



THE AG

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The U.S. Environmental Protection Agency (EPA) routinely promulgates new and updated rules governing activities under its purview. While many of these rules are minor and go unnoticed by the general public, particularly in their draft forms, their effects can be profound once they are adopted and implemented by the agency.

CLIENT:

IMPORTANCE OF SUBMITTING COMMENTS TO EPA RULEMAKING AND NEPA DRAFT ENVIRONMENTAL IMPACT STATEMENTS

In addition to the direct affect new regulations may have on the agricultural client, they may also have a ripple effect causing a major federal action which triggers compliance with the National Environmental Policy Act (NEPA). In many instances, NEPA compliance requires completion of a comprehensive environmental review that results in issuance of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) by the agency implementing the federal action. The following is a discussion of the actions that can be taken to best protect the agricultural client in EPA rulemaking and NEPA processes.

NEPA Process

NEPA was signed into law on January 1, 1970, and its primary goal is to protect and enhance the environment by requiring environmental review whenever a major federal action is undertaken.¹ Accordingly, whenever a federal agency proposes any new action, it must assess whether or not the action requires environmental review under NEPA.² This involves evaluating the impact the action will have on the environment, resulting in one of three increasingly complex levels of analysis.³

The lowest level of NEPA is called a categorical exclusion, which means that the activity falls into a predetermined class of actions found to have such a minimal impact on

the environment that it requires no environmental review. The next highest level of environmental review is an EA to assess the environmental impact of the federal action. If no significant effect on the environment is found, the agency issues a Finding of No Significant Impact (FONSI). Third, if the action might have a significant impact, the most comprehensive of environmental reviews (the EIS) is conducted. It is during the EIS process that the agricultural client has the greatest ability to impact the scope and outcome of the project. Initially, a project undergoing an EIS process has a scoping period, during which comments are accepted. Once the draft EIS is issued, the federal agency must consider the comments of other federal agencies, public and private individuals, and organizations.⁴ Once comments are considered, a final EIS is published and a record of decision is issued.

How to Submit EPA and NEPA Comments

EPA-proposed rules and all EIS documents are first published by the EPA in the *Federal Register*. Among other things, every day the *Federal Register* publishes the Rules and Proposed Rules and Regulations concerning Federal Administrative Agencies.⁵ Once a proposed rule or EIS is filed with the *Federal Register*, any interested person is welcome to submit comments.

Comments are reviewed by the agency to determine possible issues with the proposed rule or action, as well as to obtain a general sense of how the rule will be received. Prior to submitting actions for comment, the agency spends a great deal of time assessing the perceived impact the rule or action may have. However, this initial agency review often cannot account for the rule's real-world effects. This is why commenting is of vital importance. Commenting allows for the sharing of unique insights into the effect the rule or action may have, be it positive or negative.

The current docket for proposed administrative rulemaking and NEPA compliance documents is now available online, providing a convenient way to offer comments to a proposed rule or EIS.⁶ Comments can either be submitted electronically, via a form on a website designated to the rule or action,⁷ or by hard copy mailed or hand-delivered to the agency.

Effects of EPA Rulemaking and NEPA on Agriculture

This year, the EPA was at the epicenter of considerable controversy resulting from proposed rulemaking redefining "Waters of the United

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States,” under the Clean Water Act, which will determine the agency’s jurisdictional reach over this nation’s water resources.⁸ For those involved in agriculture in Nevada and elsewhere in the U.S., this proposed rule created the possibility of added federal permitting and regulatory requirements with the potential to hit farmers and ranchers with an increase in the costs necessary to remain in environmental compliance.

Because of the potential impact created by this rule’s fundamental definition to the scope of the EPA’s power, the proposed rule is not one that slipped quietly under the radar. Rather, this proposed rule resulted in numerous public interest groups challenging the rule and even sparked involvement by members of Congress. In the end, after numerous comment deadline extensions, thousands of comments were submitted, both in support and in opposition to the rule. Now the EPA has the duty to review the submitted comments and determine what changes to its rule are appropriate.

Also this year, the BLM issued a draft EIS addressing Greater Sage Grouse implementation into public land conservation measures and management plans. Public comments were accepted, and many individuals and organizations involved in agriculture expressed their concerns regarding the proposed action. Like the EPA’s proposed rule, the proposed BLM action threatened agricultural interests across the state by potentially reducing grazing opportunities. The NEPA comment period accomplished one of the key objectives of NEPA: it gave the public and agency stakeholders the opportunity to comment on the draft NEPA document, and thus influence the agency’s decision-making process.

These examples of how federal action can affect agricultural interests in ways that may not be initially realized illustrate the importance of submitting comments. In both instances, the agricultural community articulated its concerns through the rulemaking and NEPA comment processes, and as such, helped shape the agency decision-

making process, while forming a basis from which to assert standing in possible later legal actions.

Tips for Writing Comments for the Agricultural Client

Often, when environmentally-based federal action is being promulgated, scientific, governmental and economic effects are considered; however, the perspectives of those on the ground and in the direct path of the issue are often misplaced. The importance of submitting comments on behalf of the agricultural client is evident because without such comments, rules and regulations carrying profound effects can be implemented without the knowledge of those actually effected. The agencies state that they consider each comment submitted, however with the thousands of comments

filed, it is unlikely that each comment is given full consideration. Therefore, when drafting comments for your client, it is important to make them stand out. This can be accomplished in a number of ways.

During a regulatory comment period, many organizations or entities will release form comments for interested parties to use, believing that if enough similar comments are submitted, the agency will take notice. While there is some truth to this tactic, some messages can be lost in the monotony. Rather, well-reasoned comments displaying your clients’ unique perspective and situation increase the likelihood of full consideration. Further, commenting is a chance to break away from pure legal analysis and tell your clients’ story. While legal reasoning has its place in regulatory comments, making the agency understand its effect on your clients’ unique situation will better assist the agency to recognize needed revisions. Finally, when commenting on proposed

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new or revised regulations, it is important to point out the specific section of the rule that your client supports or opposes. Specific comments, and even suggested revisions or edits, will better assist the agency in its review. Work with your client to understand a proposed rule or regulations' individual effect and draft comments that better serve your clients' individual situations. **NL**

1. PL 91-190, 83 Stat. 852 (See also, 42 USC § 4321 to 4347).
2. 42 USC § 4332.
3. *Id.*
4. *Id.*
5. <http://www.federalregister.gov>.
6. <http://www.regulations.gov>.
7. A commenter has the option of uploading a file, giving one the ability to draft their comments on their own letterhead, and submitting a signed document in PDF form.
8. 33 USC § 1251-1387.



LINDA M. BULLEN'S practice encompasses regulatory counseling, permitting and litigation, with an emphasis on energy, environmental law, NEPA, Utility Environmental Protection Act, Endangered Species Act and Migratory Bird Treaty Act. She advises clients on complex state and federal environmental matters, specializing in hazardous waste, water, air, renewable energy, federal land use, permitting, and UEPA and NEPA issues. Bullen represents the developers siting utility scale solar, wind, geothermal and transmission projects throughout the western United States and holds the distinction of being the first Nevada attorney to be invited to join the American College of Environmental Lawyers. She has also served by invitation from U.S. Sen. Harry Reid on the Blue Ribbon Panel on Clean Energy.



MATTHEW J. CURTI joined Schroeder Law Offices in January 2014. He focuses his practice on water right and public land law, including water right file review, permitting, transfers, vested claim adjudications, extensions, historical water use research and water related real property transactions. His clients include private individuals, municipalities, counties and irrigation districts.