NATIONAL CATTLEMEN'S BEEF ASSOCIATION
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September 16, 2002

NEPA Task Force
P.O. Box 221150
Salt Lake City, UT 84122

To Whom:

The National Cattlemen's Beef Association (NCBA) and the Public Lands Council (PLC) hereby submit the following comments to the Council on Environmental Quality's (CEQ) National Environmental Policy Act (NEPA) Task Force proposed activities. NCBA is the trade association for America's one million cattle producers. NCBA is a consumer-focused, producer-directed organization representing the largest segment of the nation's food and fiber industry. PLC is a non-profit organization representing over 25,000 federal grazing permittees. PLC membership consists of agricultural organizations, such as the American Sheep Industry and the Association of National Grasslands, as well as state affiliates representing individual cow-calf producers, and wool and lamb growers.

PLC and NCBA membership consists of stakeholders of interests in federal lands managed by the Department of Interior's Bureau of Land Management (BLM), the United States Forest Service (USFS) as well as other federal agencies such as the United State Park Service. The bulk of federal lands grazing occurs on lands administered by the BLM and USFS such as national forests, grasslands, grazing districts and rangelands. Both of these agencies develop land and resource management plans which include consideration of uses such as grazing, mining, timber, recreation, hunting, and wildlife. Our members' usage of these lands is primarily grazing through the use of grazing permits. The grazing permit system allows a producer to graze livestock on federal lands for a fee and for a period of time pursuant to the terms and conditions outlined in the grazing permit. The grazing permit shall be for a term of ten years and is part of the land use process as established by the Federal Land Policy Management Act. 43 U.S.C. § 1752.

We applaud CEQ's efforts to improve and modernize NEPA processes. Such an effort is highly warranted and much needed. Hopefully, some sense can be made of the bureaucratic mess of what was once a well intended statute. Furthermore, what once was an environmental procedural statute has now become a land use statute, something Congress clearly did not intend. Federal land management agencies are devoting more resources, employees, and funding to the procedural quagmire of the land use planning and NEPA processes. Countless appeals and never-ending litigation clog any land management practice or agency decision. Environmentalists and opponents of grazing constantly challenge any agency decision regardless of whether the agency decision is procedurally correct or scientifically accurate. Their efforts to "save the environment"

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are not really designed to save the environment at all but rather to advance a political, philosophical and ideological agenda. Instead of saving the environment, they are actually causing more harm by diverting valuable resources away from sorely needed for resource management, monitoring and land use planning – activities that actually help the environment. In reality, we are seeing the manifestation of the administrative gridlock hampering federal agencies in the form of acres and acres of land being consumed by this year's wildfires, not to mention the lost lives and the communities threatened. Something must be done and we commend CEQ's efforts to improve and modernize NEPA analyses.

We will submit our comments in a format following CEQ's Federal Register notice of seeking answers to questions. In answering the questions presented in the Federal Register notice many of the questions will be difficult for a national agriculture organization to answer since the questions involve requests for specific information or examples such as individual case studies on NEPA successes. Many of our state organizations and individual producers will be submitting comments and are better suited to discuss specific NEPA success and failures.

A. TECHNOLOGY, INFORMATION MANAGEMENT, AND INFORMATION SECURITY

A-1. Where do you find data and background studies to either prepare NEPA analyses or to provide input or to review and prepare comments on NEPA analyses? The information may include scientific and statistical information in printed or electronic form. Examples include but are not limited to species or wetlands inventories, air quality data, field surveys, predictive models, and trend analyses.

Livestock producers with federal grazing permits are subject to NEPA processes and therefore desire to be involved in the NEPA process. Most participate by providing information to an agency during the planning process when a federal action, such as renewing a grazing permit, occurs. Most also review or prepare comments as part of the land use planning process. The type of information collected by producers varies from producer to producer, and may include differences such as geographic area, size and complexity of operation, type of livestock, USFS or BLM permit, riparian vs. non-riparian, seasonal vs. year long usage and a host of other variables. Most of the data is gathered during the monitoring process, a process typically and historically conducted by an agency but increasingly performed by producers in order to preserve their ability to obtain renewed grazing permits. Some producers also track hydrological resources such as instream flows, groundwater depths, water temperature and runoff. Other producers maintain ranch management software programs for their ranching operations. The collected information is primarily for the purpose of renewing a grazing permit or the land use planning process. The information gathered and maintained by producers can then be forwarded to the appropriate agency for incorporation into the land use planning process.

