

Northern Sierra Natural Resource Coalition

Working Families Advocating Responsible Forest Management

Rose Comstock Correia, Executive Director

P.O. Box 4212

Quincy, Ca. 95971

Phone/Fx: 530-283-1565

comstock@inreach.com

Steering Committee

Holt Logging

*Tim Holt
Chester*

DC Construction

*Dennis Crites
Greenville*

Medici Logging

*Jack Medici
Westwood*

Græagle

*Timber Company
Pete Thill & Dan West
Græagle*

Impact Resources

*Tony Welander
Kevin Fletcher
Burney*

Pew Forest

*Products
Randy Pew
Taylorsville*

Schroeder Logging

*Dave Schroeder
Susarville*

At Large Members

Pinky Forbes

Meadow Valley

Loretta Stringfellow

Quincy

Janice Salinas

Quincy

McLaughlin

*Trucking
Crescent Mills*

September 20, 2002

Council on Environmental Quality

NEPA Task Force

P.O. Box 221150

Salt Lake City, UT 84122

Sent via FAX: NEPA Task Force 801-517-1021

Sent via E-Mail: ceq_nepa@fs.fed.us

RE: CEQ request for comments on the National Environmental Policy Act Task Force [Federal Register: July 9, 2002 (Volume 67, Number 131)] [Notices] [Page 45510-45512].

Dear Sirs:

The Northern Sierra Natural Resource Coalition (NSNRC) would like to express our sincere appreciation and compliment the Council on Environmental Quality (CEQ) for establishing the NEPA Task Force and providing the NEPA Task Force with a wide-ranging mandate that begins with the direction "to seek ways to improve and modernize NEPA analyses and documentation."

NSNRC membership is primarily small businesses that perform timber harvesting and road building on public and private lands in the State of California. Our members are committed to environmentally sound resource management practices and policies, responsible forestry and the sustainable use of natural resources. Our members represent the infrastructure used closest to the land when implementing many proposed actions by federal agencies, the US Forest Service and BLM for instance.

Many times we've taken responsibility for implementing federal resource projects including constructing roads to provide access to public lands, enhancing wildlife habitat by implementing fuel reduction and thinning projects, salvage harvest dead and dying timber from burned over lands and provide the man power to restore degraded and destroyed timber lands after catastrophic events. We represent the working families who advocate responsible forest management.

We have been involved with NEPA analyses, documents and appeals for several years and we think your efforts are long over due. We are among the public who are visibly frustrated and deeply disappointed when excessive analysis proves to be worthless to judges and other's who seem to over-ride professional decision makers.

CQ452

Page 2 – NEPA Comments

We've watched our national forests grow and choke with too many trees, burn out of control and then stand and rot because NEPA allows for too many opportunities for those opposed to responsible forest management to appeal and litigate decisions addressing the above mentioned problems.

The problems with NEPA are only now receiving media attention. The devastating wildfire season has brought to light both the need for thinning our nation's forests and the difficulties encountered in accomplishing it. Most of the difficulties center around navigating the NEPA process. The U.S. Forest Service recently published a report entitled "The Process Predicament," which describes the stranglehold red tape, such as NEPA, has on the ability of the agency to perform its responsibilities.

We strongly agree that the federal agencies' planning and decision-making processes using NEPA can obtain higher levels of efficiency. General federal agency implementation originally had a simple, clear, early message concerning the purpose of NEPA. That articulated as one of "fostering excellence in decisions, not excellence in paper work." Now the focus for the agencies is one of making sure they develop "bulletproof documents" as they develop their programs and projects and the purpose, need and objectives are lost. Given the complexity of CEQ rules and regulations, agency rules and regulations, and diffused authorities between agencies, there is little wonder why a federal agency such as the USDA Forest Service is tied up in process gridlock.

A significant percentage of the process gridlock and perhaps most of the NEPA lawsuits have been based on alleged violations of CEQ's regulations. The simple facts are that CEQ regulations present abundant opportunities for lawsuits. Numerous litigation targets are established – elaborate procedures (e.g., multiple public comment opportunities); requirements for additional documentation (e.g., Environmental Assessments (EAs) and Findings of No Significant Impacts (FONSI)); and expansive but vague analytical requirements (e.g., the content, and geographical and temporal scope of analyses of cumulative impacts, connected actions and indirect effects).

