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September 23, 2002

Council on Environmental Quality  
NEPA Task Force  
P.O. Box 221150  
Salt Lake City, UT 84122

**Re: Council on Environmental Quality (CEQ) Notice and Request for Comments on National Environmental Policy Act (NEPA).**

These are comments of the Intermountain Forest Association (IFA) in response to CEQ's request for comment on the effort to improve and modernize NEPA, published in the Federal Register 45510, Vol. 67, No. 131 (July 9, 2002).

IFA represents forest businesses in Idaho, Montana, Utah, Wyoming, Colorado and South Dakota. Our members are forest landowners, forest workers, manufacturers of forest products, and related forest businesses. These comments are submitted on behalf of our members that collectively employ more than 20,000 individuals across the intermountain region.

IFA is a member of the American Forest and Paper Association (AF&PA) and hereby supports the more detailed comments submitted by the American Forest & Paper Association in their entirety.

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 (FONSI's)); and expensive 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," 48 Fed. Reg. 18026 (1981); "Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under NEPA" (1993); and "Considering Cumulative Effects Under

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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:**

**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.

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 prohibitively 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:

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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 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 its 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 EA's 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's.

#### 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. § 1508.11. 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.

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**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 EAs are not required by the statute 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:

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:

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.

Thank you for considering our comments. Please keep us informed about this effort as it progresses and place us on your mailing list to receive copies of any and all documents made available for public review.

Sincerely,

James S. Riley  
Executive Director



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Date: 13 SEP 2002

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To: CEO  
NEPA TASK FORCE

From:  Jim Riley  Jennifer N. Frades  
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Urgent  For Your Information  Please Comment  Please Reply  As Requested

● Comments:

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