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A-2. What are the barriers or challenges faced in using information technologies in the NEPA process? What factors should be considered in assessing and validating the quality of the information?

The information relevant to the NEPA process is typically generated by the agency for the purpose of completing the NEPA process as part of the land use planning process. Barriers to using information and information technology often arise from an agency's refusal or reluctance to disclose information and information technology. An agency such as the BLM or USFS is charged with conducting the appropriate NEPA review and using the latest or most efficient technology available. Yet, the entire process has been highly subjective and the agencies should develop a standard protocol to foster objectivity and eliminate subjectivity.

Some helpful factors that should be considered in assessing and validating the quality of information include: history of use, type of use (such as grazing), duration of use, the origin of the information (agency vs. permittee), geographical area, baseline data, among others.

In today's litigious environmental context, the true test in assessing and validating the quality of information is whether the information will withstand a court challenge. In the West where environmentalists and opponents of grazing challenge nearly every agency decision concerning NEPA processes, the information and decision of the agency must withstand legal challenges. Therefore, it is important that the technical information be precise, accurate and reliable.

Perhaps the best guidance for determining the validity of information can be found from the court system. The Supreme Court in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), suggested five criteria for determining scientific validity, and hence reliability, including 1) whether the information is derived by the scientific method, 2) whether the information has been subjected to peer review or publication, 3) whether the relevant scientific community "generally accepts" the information, 4) consideration of the actual or potential rate of error of the scientific technique, and 5) whether standards for controlling the technique's operation exist. Id. At 593-95. By establishing these five criteria as the parameters for assessing and validating the quality of information, agencies will undoubtedly withstand most legal challenges.

A-3. Do you maintain databases and other sources of environmental information for environmental analyses? Are these information sources standing or project specific? Please describe any protocols or standardization efforts that you feel should be utilized in the development and maintenance of these systems.

As an agricultural trade organization, we do not maintain databases of environmental information for environmental analyses. From time to time, we conduct environmental surveys or questionnaires for the purpose of learning about our members' operations, trends, and environmental practices. This information is used more statistical purposes rather than environmental analyses by an agency. However, some of our members may have such information for the purpose of participating in the land use planning process, including the NEPA process, and for purposes of commenting on a proposed agency

action. The information in these circumstances is likely to be project specific but may include ongoing practices such as monitoring of range conditions.

A-4. What information management and retrieval tools do you use to access, query, and manipulate data when preparing analyses or reviewing analyses? What are the key functions and characteristics of these systems?

This is a difficult question for a national organization to answer. Our members are better suited to reply to this question.

A-5. What are your preferred methods of conveying or receiving information about proposed actions and NEPA analyses and for receiving NEPA documents (e.g., paper, CD-ROM, web-site, public meeting, radio, television)? Explain the basis for your preferences.

For the most part, we convey information concerning proposed actions and NEPA analyses to our members through electronic means (e-mail). For our members who do not have access to e-mail or prefer postal delivery we will mail the information. Also, our national, state and local organizations hold meetings throughout the year and during those meetings discuss proposed actions if necessary. One of the services we provide to our membership is the monitoring of the Federal Register (FR). For instance, a FR notice is forwarded to staff with the relevant expertise in a particular area. Staff then determine if the notice warrants further action and then take whatever action is necessary. Such notices may also be posted on our organization's website, discussed at a meeting, disseminated through national agriculture media, or placed in one of our publications. We tend to favor electronic means as it reduces paperwork and cost.

A-6. What information management technologies have been particularly effective in communicating with stakeholders about environmental issues and incorporating environmental values into agency planning and decision making (e.g., web sites to gather public input or inform the public about a proposed action or technological tools to manage public comments)? What objections or concerns have been raised concerning the use of tools (e.g., concerns about broad public access)?

NCBA has utilized a password protected website to obtain information from members. Examples of such usages include NCBA's Environmental Stewardship Award program and online surveys and questionnaires, and electronic grass roots activities such as e-mail. However, none of this information has been disclosed to the public or to an agency for agency planning and decision making. Furthermore, our answer to A-5 also applies to this question.

The only real objection or concern about our use of tools is that some members do not have access to or own personal computers or other electronic data communication devices. Other concerns will be presented below.

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A-7. What factors should be considered in balancing public involvement and information security?