When the CEQ has attempted to reduce complexities or ambiguities arising from case law or its own regulations, it typically has done so through guidance documents (e.g., "Forty Most Asked Questions," 46 Fed. Reg. 18026 (1981); "Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under NEPA" (1993); and "Considering Cumulative Effects Under The National Environmental Policy Act" (1997)). These documents, however, lack the force and effect of law and have been virtually ignored by the courts. We believe our regular comments to most proposed actions on our local national forests, and many regional and national decision documents as well, have fallen on deaf ears or are considered almost meaningless.

CEQ should better and more clearly define key NEPA terms such as "major federal action," "no action alternative" and "significant impacts on the human environment," so action agencies have a better idea of what their requirements are. NEPA processes need to be better and more clearly defined in order to withstand judicial attack. The NEPA Task Force needs to develop a clear administrative roadmap for satisfying NEPA requirements, enact it into regulations, and defend it in court. While a certain amount of agency flexibility is necessary to accommodate different agency situations, CEQ should take a stronger position on core elements of key aspects of the NEPA process.

Thirty years of NEPA litigation should tell us where the major problem areas are, and what areas need to be fixed. CEQ is charged with enacting creation of the Task Force provides the opportunity for reviewing NEPA and revising its process. Strong CEQ regulations could help the executive branch reclaim control over the NEPA process. In so doing, it would guide agencies to become more efficient and effective in the way they discharge their NEPA responsibilities.

CQ452

Page 3 – NEPA Comments

We can only hope that the Task Force will provide a clearer vision of what NEPA is actually suppose to accomplish and resolve the current, and on-going, frustration of line officers, decision makers and those who actually are suppose to implement the final decision made.

Background:

- We compliment CEQ for establishing the National Environmental Policy Act (NEPA) Task Force and providing the NEPA Task Force with a wide-ranging mandate that begins with the direction "to seek ways to improve and modernize NEPA analyses and documentation."
- A significant percentage – if not most – of the NEPA lawsuits have been based on alleged violations of CEQ's regulations. The CEQ regulations have presented abundant opportunities for lawsuits because they established numerous litigation targets – elaborate procedures (e.g., multiple public comment opportunities); requirements for additional documentation (e.g., Environmental Assessments (EAs) and Findings of No Significant Impacts (FONSIs)); and expansive but vague analytical requirements (e.g., the content, and geographical and temporal scope, of analyses of cumulative impacts, connected actions and indirect effects).
- When the CEQ has attempted to reduce complexities or ambiguities arising from case law or its own regulations, it typically has done so through guidance documents (e.g., "Forty Most Asked Questions," 46 Fed. Reg. 18026 (1981); "Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under NEPA" (1993); and "Considering Cumulative Effects Under The National Environmental Policy Act" (1997)). These documents, however, lack the force and effect of law and have been virtually ignored by the courts.

Recommendations:

- NEPA analysis must consider the "human environment." The NEPA statute requires a statement be included "in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." Despite this requirement, the "human environment" rarely receives more than a perfunctory glance. These cursory reviews often are separate from any consideration of natural environmental impacts. The human element is an important part of the "environment" in which decisions are made.
- Council on Environmental Quality (CEQ) and action agencies need to specify in regulations the social and economic impacts on people within a decision area and must be better addressed as part of the environmental analysis. Moreover, these social and economic analyses must be considered as part of the entire analysis.

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.

CQ452

Page 4 – NEPA Comments

- 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.
- 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.

Increasingly EISs – programmatic or project—are encyclopedic and very costly to prepare, but in many cases do not withstand judicial scrutiny. CEQ has only provided very vague and open-ended analytical requirements in rules and guidance. These are largely problems of CEQ’s own making. Those who are tasked with preparing the EIS are left with virtually no guidance on the critical decision of “where to stop” in the analysis of effects.

- 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.

We question whether NEPA requires the preparation of EAs. We recognize that a mechanism must be in place to determine whether an agency action is a “major Federal action significantly affecting the quality of the human environment” and thus requires preparation of an EIS under NEPA § 102(2)(C). At most, that mechanism could be a FONSI that looks solely at the impacts of the proposed agency action, and not to alternatives to the action.

If CEQ determines that EAs should be maintained as a NEPA compliance tool, then the following are recommended:

- New simplified requirements for the contents of project EAs should be developed by CEQ to ensure that EAs are not, as they now are, “detailed statements” which are required only for EISs on major Federal actions under § 102(2)(C).
- CEQ should develop new requirements for EAs that differ fundamentally in organization and contents from the requirements for EISs (rather than simply repeat the requirements of an EIS for

CQ452

Page 5 – NEPA Comments

an EA, qualified only by the increasingly meaningless wording "brief discussions of," 40 C.F.R. § 1508.9(b)).

