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To: CEQ NEPA TASK FORCE <ceq_nepa@fs.fed.us>
cc:
Subject: The Maturing of NEPA

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Please respond to
Vernon Bates

To the National Environmental Policy Act (NEPA) Task Force,

I have reviewed the report entitled, "The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years," as a beginning point for the enclosed comments. I have also reviewed the NEPA Task Force web site. I am providing the following comments outside of the online forms provided by the NEPA Task Force in order to apply them in a broad sense to many different aspects of discussions about the utility of NEPA to the public.

My experience with NEPA comes from being an "external" to the Forest Service for over a decade. I have spent several years studying the Ouachita National Forest as a professional consulting botanist to the Forest Service, the Arkansas Natural Heritage Office, the Oklahoma Natural Heritage Inventory, and companies doing business in the Ouachita region. However, I have also learned much from my friends who are members of such organizations as the Ouachita Watch League, the Sierra Club, Scott County Organization to Protect the Environment, Forest Inholders Guarding Habitat Together, Newton County Wildlife Association, Heartwood, etc.

I have spent a great deal of my own personal time (and money) to observe the NEPA "process" in detail. I have noteworthy experiences from the outset of planning efforts (pre-scoping) to the on-the-ground effects of decisions. While my comments may not be applicable to all federal agencies, please consider them where they are applicable. And, as NEPA matures, some changes and/or clarifications should be made for agencies that have quite different opportunities for environmental protection, e.g., direct (conserving public land areas) and indirect (other areas).

NEPA needs to mature into something that is more useful for the public at the lowest levels of agency decisionmaking. Even though NEPA may have been designed solely "for" government agencies, as a mere framework, the framers did make many statements about the "environment" and "public participation." The greatest value for the NEPA is recognized when the public recognizes that the framework is about local people and local federal projects. The NEPA needs to do more to constrain agencies to seek out the best advice from the best sources in trying to provide the best protections for what our nation has not yet severely impacted.

One can call NEPA a success only in that it has brought our society (common man) to a point where we recognize a) that we do live in a complex, dynamic environment that is being degraded in many ways, b) that agencies must produce some kind of documentation for the public, and c) that federal agencies must at least reply in some fashion to citizens and some of their concerns before decisions are made.

I believe that NEPA has failed in a number of ways, based on my experience with the Forest Service. More and more, citizens like myself are drawn into the dungeon created for us by the Forest Service and the government. This downward slide is due to four primary reasons: a) NEPA has no framework for enforcement or monitoring at the site specific level, b) the federal "world" has no genuine plan in place to help citizens with the immense task of evaluating federal proposals and whether or not they should be opposed, c) multiple failures at multi-level planning for each level ensures that poorly qualified decisionmakers make poor decisions, and d) simple citizen complaints are intentionally mishandled.

The NEPA is about a local, site specific process to be used to evaluate important data prior to making a decision. It involves the sharing of information with the public, doing diligent and objective work, and an substantive effort to formulate a decision that is consistent with the need for environmental protections as well as maintaining public trust. How can the CEQ or the federal agencies make any claims about the success of NEPA when they have not sought to audit the NEPA process at the most basic interface? Do appeals of agency decisions reflect problems with local, site

specific processes or the evaluation of important data? How would one know? Don't look, don't tell? Also, what happens to our goal of protecting the environment when federal agencies "pollute" the NEPA process in order to dress up their rationalizations? What happens when an agency wahoo undermines the NEPA process to achieve his personal desires? Who has been provided to ordinary citizens to oversee the integrity of this process?

For our society, there are important answers discovered during careful planning. The only way to reach those answers is to do careful planning within an environment of effective two-way communications. It is not productive for the Administration or for federal agencies to unilaterally decide that NEPA is not important or that it needs to be weakened at this point in time.

NEPA should clearly state the important roles that citizens have in the NEPA process as well as in the efforts to protect the environment.

