and federal entities – without providing clear guidance for deciding where and when the analysis should stop. The CEQ regulations also force agencies to redo their NEPA documents by requiring a supplemental EIS whenever new information or circumstances suggest a change in expected environmental impacts. Most of the NEPA cases that have flooded the courts in recent years are based on violations of the CEQ regulations.

Thus, while NEPA has accomplished a worthwhile goal of focusing agency attention on environmental values, in many instances it has created an arduous decision-making process that presents difficult compliance hurdles for inexperienced agency personnel, requires years of analysis and document preparation and millions of dollars of staff time, and is subject to the moving target of new information and the second guessing of the courts. Many worthwhile and environmentally-friendly agency projects are delayed for years and experience large cost increases solely as a result of required NEPA procedures that ultimately add nothing of value to a project's design or utility.

CONCLUSION

CEQ has the power to streamline the NEPA process, and to eliminate most of the current agency problems with NEPA review, through amendment of its regulations or by issuing additional non-regulatory guidance, with no action required by Congress.

These comments present opportunities to streamline NEPA procedures to implement federal agency projects more promptly and less expensively while at the same time reducing the risks of courts delaying projects based on deficiencies in the NEPA documents. The comments discuss current impediments to a smoothly functioning NEPA

process, and identify areas in which the NEPA process can be improved. The recommendations focus on the power of the CEQ to reform the NEPA process administratively, and discuss possible amendments to CEQ's NEPA regulations. Amending the NEPA statute is unnecessary to achieving any of the improvements identified below.

In closing, I'd like to strongly urge CEQ to convene one or more structured meetings or panels to have an exchange of ideas from outside the Federal government about current problems and needs for real change in the CEQ regulations. There are many people well versed in both the legal and practical application of NEPA outside the Federal government that we believe can contribute valuable information and experience.

I also wish to incorporate by reference the more detailed comments submitted by the American Forest Resource Council—an organization that our company belongs to.

If you have any questions or would like to discuss these comments further, please call me at ###-###-####.

Yours truly,