- Rules and guidance should contain explicit statements that certain analyses are appropriate only for EISs and are not to be conducted for or included in EAs.

EAs have been subjected to more than just excessive paperwork; they also have become immersed in excessive procedures. We question whether any public comment is required for EAs, particularly when it's not required for EISs by NEPA or for EAs by CEQ's rules. Indeed, CEQ's regulations simply direct the agency proposing the action to include the public "to the extent practicable" during EA preparation. 40 C.F.R. § 1501.4(b).

- CEQ should provide rules and guidance that EAs need only be made available to the public.
- 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 describing the reasons why an action ... will not have a significant effect on the human environment and for which an [EIS] will not be prepared" – is apparently insufficient for at least some courts. 40 C.F.R. § 1508.13.
- CEQ should provide complete direction on the full contents of FONSI.

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.

Emergencies.

- CEQ should develop a better process for determining when circumstances are "emergencies" and selecting the "alternative arrangements" for NEPA compliance for the responsive Federal actions. 40 C.F.R. § 1506.11. The present emergency provision of the CEQ regulations is so unwieldy as to be virtually useless – every decision under it is made individually and with no guiding criteria or templates.
- CEQ's emergency provision should be broadened to include any circumstances where delay would result in failure to respond in a timely manner to adverse environmental consequences resulting from fire, windstorms, disease or insect infestations or other natural causes.

Categorical Exclusions.

- CEQ should reconsider fully the "kick out" criteria and develop a narrower set of criteria for excluding categorical exclusions based solely on science and the expected level or degree of adverse effects. In particular, CEQ should eliminate the confusing references to "controversial."
- CEQ should consider developing a set of criteria – a checklist that is not subjective – for agencies to determine whether an action or class of actions is eligible for categorical exclusion.

C0452

Page 6 – NEPA Comments**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.

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. The courts have held that there is a "continuing" duty to respond to new information to determine if a supplemental EIS required. *Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000). When the new information addresses a wide-ranging wildlife species such as the salmon or goshawk, supplements to hundreds of environmental documents can be required.

Supplementation has also been extended to EAs, even though there is no regulatory requirement for such supplementation. . Even though supplemental EAs are not specifically required by the regulations, agencies have prepared supplements to EAs. Because the statute does not require EAs and EA supplements 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.
- 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 is likely to 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.
- The regulations should provide that when an agency decides a supplemental EIS should be prepared on an ongoing project or program, the agency must halt an activity that is part of the project or program until the supplemental EIS is completed only if the agency finds:
 - 1) the activity is likely to cause serious and irreparable environmental 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.

CQ 452

Page 7 – NEPA Comments

Affected interests should reflect true stakeholders

- Narrow the definition of "affected interests" who can appeal NEPA decisions to those who are actually affected. Another issue impacting the NEPA gridlock is the fact that for the price of a postcard, anyone can file an administrative appeal of a NEPA analysis. There are people who file appeals on every governmental action, regardless of where it is or what it does. The agencies are clogged with administrative appeals, filed for no other purpose than to delay implementation of a project. The appeals process needs to be amended to focus on people or entities that are actually impacted by a proposal, not to anyone who philosophically disagrees with a project.
- While this suggestion does not directly relate to the processes under the National Environmental Policy Act, it has important indirect implications. The Forest Service and other agencies iterate that NEPA documents are geared toward an appeals officer or a judge, and not for sound agency decision-making. True stakeholders and true "affected interests" are never given any priority when appeals are considered yet they are the ones most directly affected by inaction or proposed actions.

Repeat analysis

Site-specific NEPA analyses should be limited to whether the proposed action is consistent with an applicable overall land use plan. A common criticism of the NEPA process is it is often duplicative. Nowhere is this more evident than in the land use planning process.

Both the Forest Service and the Bureau of Land Management (BLM) require the development of land use plans for their individual management units every 10 to 15 years. The NEPA analysis performed on these units is an Environmental Impact Statement for the entire unit.

The land management agencies also conduct NEPA analyses for each site-specific action that comprise the land use plan. For example, a land use plan might allow for a certain resource management activities within the unit. Land managers would also conduct a level of NEPA analysis for each activity: timber sale, grazing allotment, road construction or campground. The same holds true for each oil and gas lease, or other action allowed by the land use plan. These analyses often duplicate the analyses conducted in the land use EIS.