Here are some important aspects that are critical for citizens:

- * To request information about any phase/procedure/task/data related to a proposal.
- * To learn about and effectively participate in an open planning process.
- * To learn what the internal and external experts have to say about planning needs and certain aspects of proposals.
- * To help protect the physical and biological elements of the environment by lawful means.
- * To impress procedural and documentation standards where they are absent or poorly thought out.
- * To reject elements of policy statements, conclusions, assumptions, etc. for a proposal or as a basic component of a proposal.
- * To have a means to stop the creation of project proposals based on certain criteria or local guidelines.
- * To stop proposals and the implementation of proposals by writing letters.
- * To file appeals and lawsuits when bad decisions are made.

Opposition to federal proposals and policies is, at times, acceptable and appropriate behavior. Citizens, or groups of citizens, that act to try to protect the environment should never be considered as a special interest group or as a "competing interest."

NEPA should clearly state that Federal agencies should avoid hindrances to effective public participation in the NEPA process.

Each federal agency should formalize a plan to prevent hindrances to public participation. Below is a list of hindrances encountered within the NEPA process used by the Forest Service on the Ouachita NF:

- * Overall agency bias to "treat and keep" externals outside of "the information loop" by producing flimsy, generic NEPA documents
- * Falsification of NEPA documentation by "boiler-plate", hiding authorship of components of NEPA documents, use of no data, no fieldwork, etc.
- * Unfair appeal handling; not tied to site specific observations made during the NEPA process or in NEPA documents
- * Use of Decision Memos often improper, bypassing NEPA and the appeal process.
- * Many unpublished "decisions" do not allow participation; initiate NEPA process for them.
- * Too many Forest Service activities requiring public participation.
- * Not enough time to do a good job of participation
- * Not enough time for all planning phases, beginning with scoping
- * No formal audit of the KV "slush" fund and its uses
- * Annual budget process should be moved into the public planning process if lack of funding becomes an excuse for not doing something important
- * Not enough time or money to conduct quality field surveys related to the NEPA process.
- * Employees not qualified to conduct many types of needed field surveys for the NEPA process.
- * Cannot persuade the Forest Service to be conservative on NEPA process proposals
- * The public had no real role and no appeal rights in the large Weyerhaeuser land exchange
- * Forest Service employees refused to follow NEPA for Weyerhaeuser land exchange
- * Lack of objective external scientist involvement in the NEPA process
- * Lack of peer review in the NEPA process
- * No master bibliography of important works, especially local research articles, for use during the NEPA process.

- * No published or peer-reviewed interpretation of important works, especially local research articles, for use during the NEPA process.
- * No site specific project level information is being collected by qualified individuals during the NEPA process
- * Post-implementation effects are not being studied for use in the NEPA process.
- * NEPA process information does not identify the cumulative impacts to be avoided.
- * Poor programmatic EIS approach bypasses site-specific concerns
- * Forest Service claims comments supplied during the NEPA process as being "out of scope" at all levels.
- * NEPA documents are built solely for the court, i.e., for limited legal sufficiency.
- * NEPA environmental assessments are biased towards the support of substantive environmental impacts
- * NEPA environmental assessments do not present important site specific information
- * NEPA environmental assessments do not undergo "objective external peer review"
- * Line officers are not very well qualified to gauge the quality of work on NEPA documents.
- * NEPA process has not been audited in the past.
- * NEPA has no formal auditing plan for key activities and processes
- * NEPA process does not require federal agencies to answer important questions in a complete and professional manner.
- * NEPA does not try to solve communication/language barriers.
- * Employees often not on duty; unable to help with public needs
- * NEPA does not provide for the discovery of qualifications or limitations of federal employees that have key roles in the NEPA process.
- * NEPA does not provide a framework for the detailed tasks relating to the preparation of EAs, EISs, and related planning documents.
- * NEPA does not recognize that the public has no access to uncollected or unprocessed information that is used in the NEPA process.
- * NEPA has an implied assumption that the public has reasonable access to reasonable elected officials to handle problems with the NEPA process.
- * NEPA does not recognize that the public does not have a direct means to seek assistance from the General Accounting Office, in order to address financial or economic data presented during the NEPA process.
- * NEPA does not recognize that the public does not have a direct means to seek legal assistance from the Office of General Counsel or the Department of Justice, as it pertains to needs that arise from within the NEPA process.
- * NEPA does not provide that federal agencies make available all "internal" documentation, databases, methodology descriptions, etc. that relate to the NEPA process.
- * NEPA does not provide that federal agencies should offer training to the public on the various complex aspects of scoping; meeting legal requirements, methods for evaluation of comments, etc.

