

A F & P A[®]



American Forest & Paper Association

Legal Department

1111 19th Street, NW, Suite 800

Washington, D.C. 20036

Phone: 202.463.2590

Department Fax: 202.463.2052

March 15, 2004

Horst Greczmiel
Associate Director for NEPA
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20503

Dear Mr. Greczmiel:

Thank you for the opportunity to submit comments on implementation of the September 2003 NEPA Task Force Report (Report). The American Forest & Paper Association (AF&PA) is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. You have posed three questions: (1) which recommendations should CEQ adopt; (2) how should recommendations be implemented; and (3) what are the priorities for the recommendations?

We have answered your questions in the following manner. We begin with our preferred method of implementation. We then discuss the recommendations which we believe should be given the highest priority. We are not limiting our comments to the chart that you distributed at the four regional workshops because the chart does not include every recommendation in a given area. Generally, we give a lower priority to the recommendations on "Technology and Information Security" and the various educational proposals. While efforts in these areas may prove useful, they should not detract from needed adjustments to improve agency compliance with the National Environmental Policy Act of 1969 (NEPA). Similarly, "Federal and Intergovernmental Collaboration" deserves attention, but not priority. Better integration of other analytical requirements, such as consultation under the Endangered Species Act, which the Report does not discuss as a collaborative exercise but rather as "coordination," should be one of the first considerations. On the other hand, "coordination" of NEPA with programs under laws such as the Clean Water Act does not present any priority to us because most implementation is delegated to the states, such as preparation of total maximum daily loads.

We are intrigued by the recommendations on "Adaptive Management and Monitoring," including the use of environmental management systems. Our members have found that use of these techniques is essential for sustainable forest management. However, we believe that any attempt to overlay these concepts on NEPA implementation from the top will ultimately crash for two reasons. First, many federal programs that are subject to NEPA are extremely complex. Second, as much as we would like to see the government run like a business, the fact is that the government is not a business. We suggest that CEQ's role should be to recognize the applicability of these concepts to NEPA and encourage agencies to explore their use, particularly where the EIS analyzes a long-term agency action and the stakeholders/courts are expecting total

foresight of future developments. In our 2002 comments to the Task Force, we described several caveats on the use of adaptive management that remain valid.

Finally, we offer some comments on additional issues that we believe the Council on Environmental Quality (CEQ) should consider.

I. Implementation

CEQ's effort to improve and modernize NEPA implementation is more likely to be sustained in court if it is issued and codified in regulations rather than released in informal guidance documents. In general, an agency's interpretation of a statute it administers in rules adopted after notice-and-comment procedures receives strong deference or *Chevron* deference (e.g., the permissible interpretation of the statute adopted in a rule binds the court and agencies). However, when adopted in informal guidance documents only receives weak deference or *Skidmore* deference (e.g., the informal guidance is not judicially-enforceable law, but only has the power to persuade). *United States v. Mead Corp.*, 533 U.S. 218 (2001). Thus, courts have granted "substantial deference" to CEQ's NEPA interpretations in rules, even when the current rules adopt a change in regulatory position. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-56 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 385 (1979). On the other hand, informal CEQ guidance, such as CEQ's published 40 Questions memorandum (46 Fed. Reg. 18026 (March 1, 1981)), is "not owed...substantial deference." E.g., *Associations for Aurora's Residential Environment v. Colorado Department of Transportation*, 153 F.3d 1122, 1127 n.4 (10th Cir. 1998). CEQ's informal guidance often has not been decisive in court. E.g., *State of Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985).

Regulations also have at least two other advantages. First, notice-and-comment rulemaking provides the opportunity for greater public input. This can contribute to the public's sense of involvement and to the quality of the agency's decision. Second, since regulations in general and CEQ's regulations in particular are more long lived, if CEQ goes the regulatory route the changes are likely to be more permanent.

II. Priority Recommendations

We recommend that CEQ should give the highest priority to improving the entire NEPA framework, from categorical exclusion (CE) to environmental impact statement (EIS). We suggest starting at the CE and re-emphasizing the purpose and need for a viable CE process. CEQ regulations on CE methodology and documentation would help bring stability to this resource-saving device. We particularly encourage CEQ efforts to establish standards for substantiation of a CE.

The environmental assessment (EA) needs major attention. As the Task Force Report recognized, EA's now range up to the size of virtual EIS's. Agencies are conflicted by demands from stakeholders for more and more information and directives from the courts to document each and every finding but then concluding the action must require an EIS since the EA is over 100 pages. We urge CEQ to differentiate EA's and EIS's by emphasizing that only the EIS requires a "detailed statement," by eliminating the recent expansion of procedural bells and whistles in which agencies have enveloped EA's, and prescribe a format for EA's that is fundamentally different than the EIS format. Finally, CEQ should give some attention to the

content of agencies' findings of no significant impact to provide the agencies with support when they face challenges in court.

We strongly support the Task Force's recommendations on improving the use of programmatic EIS's. To make tiering successful, CEQ should establish (and thereby obtain judicial deference for) two policies. First, where an EA is tiered to a programmatic EIS, CEQ should provide that the EA should not be a stand-alone document or repeat any analysis from the programmatic EIS. Second, 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. We do not agree with the proposal to convene a Federal Advisory Committee on these topics.

