

CQ90

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420

BOISE, ID 83702

TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

RANSOM J. BAILEY
SUSAN E. BUXTON *
MICHAEL C. MOORE ‡
BRUCE M. SMITH
PAUL A. TURCKE †
CHRISTOPHER E. YORGASON
TAMMY A. ZOKAN *

JOHN J. McFADDEN **
Of Counsel

* Also admitted in Oregon
‡ Also admitted in Washington
† Also admitted in South Dakota
* Also admitted in New Mexico

August 23, 2002

*Delivered via Electronic Mail to ceq_nepa@fs.fed.us
and via Facsimile to 801-517-1021*

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

RE: Comments on Improving and Modernizing NEPA Analyses

Dear Task Force Members:

We are providing the following comments in response to the Notice and Request for Comments published at 67 Federal Register 45510 (July 9, 2002) (the "Notice"). These comments are submitted on behalf of our clients the BlueRibbon Coalition, the Montana Snowmobile Association, the Idaho State Snowmobile Association, the Hells Canyon Alliance, the Shawnee Trail Conservancy, the Rogue Alliance and the Recreational Riders Association. These entities are primarily grassroots organizations advocating the interests of outdoor recreation enthusiasts. In addition, these comments are submitted on behalf of our client Clearwater Land Exchange, an Idaho-based land exchange facilitator.

These organizations, through our office and their own staff and members, have participated in hundreds of NEPA processes over many years involving nearly every conceivable type of decision and interpretation of NEPA's procedures. We have extensive background both defending and attacking varied agency interpretations of NEPA and the CEQ Regulations in administrative, judicial, and political proceedings. We will attempt to structure our comments to respond to the specific questions posed by the Notice. Many of these questions appear to be directed primarily to agency employees or others charged with

CQ 90

NEPA Task Force Comments

August 23, 2002

Page 2

generating NEPA documents, and some of our comments may therefore address a slightly different question than that contemplated by the author of the Notice.

We are also curious as to the make-up of the Task Force. It makes sense to include diverse participants as opposed to an agency-dominated group. Please consider including experienced private and non-federal participants in the Task Force.

I. TOPICS RAISED BY THE NOTICE.

A. *Technology, Information Management, and Information Security.*

Technology has changed dramatically since the CEQ Regulations were drafted. Proper procedures should allow technology to enhance, not burden, the NEPA process.

2. Barriers/Challenges and Factors to Consider.

Among NEPA's central purposes are to allow public involvement in decisionmaking processes and to require agencies to disclose information concerning projects to all interested members of the public. It would allow agencies to be more efficient if all interested members of the public possessed and were proficient with the latest technology. This is not, and probably never will be, the case. As a result, we believe information dissemination to the public will always have to reach the "lowest common technological denominator." This does not mean that more advanced technology cannot be used to increase any agency's internal efficiency in generating NEPA product and to increase the efficiency of some members of the public in reviewing information. However, we believe "hard copy" information must still be available for those who request it.

We are also concerned about the sheer volume of comment that is now provided in NEPA processes through the advent of electronic NEPA participation. Well-funded participants have used technology to "create" hundreds of thousands of comments in highly-publicized processes, such as the Roadless Initiative or Yellowstone/Grand Teton Parks Winter Use EISs. The vast majority of these are "form letter" comments, designed to create fodder for public relations campaigns touting overwhelming "public opinion" on the issue *du jour*. All involved know that NEPA is not a "voting process" but is designed to allow the agency to focus on the substance of the input submitted. We feel the Task Force could address this challenge in at least two ways. One approach would be to simply prohibit submission of comments through electronic means. An alternate approach would be to include or strengthen regulations clarifying the focus of the NEPA process and explicitly advising that NEPA is not a "vote" and that agencies conduct NEPA processes to disclose information to the public and receive substantive input from the public.