NEPA should include statements that require federal agencies (employees at all levels) to thoroughly address items raised by the public.

It is very embarrassing to rewrite letters to the Chief of the Forest Service, the Regional Forester in Atlanta, the Forest Supervisor in Hot Springs, District Rangers on the Ouachita NF, and lower level employees in order to get them to honestly address the content and intent of my letters to them. They might consider themselves as "professionals" - but they appear to be petty, incompetent readers and writers. I can't tell if this is the best that they can do or if they are simply trying to ignore their duties. It is quite amazing how many times I have had to rewrite letters and number or underline each item in order to flag their attention. Even after this effort, employees seem compelled to offer only unproductive, abbreviated, defensive answers - as if their replies are "processed" by a legal think tank set up to prevent free thought. I would describe this "communication stance" as Sudden Political Onset - Incompetent Liaison Syndrome (SPOILS) because the writer "suddenly" takes on a "political" stance that causes himself to become an "incompetent liaison" between the agency and the other party. Such a mechanism alienates the agency from the public.

SPOILS is also the stance used throughout the NEPA process, especially by the Forest Service. Consider that many issues are raised by the public to the Regional Forester, for example. He responds by discarding all but one of them - saying that the others are not significant. The Regional Forester takes on the "incompetent liaison" role because the agency does not want to deal with the other issues for "political" reasons. In the end, the Regional Forester is a placeholder for political control, although he initiated the NEPA process to ask for issues and concerns from the public. This is a major failure since the Forest Service cannot be relied upon for the total representation of significant issues

for the public.

NEPA should include a scale for the use of the word, "significance," since it is often used by federal agencies. Decisionmakers often lump issues raised by the public, as well as their decisions, into two broad categories - significant and insignificant. Since NEPA discusses the need to consider a broad range of perspectives, it would seem that there should be further refinements to the idea of significance. Here is a list of a few considerations for this purpose:

- * significance, in terms of costs to the public
- * significance, in terms of societal/cultural needs not already available
- * significance, in terms of commercial interests
- * significance, in terms of maintaining natural conditions and processes
- * significance, in terms of quality of life (non-economic)
- * significance, in terms of quality of life (economic)
- * significance, in terms of the living organisms and their habitats represented in the region of the project
- * significance, in terms of the continual interferences by man
- * significance, in terms of time

Each use would require definitions for use with site specific projects.

As it relates to the Freedom of Information Act, require federal agencies to be proactive in their efforts to collect/maintain/share information for the NEPA process.

Rather than waiting for an opportunity to collect or create data that is important for the public to consider for a given proposal, require that federal agencies consider a comprehensive plan or system to share information that it knows that it will be using from time to time. The Forest Service is a good example of an agency that hordes data and then piece-meals it out according to what it wants to do. This creates an incredible impediment for citizens who try to get information whether or not they submit formal Freedom of Information Act requests. It is much more efficient to pre-determine what information is important to the NEPA process (the public) rather than saddling the public (individuals) with trying to find it on their own.

Public input supplied during a NEPA process must not be considered as "Out of Scope" for both site specific proposals and larger scale proposals.

The NEPA planning process should not be used by agencies (Forest Service!) to ignore substantive considerations at all levels. The use of a programmatic environmental impact statement is not appropriate for some situations. For example, many cumulative impacts cannot be effectively addressed by simply relegating the assessment of cumulative impacts to the site specific level and then, at the site specific level, reject the consideration of cumulative impacts as "Out of Scope" simply because one can "tier" to an EIS that mentions some ideas about cumulative impacts. By producing two or more levels of environmental considerations, the Forest Service plays a shell game. Is the cumulative effects analysis under Shell #1 (forestwide EIS)? Is it under Shell #2 (environmental assessment for a site specific project)? Or, is it under Shell #3 (empty by design)?