Agencies must be very careful when dealing with information obtained from private citizens. Several legal safeguards exist to protect the privacy of citizens. For instance, the Privacy Act, 5 U.S.C 552a, and the Freedom of Information Act (FOIA), 5 U.S.C., are two statutes with provisions to protect private citizens' personal lives. Agency regulations governing the release of private information also exist such as 7 C.F.R. §1.12, the United States Department of Agriculture's rules on business information. Citizens certainly have the right to know what their government is up to but that right is not absolute. One applicable Exemption to FOIA bars the release of trade secrets, commercial and financial information. 5 U.S.C 552(b)(4). Another Exemption bars the disclosure of any personal identifying information the release of which would result in a unwarranted invasion of privacy. 5 U.S.C. 552(b)(6).

Designating specific factors for the purpose of balancing public involvement and information are difficult to enumerate on such a broad scale. Much depends on the nature of the agency action, the extent of information gathered by the agency, and for what purpose the agency is collecting the information and whether the information obtained is for the purpose of receiving technical or financial assistance. In order to properly balance public involvement and information security, we suggest all agencies follow the measures originally outlined in Executive Order 12600 and then issued by USDA under 7 C.F.R. §1.12. Exec. Order No. 12,600, 52 Fed. Reg. 23781 (1987).

7 C.F.R. §1.12 requires the agency to notify the submitter of information that a request for information has been made, allows for the submitter to object to the release of any information, provide submitters of any determination to release in order to allow for possible judicial intervention, and notify submitters that a suit has been brought seeking the submitter's information. 7 C.F.R. 1.12(a)(d) and (e). Following these steps when handling information will help to insure a reasonable balance between public involvement and information security.

B. FEDERAL AND INTERGOVERNMENTAL COLLABORATION

One goal of NEPA is to enhance public involvement. One way of fostering public involvement is for an agency to grant "cooperating agency status" to local governments such as county commissions. Some of our members serve as county commissioners and while the concept of cooperating agency status is relatively new, the benefits are evident and long lasting.

B-1. What are the characteristics of an effective joint-lead or cooperating agency relationship/process? Provide example(s) and describe the issues resolved and benefits gained, as well as unresolved issues and obstacles. Such examples may include, but are not limited to, differences in agencies' policies, funding limitations, and public perceptions.

Perhaps the most prevalent characteristic of an effective joint-lead or cooperating agency relationship is that all the parties involved must maintain honesty. In the past, federal agencies were not always open or honest in what they were doing and therefore an enormous rift developed in the public's trust in the federal agency. Granting cooperating agency status to a county commission, for instance, insures that the local government and the local population will be informed of what the agency is doing. We will let our members who are submitting comments provide examples of what has worked and what issues have been resolved. However, we can offer suggestions on what may improve the relationship between federal agencies and local governments that have obtained cooperating agency status. At the outset, the federal agency should establish a working group consisting of members from each entity granted cooperating agency status. If possible and feasible, each working group member should use their own funds for participation. Also, stringent observation must occur to avoid violating the Federal Advisory Committee Act (FACA). Each cooperating agency should appoint one designee to work with the agency with the responsibility of informing the cooperating agency of the progress of the agency action. The working group efforts should be from a unanimous front in order to ensure that any position has been fully debated. As long as the working group, cooperating agencies, and the federal agency participate in partnership, openness and honesty, few surprise decisions and with their resulting ramifications will occur.

B-2. What barriers or challenges preclude or hinder the ability to enter into effective collaborative agreements that establish joint-lead or cooperating agency status?

Most of the barriers or challenges precluding or hindering collaborative agreements exist within the agency. Often, a federal employee is the root of the problem and may be the result of an unwillingness to share information, contrasting ideological philosophies, or complete disdain for the activity or use for which the agency is proposing. Other hindrances could also include a lack of communication and direction within the agency, the enormity of the project, agency personnel lacking the proper qualifications, expertise or experience to manage the project, or lack of funding.

B-3. What specific areas should be emphasized during training to facilitate joint-lead and cooperating agency status?

Our members with cooperating agency status experience are better suited to answer this question. Some suggestions we will offer are to ensure that agency personnel working with the cooperating agency understand the local government process where the project will occur. Also, agencies should understand the community's relationship with the natural resource or public lands. This type of social understanding will lead to a better working relationship between the federal agency and the local cooperating agency.

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C. PROGRAMMATIC ANALYSIS AND TIERING

C-1. What types of issues best lend themselves to programmatic review, and how can they best be addressed in a programmatic analysis to avoid duplication in subsequent tiered analysis? Please provide examples with brief descriptions of the nature of the action or program, decisions made, factors used to evaluate the appropriate depth of the analyses, and the efficiencies realized by the analysis or in subsequent tiers.