These second tier analyses can be very expensive and time-consuming, often diverting scarce manpower resources from the work they are supposed to do.

A strong case can be made that these second tier analyses are unnecessary. The land management plan has already considered the environmental, social and economic impacts of the general activity on the land unit. The level of analysis typically conducted in such plans is site-specific enough to encompass site-specific activities. If the decision to permit timber harvesting in certain areas of a land unit has been made, of what value is it to require other analyses for each individual timber sales or contract? Unless conditions have changed since the land management plan was developed, further analysis will be of no benefit. Environmental conditions have been considered, and decisions have been made based on that information. It certainly makes no sense to duplicate the prior analysis.

If site-specific analyses are to be required, their scope should be narrowed considerably. Any site-specific NEPA document should only consider (1) whether conditions have appreciably changed since the unit EIS was conducted, and (2) whether the proposed site-specific action is consistent with the

CQ452

Page 8 – NEPA Comments

land management plan. Any other consideration should have already been a part of the EIS on the land management plan, and need not be duplicated.

- Appropriate limitation of site-specific NEPA analyses to avoid duplication could save agencies significant money and manpower.
- An example of excessive analysis:

In 1988 the Plumas National Forest Land & Resource Management Plan was completed; in 1992 the Interim California Spotted Owl Guidelines were adopted by Region-5 California for the Sierra Nevada and amended the 1988 Land Management Plan; in 1996 the Sierra Nevada Ecosystem Project report was completed after 2 ½ years of analysis and much of that analysis was then incorporated into decisions; three other separate efforts to develop amendments to the entire 11 national forests in California failed to be completed; in 1998 the Herger Feinstein Quincy Library Group Act was passed and required an EIS which was completed in August of 1999 amending the Plumas and Lassen National Forest Land Management Plans again; in January of 2001 the Sierra Nevada Forest Plan Amendment was completed after several attempts in previous years and amended the Land Management Plans yet again. In a little more than a decade after the Land & Resource Management Plan was completed in 1988 it was amended at least three times. Many Forest Plans are due again for another analysis process according to the 10-15 year schedule. We can only wonder what will come of yet another long NEPA process amending our Forest Plans.

Critical timing

CEQ regulations must be amended to permit timely projects beneficial to the environment, such as hazardous fuel reduction projects that promote the President's Healthy Forest Initiative. In an ironic twist to the whole NEPA issue, NEPA red tape has been used to thwart projects that are actually beneficial to the environment. Of course, this is not what Congress intended.

The most recent example of this relates to wildfires. The past few years have seen record fire seasons, both in intensity and the number of acres scorched. These wildfires burn hotter than normal fires, sterilizing the soil so regeneration takes decades instead of years.

There is general agreement that a major contributing cause of these devastating fires is the too many trees per acres, undergrowth and fuel loads that have been allowed to build up over the past several years. It is imperative that these excess hazardous fuel loads be removed in order to restore our nation's forests to a healthy state and to minimize the devastation caused by wildfires. Hazardous fuel reduction projects suffer the same costly delays from NEPA as other projects.

CEQ regulations should be amended to either exempt hazardous fuel reduction projects in class 2 and 3 fire areas identified as at high risk from NEPA requirements, or streamline the process so they may be conducted in a timely manner. There were several such projects that had been proposed in areas devastated by fires this summer, but those areas burned before the projects could be started or completed.

We would prefer regulations be amended to provide categorical exclusions for such projects deemed necessary. While no one can predict where fires will occur, agencies should prioritize those areas most at risk due to excess hazardous fuel loads, and thinning projects should be permitted to occur without NEPA delays or with minimal NEPA requirements. NEPA does allow for emergency situations, but

CQ452

Page 9 – NEPA Comments

emergencies are usually only declared after a devastating wildfire. The goal here is to prevent those fires from occurring in the first place.

We would be happy to work with the Task Force to develop more specific recommendations on this issue.

We commend the Task Force for undertaking the daunting but absolutely necessary task of reviewing and revising the NEPA process to better reflect the experience gained in the last 30 years. We hope these suggestions are helpful, and our Coalition stands ready to assist the Task Force in any way possible.

Sincerely,



Rose Comstock Correia

Executive Director

Northern Sierra Natural Resource Coalition