Of all the places that I have seen or heard the Forest Service use the phrase, "out of scope," I can only suggest that the employees are really out of scope.

"My data is as good as your data, and I don't have any!" (Citizen comment to a Forest Service Ranger).

The above comment was originally made by a good friend of mine who lives near Oden, Arkansas. The comment is a pointed reminder that federal agencies are often "dataless" when it comes to the making of important [uninformed] decisions about the environment. What do we do in these cases? Well, I can tell you what the Ouachita NF does. They repeatedly claim, project after project, that there are "no significant impacts to the human environment." It is like a chant that gets louder and more unbelievable at the same time. They make these claims without substantive site specific data and in the face of substantial complaints from the public. Who can we blame for these dataless situations? The public, of course. It is the fault of the public that we have not brought about enough research over the last 200 years that would help to answer all of the questions that we are now asking. It is also the fault of the public that we have not elected the right government leaders that would have, in turn, created another forestry service that could have pulled together meaning data and/or could help us conserve our national forests during our times of ignorance. Are we arguing over the lack of data? Or, are federal agencies and leaders making the claim that they

have been given the inalienable right to alienate the public and to do whatever they want?

NEPA should recognize that federal agencies should not be in the business of creating environmental impact statements or environmental assessments. It is worthwhile to consider a source that is not controlled by politicians.

There are hundreds of ways to bias these documents and that is generally what is done (Forest Service!).

Collectively, we need to drop back and look at alternatives for studying environmental concerns at the site specific level. We need to incorporate peer review into the local considerations - not simply accept a notion or policy from government officials. For example, when did we reach the conclusion that forests must be cut down in order to preserve them? Also, when did we reach the conclusion that air pollution from over 100,000 acres of intentional burning on the Ouachita NF each year will not be harmful to humans and to different aspects of the environment? When did we reach the point where we consider the economy to be more important than our environment? When did federal agencies reach the point where public trust became unimportant, especially in the NEPA process? Finally, when did we reach the point where no or little information is preferable when making federal decisions?

The interested public needs training (education) for the various aspects of the scoping process.

If it is a goal of NEPA to improve public awareness, then interested citizens need to understand the detailed responsibilities of employees. The public needs an avenue to be on the inside, especially when there are procedural problems related to the performance of employees. We need to be able to sit in on review committees and make contributions and suggestions. Federal agencies should not believe that their employees, by themselves, can adequately implement the needs of public planning (from beginning to end). If the Department of Justice or the Office of General Counsel offers advice or their interpretations, then the public should have access to the same information - because the public pays for the work and the workers.

Recognize that the use of the phrase, Interdisciplinary Team, often ends up being applied to a Grossly Under-disciplinary Team. No offense meant to anyone.

Many Forest Service proposals, for example, have only the name of one biologist on the team, but there is little evidence that the person has the experience required to effectively evaluate real environmental concerns or impacts. Even though there are other biologists that may "review" the comments of the Team biologist, it doesn't mean that they have the needed experience as well. There are many types of biologists and most are not able to judge the quality of the work of other biologists. Also, the most qualified contributors for federal proposals, in my opinion, are outside of the employment of federal agencies.

So, how do you make a Team of different individuals appear to be able to adequately "cover" all of the disciplines needed? The Forest Service a) has hiring/management practices that rewards loyalty (which limits lawful compliance and adaptation to public needs for environmental protection), b) hides employee qualifications (what is and what is not their special line of experience as it relates to their assigned tasks), c) hides "who does what, when" for various tasks, d) hides supervisor qualifications (who is supposed to be able to judge the quality of the work done by team members), and e) has never addressed public concerns about Interdisciplinary Team management. In discussing these items with Cheryl Chatham, Public Affairs Officer on the Ouachita NF, she replied that "if we hired them, then they are qualified."

Peer review is needed for decisions, pre-decisions and notions that effect policy statements, understandings, standards, guidelines, objectives, and ideas that are used in agency NEPA documents.