Perhaps the best issue lending itself to a programmatic review is the current Administration's wildfire management plan and the role of livestock grazing in the control of fire fuel loads. Under the current plan, the Secretaries of Agriculture and the Interior, along with the Western Governors Association and others worked together to develop a strategy for reducing the threat of wildfires. As a result of their collective and noble effort they developed a 10 year strategy for controlling wildfires. Included in the plan is a provision to "Incorporate sustainable livestock grazing practices as part of protection and restoration strategies, where appropriate." *A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment: 10-Year Comprehensive Strategy Implementation Plan*, 15, May 21, 2002. Using livestock grazing to control fuel loads is an outstanding idea. Livestock are mobile, consume a wide variety of forage, leave little trace, and are highly effective in reducing fuel loads. However, implementing such an idea will be problematic, not in terms of logistics but in philosophy. Many environmental groups oppose *any* livestock grazing and will go to great lengths to completely eradicate grazing. Therefore, a programmatic review of livestock grazing on a broad scale will be more efficient than to conduct site specific environmental reviews. Grazing to control fuel loads will be short-term, intense, and geographically limited. Agencies such as the BLM and USFS should only be required to produce programmatic documents to further fuel load control by utilizing livestock grazing. The environmental impacts will be minimal and in all likelihood highly similar across the western landscape where the greatest threat of wildfires occur. A programmatic review of livestock grazing for controlling fuel loads is the most efficient method.

C-2. Please provide examples of how programmatic analyses have been used to develop, maintain and strengthen environmental management systems, and examples of how an existing environmental management system can facilitate and strengthen NEPA analyses. Examples of an environmental management system may include but are not limited to systems certified under ISO 14001 (further information on ISO 14001 can be found on the Web at <http://es.epa.gov/partners/iso/iso.html>).

This question is highly specific and technical for a national agricultural trade organization such as ours to answer. We will leave this question to our members with expertise in this area. For the record, NCBA objected to the Environmental Protection Agency's (EPA) proposed Environmental Management System in the agency's revised Concentrated Animal Feeding Operations regulations. NCBA's comments may be found in the public record at EPA.

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D. ADAPTIVE MANAGEMENT/MONITORING AND EVALUATION PLANS

D-1. What factors are considered when deciding to use an adaptive management approach?

Programs involving the management or administration of natural resources are perfect for adaptive management approaches. Any environment where the elements of variation are subject to natural cycles and environmental factors controlled by Mother Nature are prime candidates for Adaptive Management systems. Monitoring data must be collected over longer time frames to ensure that the elements of natural variation in each growing season are documented. Adaptive Management also follows situations where there are responsible parties that have a strong commitment to achieving results. Outcome based incentives must be realistic and must take into account the economic factors that are relevant to the use of specific resources. They must include elements of long term trend, and the effects specific management prescriptions may have on these trends. Resource monitoring absent the management/trend information and data is simply inadequate, or the existing system of regulatory compliance monitoring is inadequate as well. This type of monitoring does not tack resource response to different management plans.2

D-2. How can environmental impact analyses be structured to consider adaptive management?

Environmental impact statements can address outcome based or adaptive management by addressing a range of outcomes or variations in outcomes as opposed to choosing single or specific outcomes or fixed levels of outcomes as they are addressed today by the federal agencies. Environmental assessments on natural resources must allow for natural variations in climate, rainfall, hot or cold weather, sunlight days, and a whole host of other factors that affect how natural resources respond to natural variation.

D-3. What aspects of adaptive management may, or may not, require subsequent NEPA analyses?

Initial NEPA analysis must address a range of responses, as opposed to a specific level of resource protection or sustainability as we often see in today's application of NEPA at the federal level. The current system forces NEPA review at any proposed change to a management plan or resource conservation plan.

D-4. What factors should be considered (e.g., cost, timing, staffing needs, environmental risks) when determining what monitoring techniques and levels of monitoring intensity are appropriate during the implementation of an adaptive management regime? How does this differ from current monitoring activities?

Current monitoring techniques do little to track resource responses to different levels of management inputs. Most federal monitoring systems use a futuristic approach, or some desired future condition, and then arbitrary reductions in existing land uses are implemented that may or may not achieve the desired results. Either way, resource

conditions as a response to the specified management plan are not being adequately monitored. Thus there is no practical way to record how the resource responds over time to the prescribed management plan. All resource monitoring must address the level of management inputs, allow for shifts in resource conditions over time, and subsequent management adjustments.

