Memorandum

TO: Marla Fox and WildEarth Guardians
FROM: Grace Erispaha
RE: Effective ways to write public comments about wildlife coexistence
DATE: 8/3/2020

Question Presented

What are effective ways to write persuasive comments about coexistence between carnivores and livestock? How should we modify Guardians’ approach to public comments to respond to NEPA modernization efforts by the current presidential administration?

Short Answer

An agency is more likely to consider a comment that is clear, concise and relevant to the proposed action. As a citizen, you have valuable information that the agency can use in its environmental review of the action, and possibly to modify the action. While drafting a coexistence comment, state the importance of coexistence measures and explain your claims fully. There are several ways to get involved in the agency decision process. It is best to get involved early in the NEPA process so that the agency has plenty of time to analyze your comments before the agency makes a decision.

Background

This legal memo outlines ways to write effective substantive comments about wildlife coexistence. Coexistence management is non-lethal control over wildlife to promote harmony between humans and animals. Wildlife are sometimes found in close proximity to human activities. These close encounters provide opportunities to learn about wildlife habitat and behavior, as well as finding ways to respond to wildlife challenges. Wild animals may disturb human activity, especially on livestock ranches. In cases where close encounters interfere with regular human activity such as livestock predation, land managers sometimes rely on lethal control against the predator. Increasingly, communities are adopting coexistence strategies that mitigate lethal killings of predators. Mitigation tactics can limit lethal killings and promote coexistence between predators and livestock.

One way to advocate for wildlife is to submit comments under the National Environmental Policy Act (NEPA) to agencies making decisions about how to manage public lands. NEPA requires agencies to assess the environmental impacts of their proposed actions prior to
making a decision. 42 U.S.C. § 4332. This law mandates that all federal agencies will prepare an environmental analysis to “insure the integrated use of the natural and social sciences and the environmental design arts.” Id. As part of the environmental analysis process, NEPA provides an opportunity for the public to comment on federal environmental decisions. Under NEPA, citizens have the opportunity to comment during public scoping and after publication of the Draft Environmental Impact Statement (DEIS). Citizens have the opportunity to assist the environmental review process by writing substantive comments that may influence agency decisions, or in the very least identify issues for the agency to consider. Substantive comments are the most effective way to notify the agency about your concerns regarding its proposed action.

It is important to write substantive comments that influence agencies to adopt coexistence measures. Wildlife are managed in the public trust which means all citizens have a role in conservation and management. For public lands in the West, the U.S. Forest Service (“Forest Service”) and Bureau of Land Management make many decisions that can and should involve coexistence techniques. This memo focuses on Forest Service decisions, which includes an additional opportunity for citizens to submit objections to a draft decision and Final Environmental Impact Statement (FEIS) if they were actively involved in earlier stages of NEPA. Objections are discussed more fully below.

As a citizen, you can use your knowledge and first-hand experience to comment on the importance of wildlife coexistence during the public notice and comment stages of NEPA, as well as during the Forest Service objection phase. If you are an interested citizen in wildlife coexistence, this legal memo will outline the most effective ways for you to get involved during the stages of NEPA.

Finally, in 2019 and 2020, the Trump Administration has sought to revise existing NEPA regulations to accelerate the environmental review and comment process. The Council on Environmental Quality (CEQ) finalized revisions to its rules that reduce the public comment opportunities to, as CEQ states, “reduce paperwork, to reduce delays, and at the same time to produce better decisions [that] further the national policy to protect and enhance the quality of the human environment.” (85 Fed. Reg. 43,304 (July 16, 2020) (Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act). This revision, known as “NEPA Modernization”, is important because it modifies the way the public can get involved in the NEPA process, and the way agencies interpret and respond to public comments and objections. Read more about NEPA modernization here.

Discussion

During the comment period, your priority is to write a comment that will shape an agency decision. To provide informed criticism, always familiarize yourself with the agency policy,
existing plans, and proposed changes to those plans to find any violations of law, inconsistencies, or resources at risk. Active involvement is time consuming and requires you to be resourceful. (Council on Environmental Quality 2007).

1. Early Involvement

The best time to get involved is early in the NEPA process (Council on Environmental Quality 2007). Early involvement gives the agency time to consider the content of your comment. Comments during the scoping period are particularly helpful for the agency because this ensures that public concerns are considered early in the process.

2. Substantive Comments

As an informed citizen, your comment can influence agency decisions related to wildlife coexistence. This is important for coexistence between livestock and predators because you are their advocate. In the NEPA process, your goal as a citizen is to share your experience and expertise with the agency. Your knowledge advises the agency about the effects of their proposals on predator management and livestock grazing. If you structure a substantive comment, the agency may be inclined to rule in your favor.