CQ90

NEPA Task Force Comments
August 23, 2002
Page 3

3. Information Source, Protocols and Standardization.

It would be extremely useful to establish protocols or standardized procedures for presenting certain types of technical information. As NEPA documents have become significantly heavier and more complex, they are exponentially more "user unfriendly" to the public. When we receive a "state of the art" multi-volume EIS it is apparent the team creating the document has expended many hours organizing and compiling the information and issues in a fashion unique to the subject at issue. This makes the document difficult and time-consuming to digest, because one must first understand the format designed by the individual team prior to even attempting to understand the issues or analysis. Some form of standardization in structure and data presentation could be very useful for NEPA producers and consumers.

5. Preferred Communication Methods.

As noted above, we believe some paper and "hard copy" materials will always need to be available for public review. Electronic communication formats such as CD-ROM, website, and e-mail, should be utilized to the extent possible in public communication and should be a primary means of communicating internally within the agencies involved. In our view, public meetings could play a lesser role in the process. As NEPA documents and associated issues have become more complex the ability to disseminate and receive meaningful information in a public meeting has decreased. The meetings generate unnecessary expense and stress for agencies as well as the public.

7. Public Access vs. Information Security.

There are some legitimate concerns about revealing certain kinds of information to the public. A frequent area of concern is location-specific information about listed or sensitive species or cultural sites. However, given the fact that most of the cases evaluating such issues have concluded that such information cannot be revealed from the public, we believe NEPA policies and regulations should reflect a liberal policy of public access to information. This is also consistent with increasing scrutiny of site-specific decisions in NEPA analyses. If the agency will ultimately be required to provide location-specific information to justify its decision there is little reason to initially reveal the same from the public.

B. *Federal and Intergovernmental Collaboration.*

The Task Force should place a high priority on establishing meaningful and efficient collaborative relationships between federal and local interests in the NEPA process. This goal could reduce the financial and human resource burdens at the federal level while fostering a better relationship between the various levels of government. Regardless of the underlying politics, state and local governments often feel "invaded" during any NEPA process. Whether

CQ90

NEPA Task Force Comments

August 23, 2002

Page 4

one looks at it optimistically and characterizes it as making them as part of the solution or cynically and characterizes it as making them part of the problem, there are many advantages to involving affected local interests as cooperators in the NEPA process.

In addition to effective cooperating agency relationships, greater use of joint-lead agency relationships could increase NEPA efficiency. Resource issues rarely follow jurisdictional boundaries. Joint-lead processes might provide a deeper "talent pool" from which to draw, while requiring fewer participants from each agency to participate in actual NEPA document generation, thereby leaving more specialists free to focus on day-to-day management activities. In short, joint-lead projects offer the ability to create an "economy of scale" that will better address broad-level resource concerns. Such projects make the most sense where regional issues can be relatively quickly addressed on a programmatic basis. Conversely, these advantages are minimized in an analysis involving extensive site-specific analysis.

C. *Programmatic Analysis and Tiering.*

Tiering can be a useful tool but is often a stumbling block in today's litigious environment. Each level of analysis presents a new opportunity for administrative and judicial challenge. "Professional" interest groups will challenge nearly any project-level analysis on the grounds it does not comply with some portion of the relevant programmatic plan.

1. Issue Types Suitable for Programmatic Review.

The following "issue types" are logically addressed through programmatic analyses: (1) "Zoning"-type decisions; (2) Shifts in general policy; (3) Response to immediate change necessitated by changing laws, new species designation, or scientific "paradigm shift." Conversely, programmatic analyses are poorly-suited for actions that will necessarily involve a substantial "on-the-ground" component.

Of primary interest to our clients are "travel planning" processes, including route designation processes for off-highway vehicles ("OHV") and other means of recreational access. In our experience, programmatic analysis is of limited utility in making such decisions. A classic example is the experience of the Shawnee National Forest in addressing OHV access. The Forest adopted a Forest Plan in 1986, which addressed OHV access through a program-level decision designating "corridors" where OHV use might be allowed. Under the Plan, subsequent project-level analysis would determine specific routes and address relevant site-specific issues. The Plan was amended in 1992, and numerous aspects of the Plan were challenged, including the decision creating the OHV corridors. While many of the challenges were rejected, a U.S. District Court found merit in a technical argument addressing the OHV corridors. No further analysis has occurred, and OHV use is therefore not generally