As I have mentioned elsewhere in this letter, federal agencies (e.g., the Forest Service!) have a way of polluting NEPA documents with all sorts of innuendos and claims. Many of these items have not been peer reviewed - yet the Forest Service uses them as if the ideas or notions are factual or they represent them as being the "best, available science." There are numerous unpublished decisions that lead up to the NEPA process. Most of these unpublished decisions are not formal agency decisions, therefore they cannot be approached using the appeal process. NEPA should be expanded to include unpublished decisions (assumptions, models, ideas), especially where they are important for the NEPA process. Here are some examples of statements or positions taken by the Forest Service that need peer review for the use of prescribed burning in the Ouachita NF of Arkansas & eastern Oklahoma. [Consider how the Forest Service could possibly combine good scientific concepts and good field observations and deductively arrive at these generalizations.] According to Ouachita NF sources, they believe that they must use prescribed burning:

* because forests depend upon fire,

- * because forests are adapted to fire and, therefore, they must be burned,
- * to restore forests,
- * to keep forests healthy,
- * to keep forests productive,
- * to save diversity,
- * to increase diversity,
- * to keep the forest floor relatively free of litter,
- * to help wildlife survive because they depend on sprouts produced by burning,
- * to keep open areas open,
- * to produce additional open areas for wildlife,
- * to restore old growth because someone once described old growth as being open, and burning is the only way to do that,
- * because some early travelers saw a lot of fire and smoke somewhere,
- * because early native Americans burned somewhere,
- * on the same site on a regular basis because early settlers and/or early native Americans burned somewhere periodically,
- * to save the red-cockaded woodpecker from extinction because it is adapted to prescribed burning,
- * because pines are adapted to fire,
- * to convert energy in downed logs into nutrients so that the nutrients can be used by other plants,
- * to prevent native hardwoods from encroaching into pine areas, and
- * to prevent or reduce growth of undesirable native plant species.

The Ouachita NF applies several of these reasons in every NEPA document that calls for prescribed burning. These reasons do not represent site specific studies nor do they represent objective reasoning at the variety of sites where they apply prescribed burning. Instead, it is easily observed that prescribed burning is used in the Ouachita NF to severely damage the native tree species diversity in order to maximize production of one species of pine. What effects are caused by burning over 100,000 acres per year (since 1997) in a mixed-deciduous forest? What are the effects on the most diverse part of the forest - the ground layer? What are the effects on soils and streams when sites are repeatedly burned AND the Ouachita region receives about 50 inches of rainfall each year? With so little research literature available for these determinations, how did the Forest Service arrive at the same conclusion many times - no significant impacts?

Unless NEPA is strengthened to force federal agencies to utilize peer review more effectively, citizens will have to continue appeals and to pursue litigation. Some parts of the country are more "needy" than others due to a low number of researchers and research literature and a relatively high number of politicians.

Clearly state how to prevent the outright avoidance of the NEPA process.

I have discovered five different approaches used by the Forest Service to avoid NEPA.

- * Highly Hostile. A federal Senator tells the Forest Service to not use the NEPA process for a major land deal. The Forest Service agrees and then tell employees not to speak negatively about the deal.
- * Sneakyness. Forest Service employees perform management actions outside of public notifications and the NEPA process.
- * Decision Memo Abuse. Certain management activities have been incorrectly classed as activities that can be "categorically excluded." Also, larger projects are broken down and done piece-meal.
- * Background Development. Works privately with "partners" to develop and promote activities and mutually beneficial outcomes.
- * CEQ Guidance.

The latter item occurs at the request of the Forest Service, not the public. Planning for "emergency" responses to events, such as ice storms or insect outbreaks, can be done prior to these events. Everyone can agree that certain things should be done - even without intervention by the CEQ. However, the Forest Service can cause the CEQ to get embroiled in the approving of matters (impacts) far beyond their capabilities to understand. The CEQ should redirect federal agencies to prepare for situations where quick work is needed. However, the public deserves the right to appeal projects and components of projects, especially when they are unnecessary or too damaging to the environment.

Include within the NEPA process a clear way to stop federal proposals, other than relegating the matter to the courts. Environmental impact statements and environmental assessments often have alternatives expressly for the public to choose. Even so, the alternatives are poorly designed in order to encourage a distribution of opinions (support) about outcomes. Alternatives are often not designed to reflect conservation levels, i.e. from Maximum to None. Also, prior to a decision, federal officials often remind the public that the NEPA process does not include a "voting contest" and that they are the sole decisionmakers. They further alienate the public by suggesting that citizens are free to appeal the decision and litigate if they desire. Such a reaction might be desired by the decisionmaker, but it is inappropriate to offer this course as a possible solution to their original proposal.

There must be a way to give the public a fair "vote" concerning proposals. There must be some counting and considerations displayed in an effort to be accountable. There also needs to be a "weighting" applied to comments from citizens who try to encourage environmental protection versus those seeking financial favors or outcomes. Could a third-party service be used to gather and report the support or lack of support for aspects of a federal proposal?

NEPA and the CEQ should provide further help for federal agencies to avoid bad faith proposals.

It is the duty of the Administration to prevent the pursuit of proposals in an environment of distrust and intentional misdeeds. Also, everyone needs to be able to recognize failures in the public planning process since it is the focus of federal agencies. Environmental-minded citizens have been calling for a halting of commercial logging on the Ouachita NF for a variety of reasons. Congressmen and businessmen may describe us as "radical" - but they don't understand the management situation provided by the Forest Service. Here are some of the elements of the management environment that many have seen on the Ouachita NF.

- * Lack of information and understanding of the scoping/planning process.
- * Lack of trust of the Forest Service at all levels, especially on site-specific projects.
- * Lack of protection of forest elements from the Forest Service.
- * Lack of government-provided legal resources to assist citizens with participation.
- * Lack of time and money to be significantly involved with all individual projects.
- * Lack of knowledge about how proposals can be defeated without appeals/lawsuits.
- * Lack of public support for the Forest Service and many of their proposals.
- * Lack of external audits of all phases of planning, including implementation.
- * Lack of adequate, honest, and knowledgeable Congressional oversight.
- * Lack of CEQ oversight.
- * Lack of a permanent atlas of forest stands.
- * Lack of a master bibliography of local research.
- * Lack of an understanding of activities and their short-and long-term effects.
- * Lack of external scientist involvement with all phases of management concerns.
- * Lack of unbiased research.
- * Lack of peer review of the interpretation of local research results.
- * Lack of information systems that support public awareness.
- * Lack of suitable management documentation.
- * Lack of audits of all financial aspects of management of the Ouachita NF.
- * Lack of respect for those who oppose Forest Service proposals and conclusions.
- * Lack of published, detailed procedural standards for all employee activities/tasks.
- * Lack of quality communications with the public.
- * Lack of access to uncollected and/or uncompiled information.
- * Lack of ability of the public to initiate forest planning or amendments.
- * Lack of ability of the public to incorporate changes in an EIS or an EA.
- * Lack of interest in avoiding repetitive and cumulative effects to specific sites.
- * Significant impacts are routinely and illegally proposed and implemented under decision memos.
- * Political partnering with the timber industry and others.
- * Polarization of communities.
- * Intimidation of citizen for trying to participate in the protection of public lands.

I believe that my experience shows that the Forest Service remains stuck in Stage 1 (strong resistance to the

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implementation of NEPA), i.e. using the broad categories cited by N.A. Robinson (see page 12 of Twenty-five Year Report). I also believe that the leadership of the Forest Service could not do such a poor job without planning to do such a poor job. It does not seem that the Forest Service is merely offering "strong resistance" - but they are setting the stage for the defeat or the weakening of the law to meet their "internal" desires. "Whether an agency reaches this [third] stage of evolution seems to depend largely on the commitment of individuals in an agency . . ." (statement of Dinah Bear, CEQ General Counsel, see last reference). This would seem to be an embarrassing situation for two reasons; a) the inability of the Department of Justice and the Office of General Counsel to reach the same conclusion and to identify these individuals and have them dismissed, and b) the crude realization that federal authorities (responsible persons) find it acceptable to look the other way when they learn about glaring problems.

Thank you for the opportunity to provide comments.

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