E. CATEGORICAL EXCLUSIONS

E-1. What information, data studies, etc., should be required as the basis for establishing a categorical exclusion?

In situations where grazing has occurred for a lengthy period of time, a categorical exclusion should be established for renewing a grazing permit. A grazing permit is usually part of an overall land management plan and therefore many of the environmental impacts have already been assessed and no further action is required to renew the permit. The two predominant federal land management agencies, the BLM and USFS, must develop land management plans as dictated by the Federal Land Policy Management Act, 43 U.S.C. §1712, and the National Forest Management Act, 16 U.S.C. §§ 1600-1614. Each of these provisions call for multiple use and do not favor one use over another.

Information concerning grazing is a constant process. Farmers and ranchers constantly monitor range conditions and usually keep records of range conditions. Our answers in Section D illustrate the type of information necessary to establish a categorical exclusion. Other information that may be helpful in establishing categorical exclusions include the length of the particular use. For instance, livestock grazing has been the predominant use of federal lands in the West. Some areas of the West have been grazed for over 200 years and, in some cases, by the same family who has ranched in the same area for generations. The renewal of a grazing permit should qualify for a categorical exclusion as long as the use remains the same, there is no change to the status quo, no change in the physical environment, and no extraordinary circumstances exist.

E-2. What points of comparison could an agency use when reviewing another agency's use of a similar categorical exclusion in order to establish a new categorical exclusion?

One point of comparison for establishing a categorical exclusion can be found in USFS's own list of categorical exclusions as established by the Chief of the Forest Service. Forest Service Handbook 1909.15 § 31.1b. One categorical exclusion exists for the sale or exchange of land. Id. at § 31.1b(7). In this provision is the phrase "*where land uses remain essentially the same*." Id. As mentioned before, grazing has long been a use of federal lands where properly managed grazing will result in little or no impact to the physical environment. The land will be basically the same before a permit renewal and after the permit is renewed. If the fundamental principle of "where land uses remain essentially the same" exists as the basis for a categorical exclusion, then the renewal of a permit should fall under a categorical exclusion. Courts grant a great deal of deference to an agency's interpretation of its own categorical exclusions, as long as that interpretation is not clearly erroneous or inconsistent with the agency's own regulations. City of Alexandria v. Federal Highway Admin., 756 F.2d 1014, 1020 (4th Cir. 1985). Therefore,

since NEPA analyses have already been completed during the land use planning phase, sufficient data exists to establish a categorical exclusion "where land uses remain essentially the same."

E-3. Are improvements needed in the process that agencies use to establish a new categorical exclusion? If so, please describe them.

Our answers in E-1 and E-2 answer this question.

F. ADDITIONAL AREAS FOR CONSIDERATION

Clearly something must be done to improve NEPA. The process used by agencies such as the BLM and USFS in renewing grazing permit and conducting NEPA analyses is not working. Currently, each agency faces an enormous backlog in renewing grazing permits and is helpless to remedy the situation. As a result, legislation in the form of language allowing for the renewal of a grazing permit, should the agency fail to complete the renewal of the permit prior to expiration, has been needed to deal with the backlog. Otherwise ranchers, through no fault of their own, will not be able to graze livestock. The provision will be needed again this year as the agencies fall further and further and behind. If such extensions are necessary and the process to renew a permit can take up to 10 years – the length of a grazing permit – then what is the point of having a statute like NEPA? The numbers of ranchers facing lengthy renewal periods due to appeals, litigation or some other obstacle are increasing every day.

One way to improve NEPA implementation is to create categorical exclusions for actions such as renewing grazing permits where the land use is the same, has been the same and will have little significant impact on the environment. Another way to improve NEPA implementation is to extend cooperating agency status to local government entities such as county commissions. Including more people in the agency process will lead to fewer surprises and a more informed general public.

Another way to improve NEPA is the amending the definition of "affected interest." Currently, practically any citizen can appeal an agency decision during the NEPA process, regardless of their stake in the agency action. A higher weight should be placed on those who rely on the agency action for economic consideration. Courts have held that NEPA does not mandate any particular substantive outcome. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350. Yet that is exactly what has happened, NEPA has become a land use statute with substantive outcomes.

We support CEQ's efforts to improve and modernize NEPA and look forward to working with the agency in anticipation of any potential regulatory changes in the future.

Sincerely,

P. Andrew Groseta
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National Cattlemen's Beef Association

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