CQ90

NEPA Task Force Comments

August 23, 2002

Page 5

allowed on the Forest. In this situation, route designation is an intensely site-specific undertaking. To the extent there is ever a programmatic element to such an exercise, there is little or no advantage to be gained by attempting the programmatic decision through a separate process. For example, if a Forest wishes to clarify that is a "designated route" Forest, as opposed to an "open" Forest, that programmatic decision can be included in the same process containing the project-level analysis of specific routes. It is inefficient and counterproductive to "tier" analyses for issues like route designation, where site-specific issues will necessarily dominate and program-level concepts can be logically covered as part of a single decision.

D. Adaptive Management, Monitoring, Evaluation.

3. Adaptive Management and Subsequent NEPA.

"Adaptive Management" is a popular concept which we would like to support. There is great logic in the notion that NEPA analyses should not be locked in stone but should be allowed to "evolve" as changing conditions dictate. However, there is a fundamental tension between this concept and the basic requirement that a NEPA document disclose impacts associated with a proposal for federal action. Excessive flexibility might make the agency vulnerable to an argument that it has not met the disclosure function. One possible means of addressing this issue would be to disclose impacts associated with a "range" of adaptive management options. This would allow the agency, in its management function, to "adapt" within a range specifically identified in the NEPA document. Adaptive management could not be used to support an action beyond the endpoints discussed in prior NEPA analysis without supplementation.

4. Factors to Consider in Monitoring.

Some of the factors listed in the Notice must obviously be considered in designing and implementing a monitoring system. We believe it is also important for the agency to consider the net public benefits associated with the monitoring choices under consideration. Agency resources are finite, and failure to monitor might eliminate certain human activities, or at least make such activities susceptible to legal challenge. If recreation serves a large public population and provides meaningful socioeconomic benefit to the locale, these factors should be considered by the agency in allocating staff and other resources for monitoring. For many years, recreation has been an increasingly dominant but chronically underfunded resource on our public lands. Agencies should consider the relative importance of the activities dependent upon monitoring when they prioritize monitoring activities.

CQ90

NEPA Task Force Comments
August 23, 2002
Page 6

E. Categorical Exclusions.

Categorical exclusions are a potential valuable tool whose utility has been diminished by recent judicial decisions. The focus of the questions posed by the Notice seems to be at the rulemaking level, where each agency establishes the broad categories of actions that may be approved through a categorical exclusion. To the extent interest groups or courts have legitimately questioned the categories of actions identified in the regulations, they have done so based on the virtual absence of supporting rationale. In other words, we do not feel that the agency must undertake a Herculean effort in documenting its categorical exclusion regulations, but must at least provide some documentation addressing relevant on-the-ground issues. The agency must provide some record demonstrating "technical expertise" to which a reviewing court can defer. The courts considering this question have not suggested this to be a difficult task, but instead seem to suggest that the agency need only advance a good-faith effort to justify their technical conclusions.

Largely ignored by the Notice is what we feel to be a more widespread issue, which is the degree to which an agency must document its decision to utilize a categorical exclusion. There may be value in creating new rules adding to or better documenting the types of actions which may be categorically excluded, but there is arguably greater value in standardizing and solidifying procedures for applying categorical exclusions.

The Task Force should consider whether some form of administrative review might be desirable for an agency's decision to select a categorical exclusion. At present, there are no administrative remedies to exhaust when a project is categorically excluded, meaning that an initial challenge can be brought in U.S. District Court. In our experience this can lead to greater inefficiency and deprives the agency of any ability to "self-police" controversial projects. Today's public land interest groups face few philosophical or logistical limits in filing suits against federal land managers, and many apparently relish the opportunity to do so. Even a cursory review process at the level immediately above the decision-maker might provide an opportunity to avoid wasteful and unnecessary legal challenges.

The Task Force could also provide further clarification regarding the format and level of analysis that should occur in categorical exclusion decision documents. Claimants typically challenge (1) whether the selected action fit within an available categorical exclusion; (2) whether "extraordinary circumstances" preclude use of a categorical exclusion; and/or (3) whether the agency's decision was "arbitrary and capricious" or was not supported by sufficient evidence. Agency's defending their use of categorical exclusions are rarely able to point to definitive regulatory guidance, particularly when facing the latter challenge. A clearer standard in the CEQ Regulations would restrict the ability of reviewing courts to create ever-changing "know it when I see it" standards for second-guessing agency decisions to use categorical exclusions.

CQ90

NEPA Task Force Comments
August 23, 2002
Page 7

F. Additional Areas for Consideration.

1. Format and Structure of Environmental Assessments.

A number of issues exist concerning organization of Environmental Assessments ("EAs"). Many of the CEQ Regulations appear, on their face, to refer specifically to EISs. For instance, 40 C.F.R. section 1502.24 states "[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." Based on this language, some courts have refused to extend the provisions of section 1502.24 to EAs. However, other courts have extended these requirements to EAs and have invalidated decisions based, at least in part, on findings that the EA failed to satisfy the requirements of section 1502.24. *See, e.g., Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998). A similar area of possible confusion involves the range of alternatives required of an EA (40 C.F.R. § 1502.14 again arguably refers to EIS requirements).

Reviewing courts have subjected EAs to increasingly stricter scrutiny. The result has been the production of EAs that are functionally and physically indistinguishable from EISs. Given this reality, there is little reason for an agency to ever produce an EA, because the selection of an EA creates a potential basis for procedural challenge without any predictable slackening of review standards. The Task Force should investigate a way to revise the CEQ Regulations to appropriately restrict judicial review of EAs so that they may return to their intended role as "concise public documents" that "briefly" determine whether a project may proceed through a Finding of No Significant Impact or whether an EIS is necessary.

2. Definitional Issues.

The Task Force should take this opportunity to revisit several definitions in the CEQ Regulations. Decades of NEPA litigation have certainly suggested many ways in which the definitions of part 1508 could be improved or expanded. In particular, we would like to see the Task Force revisit the definition of "human environment." Some scholars and a few judges have determined that NEPA is focused on protecting the natural environment and they therefore assign humans a relatively trivial role in that balance. We think this logic is questionable in light of the Supreme Court's analysis in *Bennett v. Spear*, 520 U.S. 154, 175-176 (1997), in which the Court clarified, at least in the standing analysis, that one does not focus on the overall "purpose" of a statute but rather on the interests balanced by specific statutory provisions. Thus, the proponents of a "physical environment" limitation to NEPA are committing the same analytical flaw as the Ninth Circuit in *Bennett*. We ask that the Task Force clarify the inclusion of "humans" in the balance required by NEPA's reference to the

CQ90

NEPA Task Force Comments
August 23, 2002
Page 8

“human environment.” In addition, we ask the Task Force to clarify that “human environment” necessarily includes recreational, aesthetic, and other socioeconomic factors which must be fully analyzed in any NEPA analysis.

II. CONCLUSION.

We applaud the creation of the Task Force. The CEQ Regulations have long been ripe for revision. NEPA has become less known for producing sound decisions than it has for producing delay, lawsuits and confusion. We hope that you will consider our comments and we welcome any opportunity to further participate in this important process.

Very truly yours,

MOORE SMITH BUXTON & TURCKE,
CHARTERED



Paul A. Turcke

/PAT

CQ90

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AT LAW

NINTH & IDALIO CENTER, SUITE 420
225 NORTH 9TH STREET, BOISE, ID 83702
TELEPHONE (208) 331-1800 FAX (208) 331-1202

FACSIMILE COVER SHEET

DATE: August 23, 2002 RECIPIENT'S FAX: 1-801-517-1021

TO: NEPA Task Force CLIENT: 1124-07

RE: _____

FROM: Paul A. Turcke/amanda

NUMBER OF PAGES INCLUDING THIS COVER SHEET: 9

- ORIGINAL WILL NOT BE SENT
- ORIGINAL WILL BE SENT BY FIRST CLASS MAIL
- ORIGINAL WILL BE SENT BY FEDERAL EXPRESS

ADDITIONAL COMMENTS:

***** IMPORTANT MESSAGE *****

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.