When drafting any public comment, its contents must be clear, concise, and relevant. It is important that your comment be relevant to the agency’s proposal (EPA 2020). The agency will not consider your coexistence concerns on an unrelated issue. Comments that are solution oriented and provide specific examples are more likely to be considered than simply agreeing or disagreeing with the agency’s proposal. Non-substantive comments are comments without reasoning, unrelated to the project, or vague. Explain why you have your concerns and how your concerns are valid to give the agency more context for your concern. Use your knowledge and expertise to convince the agency that coexistence practices are economically efficient, environmentally sustainable, and morally correct. Instead of saying a grazing allotment is detrimental to wolves or grizzly bears, state why that proposal is poor using past examples in clear and concise language.

As well as using the language from above, focus on the purpose and need of the action including alternatives and environmental impacts of those alternatives. When developing an alternative proposal, identify a purpose and a need for the alternative. The purpose is a goal to achieve while the need is the problem the agency is trying to solve. This serves as the framework for an alternative analysis. Some important questions to consider when drafting an alternative are: Has the agency established a purpose and need? Is it too narrow? Has the agency described all consequences and effects of the proposed plan? Does the agency analyze short term and long term effects? Direct and indirect effects? Cumulative effects? Did the
agency consider all possible mitigation strategies? If the agency failed to consider all of the questions completely, your alternative proposal may have merit.

3. **Pose Clarifying Questions**

Other factors to consider when drafting a coexistence comment include questioning the content of the document you are commenting on (Nash, Mary Anne). Any discrepancies or lack of data in the agency’s analysis warrant this approach. Even if the data is scientifically sound, it is good practice to question anything about the accuracy or methodology of the agency’s environmental analysis. If the agency found in their analysis that new grazing allotments present no significant effects to predators, question this analysis using past situations to challenge the agency’s decision. It may be helpful to find other forests who have adopted effective coexistence measures. Present these examples from other forests in your comment by conveying the importance of these measures in the current proposed action plan. Identify any other factors the agency needs to consider in your comment such as indirect or direct effects to predators. Writing substantive comments about coexistence is important because you, as a citizen, have essential insight into the impacts of livestock grazing on wildlife coexistence.

4. **Structure a coexistence comment during the stages of NEPA.**

The next section of this legal memo will discuss the general timeline and structure of public commenting during the NEPA process. During the scoping process, state what problems need to be analyzed during the environmental review process. The more specific and informative the comment, the agency is more likely to take the comment into consideration. It is best to state questions and alternatives during this stage because that gives time for the agency to consider the alternative early in the process. To structure a coexistence comment, use your knowledge of past agency actions related to coexistence between predators and livestock. Some factors to consider adding to your comment are the importance of coexistence measures for ecosystem health and prevention tactics to limit conflict. The Endangered Species Act could be a helpful source in your argument if the predator is endangered.

After the scoping process, the lead agency will release a DEIS for public comment. The agency will outline a few alternatives for the proposed action and list environmental effects for each alternative. During this stage, analyze the environmental effects and explain why or why not the alternative supports coexistence between predators and livestock. Locate any flaws, inconsistencies, lack of science or inaccurate data in the agency’s environmental analysis. In your comment, state your preferred alternative and mention how it will promote coexistence. You could also write comments that modify the proposal and give alternatives that will shape the final EIS (Nina M. Hart and Linda Tsang, 2020).
This paragraph will discuss the best way to structure a coexistence comment on a DEIS. Organizing your argument with headings will separate the sections of your argument and make it easier for the agency to follow your claims. Next, structure your argument so there is a statement of cause and effect. For example, you could argue that the DEIS underestimated the effects of livestock grazing on predators because the analysis did not account for the detriments of lethal predator control due to livestock conflicts. It is important to identify a cause and effect in your comment because this clarifies your reasoning for the agency. (Regulations.gov).

Following the DEIS, the Forest Service uses an objection process as one more level of review before finalizing its decision. To be eligible to submit an objection, you must have raised your concerns earlier in the NEPA process in comments. Under the Forest Service regulations, you need to have commented at some point during the NEPA process. In an objection, outline the flaws that you had identified in your previous comments and that remain in the FEIS. State your alternatives and suggest resolutions to your concerns using facts.

No matter what agency proposal you are commenting on, it is best to provide as many facts as possible in your comment. Include an explanation with every fact or claim you make. Identify any vague terminology or missing information relating to environmental or economic impacts in the agency analysis. Always relate your comment back to the proposal because agencies will only consider relevant comments. For example, if there are no coexistence measures, use science and data in your comment to state that there is high potential for conflicts between predators and livestock based on the current management practices. Identify and state examples of non-lethal tactics such as fencing, guard dogs, or livestock husbandry to keep predators away from livestock. Finally, cite other plans or forests who have adopted non-lethal tactics and its success rate.

