



January 27, 2012

Nancy Sutley
Chair, Council on Environmental Quality
736 Jackson Place, NW
Washington, DC 20502

Re: Public Comment, Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act

Dear Chairwoman Sutley:

The Society of American Foresters (SAF), the national scientific and educational organization representing the forestry profession, appreciates the opportunity to comment on the recently published Council on Environmental Quality (CEQ) draft National Environmental Policy Act (NEPA) Guidelines. SAF is the largest professional society of foresters in the world with more than 14,000 members including CEOs, administrators, natural resource managers, scientists, and academics. A significant number of SAF members work directly on the NEPA process, with many more affected by NEPA decisions, appeals, and resulting judicial decisions.

NEPA is a valuable tool for evaluating environmental impacts and making decisions, but it has also become fraught with controversy and mired in bureaucratic processes. In some cases, the inherent vagueness of NEPA processes has led to excessive analysis and a "bottleneck" that results in delay, further conflict, outdated information, lost opportunities to improve forest health, and public safety hazards. The guidelines titled, "Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act," take steps to address and clarify the gaps in information and expedite the procedural process. These efforts, however, will only be effective if the guidelines are actually implemented by the agencies and strongly supported by CEQ. SAF is encouraged by CEQ efforts to update NEPA guidance. Upon review of the guidelines, we have several additional recommendations we ask that CEQ consider.

CEQ's six principles below provide federal agencies with guidance to conduct environmental reviews. Many have been supported by SAF in the past. We have provided SAF's latest comments below on each of these principles:

- 1) NEPA encourages simple, straightforward, and concise reviews and documentation that are proportionate to and effectively convey the relevant consideration in a timely manner to the public and decisionmakers while comprehensively addressing the issues presented;

SAF strongly supports this statement, and encourages CEQ to recommend that federal agencies take steps to adhere to this guidance. CEQ Regulations state that, “Environmental Impact Statements (EISs) shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations,” 40 C.F.R. § 1502.2. SAF is encouraged by CEQ’s declaration that Environmental Assessments (EAs) and EISs should be no longer than 15 and 350 pages, respectively. This principle will help to address confusion as to how much completed analysis is appropriate to sufficiently address significant impacts.

- 2) NEPA should be integrated into project planning rather than be an after-the-fact add-on.

Integrating the NEPA process in the beginning of planning efforts is important as it provides transparency to the public, indicates the agency’s priority to effectively manage the affected habitat, and creates a well-defined process that integrates both the planning and environmental analysis together. The benefit to completing the two together allows agencies to identify issues and impacts and then address them through NEPA concurrently.

- 3) NEPA reviews should coordinate and take appropriate advantage of existing documents and studies, including through adoption and incorporation by reference.

Cooperation and coordination among all levels of government is critical to ensuring that sound decisions are made. Communication can benefit lead agencies when completing environmental analyses as responsible officials have the opportunity to identify existing evidence and studies that can be referenced, and thus not duplicated, in their documentation. This guidance also clarifies the conflicting interpretations by courts as to whether all data must be physically incorporated in NEPA documents (as opposed to via reference) and whether referenced documents are considered part of the administrative record.

- 4) Early and well-defined scoping can assist in focusing environmental review to appropriate issues that would be meaningful to a decision on the proposed action;

SAF strongly supports beginning the planning and scoping process as early as possible in the environmental analysis. Scoping can help distinguish between significant and insignificant issues. In practice, agencies sometimes select their proposed alternative prior to engagement of the public. This often results in conflict; conflict that could be minimized by including the public throughout the development and release of the Draft EIS. Scoping can reduce the need for further analysis later in the NEPA process, and conserve personnel and funding resources for more important needs.

- 5) Agencies are encouraged to develop meaningful and expeditious timelines for environmental reviews; and

SAF supports the establishment of timelines for completing NEPA documents with some flexibility for unforeseen events. Research has documented that the NEPA process (and subsequent judicial review)

can significantly delay federal agency decisionmaking because of controversy that may occur from its final decision. To discourage conflict, federal agencies often overcompensate and conduct excessive analysis to make more certain of the success of the project under litigation, thus adding additional time and resources to the NEPA process. The inclusion of timelines can be particularly helpful when there is an urgent threat or issue such as a wildfire or insect outbreak. That said, SAF strongly encourages CEQ to advocate for the inclusion of appropriate timelines, as agencies may continue to “bullet-proof” environmental analyses in fear of appeal and litigation.

- 6) Agencies should respond to comments in proportion to the scope and scale of the environmental issues raised.

Federal agency response to comments on its environmental analyses is an important step under NEPA as it continues the dialogue between federal agencies, the public, and interested organizations, and illustrates that the lead agency reviewed and considered comments. It is also important that the agency adjust the scope and scale of the comments in proportion to the importance of the issues. SAF supports CEQ’s statement, “If changes [to the draft EIS] in response to comments are minor and are limited to factual corrections and/or explanations of why the comments do not warrant further agency response, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement,” 40 C.F.R. § 1503.4(c), 1500.4(m).

In addition to SAF’s comments on the principles above, we like to make suggestions on several items not addressed in the guidelines that SAF believes would strengthen and clarify NEPA regulations. One particular topic of conflict is the notion of “tiering EISs” as they become narrower in scale and scope. Tiering is an efficiency concept in the CEQ regulations that the environmental analysis for a broader programmatic EIS can be used to simplify and streamline the analysis for a project that implements the program. Unfortunately, court decisions have precluded the agencies from tiering to the most relevant EIS or national forest plan, and essentially have required a full analysis for projects. Programmatic statements are of no use if they cannot be used to make project-level NEPA analysis less costly and time consuming. The CEQ regulations, 40 C.F.R. § 1508.28 define tiering as:

[T]he coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

The CEQ regulations further explain:

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent

statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site-specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action.

It has been difficult for the USDA Forest Service to tier projects to National Forest Plan's environmental analysis. An example is Blue Mtn. Biodiversity Project v. Blackwood, 161 F.3d at 1208, 1214 (9th Cir. 1998) when the Ninth Circuit held that:

We also reject the Forest Service's argument that it need not prepare an EIS for the Big Tower project or any of the other proposed sales because these projects may be "tiered" to the Umatilla National Forest Plan EIS and to the other EAs pursuant to federal regulations. "Tiering refers to the coverage of general matters in broader environmental impact statements ... with subsequent narrower statements or environmental analyses," 40 C.F.R. § 1508.28. Nothing in the tiering regulations suggests that the existence of a programmatic EIS for a forest plan obviates the need for any future project-specific EIS, without regard to the nature or magnitude of a project.

The Bureau of Land Management (BLM) and the Forest Service were also rebuked in their effort to use analysis in Forest Plans in Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d at 989 (9th Cir. 2004) and Muckleshoot Indian Tribe v. US Forest Service, 177 F.3d at 800 (9th Cir.1999).

In KS Wildlands Center, the court rejected BLM's attempt to tier a timber sale to the EIS prepared for the Medford District's Regional Management Plan ("RMP-EIS") and the Little Butte Creek Watershed Analysis. The Court said:

Tiering to the RMP-EIS cannot save the EAs. We accept the BLM's argument that the RMP-EIS contains general statements about the cumulative effects of logging across the Medford District. And the EAs at issue here contain general statements about the cumulative effects of logging in the SFLBC watershed. What is missing in the documentation, however, is any specific information about the cumulative effects. Neither in the RMP-EIS nor in the EAs does the agency reveal the incremental impact that can be expected on the SFLBC watershed as a result of each of these four successive timber sales. KS Wildlands Center, 387 F.3d at 998.

In Muckleshoot, the Forest Service attempted to tier an EIS for a land exchange to the Forest Service's programmatic Land and Resource Management Plan (LRMP). The Court reviewed the LRMP and found that while it discussed the land exchange program in general and mentioned the particular exchange at issue by name, the challenged EIS did not "account for the specific impacts of the Exchange." Muckleshoot, 177 F.3d at 809-10.

By their very nature, programmatic documents take time to develop and finalize. It can be argued by plaintiffs that any programmatic EIS is outdated, based on new studies and other changes, when it comes time for a project to tier to that programmatic EIS. This appears to be a structural problem. SAF believes that CEQ and federal agencies should examine successful and unsuccessful tiering to ascertain if there is a need to further refine the guidance related to a programmatic EIS.

Finally, SAF believes CEQ could provide further clarification on “incorporation by reference” guidance #3 above. Courts often confuse tiering and incorporation by reference, holding that an agency has illegally tiered to a document, when all that the agency was trying to do was incorporate the document by reference. As CEQ noted in its guidelines, incorporation by reference is allowed. In fact, CEQ regulations instruct agencies to use this method “when the effect will be to cut down on bulk without impeding agency and public review of the action,” 40 C.F.R. § 1502.21. Material may not be incorporated by reference when “it is [not] reasonably available for inspection by potentially interested persons” or when it consists of “[m]aterial based on proprietary data which is itself not available for review and comment[.]” *Id.* Unfortunately, the Ninth Circuit held in Center for Biological Diversity v. US Forest Service, 349 F.3d at 1157 (9th Cir. 2003) that opposing scientific views must be discussed in the text of the EIS rather than in an appendix. CEQ should make it clear that an agency may discuss opposing viewpoints in an appendix such as the response to public comment.

Thank you for the opportunity to comment. We appreciate your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. William Rockwell Jr.', with a long horizontal flourish extending to the right.

H. William Rockwell Jr., CF/FCA
President
Society of American Foresters