III. Additional Comments

Supplemental EISs and EAs. CEQ should establish a set of criteria to govern those circumstances in which supplemental NEPA documentation is required. The agency should be required to assess publicly and in writing the validity of the new information which is alleged to create the supplementation obligation. Secondly, the agency should place the information through several screens to eliminate premature commitment to unnecessary additional NEPA paper chases, including: (1) whether the information discloses substantial, irreparable, and permanent environmental injury, beyond any adverse environmental effects analyzed in the previous NEPA document; (2) whether the effects can not be mitigated by the agency without further NEPA analysis; and (3) whether the benefits outweigh the costs of preparing supplemental NEPA documentation. CEQ should also limit those circumstances where all or parts of programs or projects are suddenly frozen when the decision to supplement is made and remain so for the duration of the preparation of the supplemental documents. We suggest that such paralysis should be inflicted only when it is clear that the substantial, irreparable, and permanent environmental injury would occur *before* publication of those documents.

CEQ should bar supplemental EAs. If the new information does not reveal the possibility of environmental harm of sufficient severity to make a Finding of No Significant Impact unlikely, further NEPA analysis would be make-work.

Emergencies. CEQ should develop a better process for determining when circumstances are "emergencies" that warrant "alternative arrangements" for NEPA compliance by the responsive Federal actions. The present emergency provision, 40 C.F.R. § 1506.11, is so unwieldy as to be virtually useless. Every decision under the rule is made individually and with no guiding criteria or templates. This idiosyncratic decisionmaking requires extensive paperwork and negotiation at the very time when on-the-ground action is of the essence.

CEQ should direct agencies to identify, using appropriate criteria, circumstances that automatically qualify as emergencies warranting alternative arrangements, as agencies must do for categorical exclusions under 40 C.F.R. § 1507.3. Anticipating that there will be far fewer emergencies than categorical exclusions, CEQ should develop template procedures for each class of actions to address emergencies. This will allow the affected agency immediately to determine if a circumstance qualifies as an emergency and to promptly launch on-the-ground actions in accordance with the template alternative arrangement for that class of actions. The criteria for

identification of emergencies should 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 calamities. Classic examples of these circumstances are the recent wildfires on Federal lands. The criteria should allow possible temporary environmental consequences, but promise long-term environmental benefits and possible avoidance of long-term environmental harm.

Cumulative Impact Analysis. CEQ's rules refer to "cumulative impacts" and "cumulative actions" in several definitional sections. However, these regulations are ambiguous and lack clear limits. The result of these confusing rules is that, while "[f]ederal regulations do not explicitly require an EIS to include a discussion of cumulative impacts," most courts "have interpreted the regulations to require that the EIS consider the cumulative impact of the proposed action." *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1076 (9th Cir. 2002) (internal quotation omitted).

For example, the rules provide no guidance on how far beyond the geographic boundary of a site-specific project the agency must look for other proposed and possible actions that could have cumulative effects on some resource. Further, the preamble to the final rules does not address cumulative impact issues. And, there is a tension between the ambition to obtain extensive environmental information for holistic NEPA analysis and the competing aspirations to decrease NEPA costs and delays and to focus on the controllable impacts of the proposed action under consideration (instead of the cumulative impacts of actions that might or might not be undertaken by others).

Due to the above-described factors, CEQ's cumulative impact rules have been interpreted inconsistently by various courts and federal agencies. Moreover, these regulations have been read expansively by some courts, particularly courts within the Ninth Circuit. Those courts have construed CEQ's rules to require types and levels of cumulative impact analysis which exceed what is required by the text of the statute and by the seminal Supreme Court decision on this issue, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

CEQ admitted that there was regulatory confusion over many cumulative impact issues in its 1997 report, *Considering Cumulative Effects Under the National Environmental Policy Act* at v, 4 (CEQ Jan. 1997). In this report, CEQ offered non-regulatory guidance on how to conduct and contain cumulative impact analyses, so that the analyses would "count what counts" in a cost-effective manner without diverting EIS attention to environmental issues that would not be significantly affected by the decisions on the particular agency actions. If anything, this guidance compounded the problem. Statements such as "[i]n most cases, the largest of these areas [occupied by the resource of concern] will be the appropriate area for the analysis of cumulative effects" (*Cumulative Effects* at 15) encourage courts to require the assessment of the cumulative impacts of many actions over broader geographical expanses. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 896 (9th Cir. 2002)(citing *Considering Cumulative Effects* in concluding that an EA on a timber sale must consider cumulative impacts throughout a national forest).

The bottom line is: while CEQ's rules were designed to reduce paperwork and delays (see page 2, above), the regulations' imprecise cumulative impact provisions have managed to produce the antithesis — lengthening NEPA documents, increasing the costs of NEPA

compliance, and prolonging NEPA-related delays at the agency level and allowing courts to inject their own, often inflated, view of what is required.

We recommend a return to the *Kleppe* analysis for new regulation addressing geographic scope, temporal scope, scope of the proposed agency action and use of cumulative impact analysis in EA's. For example, the Supreme Court never mentions the ambiguous concept of "reasonably foreseeable future actions" that CEQ includes in its definition of "cumulative impact" at 40 C.F.R. § 1508.7. In conclusion, CEQ should take to heart the Supreme Court's admonition: "Even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements." *Kleppe*, 427 U.S. at 414.

Irreversible and Irretrievable Commitment of Resources. We recommend that CEQ also provide guidance on the extent of analysis required for irreversible and irretrievable commitment of resources. This requirement has caused confusion and interpretation by the Courts and agencies do not address this analysis requirement consistently.

Thank you for the opportunity to provide these comments. If you have any questions, please call me at 202/463-2740 or Chip Murray at 202-463-2781.

Sincerely,



John Heissenbuttel
Vice President, Forestry & Wood Products