5. Other ways to get involved

While the focus of this memo is writing substantive comments, you are not limited to just commenting. Reaching out directly to the agency to request notifications of any proposed action related to wildlife coexistence is an important way to stay informed of agency actions. (Council on Environmental Quality, 2007). If you missed the Notice of Intent or the public comment periods, you can submit a Freedom of Information Act (FOIA) request for documents related to monitoring or mitigation in the Record of Decision (ROD). If an agency mentions coexistence efforts in a ROD, you can reach out and request those documents become public so you can monitor agency progress on the issue. (Council on Environmental Quality, 2007).

6. Agency Responses & Examples of Persuasive Comments
This section outlines some examples of agency responses to coexistence comments from the Flathead National Forest EIS and objections regarding the Flathead’s process to revise its forest plan. In its responses, the Forest Service noted the comment when the comment was specific, informative, and relevant. In terms of agency conclusions at the end of the comment period, the agency generally agreed that preventative tactics are successful in decreasing conflicts between livestock and predators. But there weren't many cases where the Forest Service decided to adopt a specific plan from a commenter. During the objection period, the Forest Service acknowledged the objections but did not adapt their plans to include the alternatives proposed by the objectors.

There is some case law showing where commenters have had a significant impact on the outcome of an agency action. For example, in Montana Wilderness Association v. McAllister, the court ruled that the United States Forest Service (USFS) was not required to respond to parties who sent “miscellaneous” documents during the public comment period. 460 F. Supp. 667 (D. Mont. 2011). Miscellaneous documents are documents sent with no context or relevance to the issue at hand. This case demonstrates that the agency can reject unsupported arguments not relevant or specific to the proposed agency action. In contrast, Greer Coalition v. USFS is an example where the Forest Service did consider public comments. 470 Fed.Appx. 630 (D. Ariz 2012). Commenters criticized an EIS report for lacking data. The court ordered the Forest Service to publish an amendment to that EIS. Finally, cases have held the agency has a duty to respond to comments, even if those comments do not change the agency’s decision. In particular, Great Old Broads for Wilderness v. Kimbell is considered a success story in terms of the public because the Ninth Circuit ruled that the Forest Service did not “[consider] and [answer] concerns of commenter[s]” despite the Service Supervisor’s claim he had considered all comments. 709 F.3d 836 (9th Cir. 2013).

7. Addressing NEPA Modernization

One important goal of NEPA is to give the public an opportunity to learn about and comment on proposed actions. But public involvement may be impacted by CEQ’s proposal to change its regulations. 85 Fed. Reg. 43,304 (July 16, 2020) (Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act). The proposed revisions will shorten the environmental review process to a 2-year goal completion. An accelerated review and decision process may shorten the public comment period which could jeopardize the extent of public involvement.

The main takeaway from this regulatory change is that agencies will have more discretion over public involvement. Agencies will have greater flexibility in requesting and responding to comments which may limit public involvement. Id. Discretion is consistent with prior NEPA regulations, but increased discretion will be a larger change under CEQ’s NEPA modernization
effort. This level of discretion may decrease public involvement in the agency’s decision process.

The last paragraph discusses a few more factors to consider when writing public comments to align with the new NEPA modernization plan. CEQ will revise part 1503 of Title 40 of the Code of Federal Regulations to state comments must be as specific as possible and timely. It will be even more important to write concise and clear comments because of the shortened NEPA process. The purpose of comments is to provide informed decisions, sufficient detail, and environmental impacts the agency has not considered. Include alternatives, impacts, relevant info and studies in the comment. 85 Fed. Reg. 43,304. Under the revised NEPA regulations, the structure of your coexistence comment should be very concise, clear, and relevant to the issue proposed by the agency. A short, informative comment may be more likely to get a response under a shorted environmental review process.

Conclusion

NEPA modernization poses some interesting changes and potential challenges to the public’s role in the environmental review process. The new regulations will shorten the comment periods and give agencies more discretion on when to involve the public. To ensure the agency considers your comment, the language must be clear, concise, and relevant. Just as under the current regulations, the most important factors to include when drafting a coexistence comment will continue to be substance, purpose and need, clarifying questions and cause and effect.
REFERENCES

Primary Sources

42 U.S.C. § 4332

40 C.F.R. § 1500

36 C.F.R. § 220


*Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836 (9th Cir. 2013) (The court ruled the Forest Service did not fully address the commenters’ concerns.)

*Greer Coalition, Inc. v. U.S. Forest Service*, 470 Fed.Appx. 630 (D. Ariz 2012) (The Forest Service actions related to exchange of private land were justifiable.)

85 Fed. Reg. 43,304 (July 16, 2020) (Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act)

Secondary Sources


https://www.whitehouse.gov/ceq/nepa-modernization/

https://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf