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Boise Cascade Corporation  
Timberland Resources  
1111 West Jefferson Street PO Box 50 Boise, ID 83728  
T 208-384-7928 F 208 384 7699  
BillDryden@BC.com

**BOISE**

Bill Dryden  
Director, Forest Resources Affairs

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

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

Thank you for the opportunity to comment on the opportunities to modernize and improve the coordination of NEPA processes between the various levels of government and the public. As a landowner of 2.3 million acres of forest lands in seven states; Alabama, Mississippi, Minnesota, Louisiana, Oregon, Washington and Idaho, Boise is very familiar with the current application of NEPA processes as they apply to federal interactions with private landowners. In addition, as a purchaser of timber sales from both the Forest Service and Bureau of Land Management, Boise has a clear view of the NEPA processes as they are applied to federal forestland management programs. Finally, as a landowner who has been victimized by forest fires spreading from federal lands to private lands, we have seen how the NEPA processes impact the ability of federal land managers to address the long-term risk of catastrophic wildfire.

In short, the NEPA processes as they apply to federal land management programs are broken. Project planning takes too long to complete and is easily challenged and stalled under the Council of Environmental Quality (CEQ) regulations by those who oppose any management of federal lands. I have reviewed the comments submitted by the American Forest & Paper Association and the American Forest Resource Council and, by reference, include those comments in this letter. In addition, Boise requests that the NEPA Task Force consider and include the following input as this effort moves forward.

***Programmatic Analysis and Tiering.***

CEQ regulations support the sound principle of "tiering" to streamline project implementation by "tiering" the preparation of a programmatic EIS with subsequent EISs or EAs that would be narrower 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. This delays the site-specific environmental analysis necessary to

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ultimately support taking action. As 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 develop its own analysis, or update and repeat the inadequate or outdated analysis in the programmatic EIS.

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

Adaptive management is a good concept, but its track record is weak. Decisions are made with available information, as we cannot wait for complete information because it's never complete. Unfortunately, NEPA review presumes complete knowledge in a deterministic sense.

"Adaptive Management" is not mentioned in the CEQ regulations. The current regulations addressing significant new information or significantly changed circumstances should be used or modified to address this issue rather than creating a whole new concept of "adaptive management" responsibilities under a new section of "adaptive management" in modified CEQ regulations.

Monitoring is often the last priority of agencies and is therefore, under funded. There is no uniform agreement on protocols (especially for wildlife) necessary to conduct monitoring. It is also time consuming and expensive. Changes observed often can be as much a result of the influence of weather or other factors which are difficult to discern. The monitoring factors selected should be more directly tied to a cause and effect relationship between the project and what is being monitored. Otherwise, the monitoring results lead to mere speculation about the influence of the project.

### ***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. The CEQ should set an acceptable level of minimal information needed to establish a categorical exclusion to give the courts a clear view of the basis for agency decisions. 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. Finally, the process to establish categorical exclusion should be simple and prompt.

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## **Specific Proposals for CEQ Regulations Amendments**

CEQ could consider the following options to remove or reduce specific problems currently impairing the NEPA process.

### **Eliminate environmental assessments.**

The 50,000 EAs prepared each year for proposed actions without significant effect on the quality of the human environment are not required by NEPA. The statute requires no study at all of proposals that do not have significant environmental effects. This EA requirement was imposed in the CEQ regulations. Agency EAs are beginning to resemble EISs in size, preparation time and cost. CEQ could eliminate the EA by replacing it with a simple process for documenting a finding of no significance. This change would also have the beneficial effect of concentrating environmental analysis resources on those projects most in need of detailed study.

### **Eliminate the programmatic EIS.**

Environmental effects result from actions on the ground. Programmatic decisions have no environmental effects unless carried out through actions. Programmatic EISs do not result in approval of on-the-ground actions without a second environmental analysis. Programmatic EISs could be eliminated, or merged with the project-level EIS that always follows. At a minimum, CEQ should state that agencies should not prepare more than a single programmatic EIS prior to preparing the environmental document for a project. This direction would be particularly helpful to land management agencies that prepare the majority of programmatic EISs and then prepare multiple levels of programmatic EISs through regional, sub-regional and local planning before a project environmental document is ever prepared.

### **Delete consideration of cumulative effects.**

CEQ should delete the requirement for consideration of cumulative impacts. The elimination of the "worst case analysis" from the CEQ regulations did not destroy the environment or the quality of environmental analysis. Agencies should limit their analysis to the direct and indirect effects of the proposed action without speculating on cumulative effects. Cumulative effects analysis is difficult for agencies to perform and permits second-guessing from the courts.

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**Expand the availability of abbreviated procedures by creating a new category of significant action called "Significant Action Needing Urgent Review".**

Agency emergencies can justify alternative NEPA procedures under the current CEQ regulations only in very narrow circumstances. 40 C.F.R. § 1506.11. On average there have been only two actions a year where alternative arrangements have been allowed. There are certainly more than two emergency agency actions each year needing prompt NEPA approval. The multiple catastrophic wildfires of 2002 that burned millions of acres of federal forestlands are just one example. CEQ should create a new category of "significant actions needing urgent review" that would allow a NEPA process to be completed in less than six months. This could apply to many actions following natural disasters such as fires, floods, hurricanes, and windstorms, which may not rise to the level of a narrowly defined emergency, but still require prompt remedial action.

**Improve 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. Agencies would not be forced to consume time and resources reviewing unreliable or unimportant information and courts could not delay projects or programs to force an agency to do so. The regulations should state that an agency is not required to consider the need for a supplemental EIS unless a study or report containing new information is based on science that meets the standard for reliability articulated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Where new information meets the *Daubert* reliability standard, 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.

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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.

## CONCLUSION

CEQ has the power to streamline the NEPA process through amendment of its regulations or by issuing additional non-regulatory guidance, with no action required by Congress. This action would solve many of the current problems agencies have with NEPA compliance.

These comments present opportunities to streamline NEPA procedures to implement federal agency projects more promptly and less expensively while addressing the environmental issues. The recommendations focus on the CEQ's ability to reform the NEPA process administratively.

In closing, I 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. People well versed in both the legal and practical application of NEPA outside the federal government can contribute valuable information and experience to this task force.

Thank you for the opportunity to comment. Please do not hesitate to contact me if you have any questions on this letter or related issues.

Sincerely yours,



William A. Dryden  
Director, Forest Resources Affairs