



Statement from Coronado National Forest Rosemont Copper Project: Environmental Consultant Selection Process

Some people have questioned the selection process for the contractor conducting the National Environmental Policy Act (NEPA) analysis. The following statement is provided to clarify the process and the regulations that implement the process.

Regulatory Background

SWCA Environmental Consultants (SWCA) was selected as a third-party contractor to conduct the National Environmental Policy Act (NEPA) review of the proposed Rosemont Copper Project, under the direction and oversight of Coronado National Forest. Forest Supervisor Jeanine Derby made this selection in accordance with the Council on Environmental Quality (CEQ) implementing regulations at 40 CFR 1506.5(c), which states:

“(c) *Environmental impact statements.* Except as provided in Secs.1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under Sec. 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.”

In CEQ's online publication, “*NEPA's Forty Most Asked Questions*,” available at <http://ceq.hss.doe.gov/nepa/regs/40/40P1.HTM>, questions 16 and 17a address the third-party contracting process as follows:

“16. **Third Party Contracts.** What is meant by the term “third party contracts” in connection with the preparation of an EIS [environmental impact statement]? See Section 1506.5(c) When can “third party contracts” be used?

A. As used by EPA [Environmental Protection Agency] and other agencies, the term “third party contract” refers to the preparation of EISs by contractors paid by the applicant. [In documentation for the Rosemont Copper Project the “applicant” Rosemont Copper company, is also frequently referred to as the “proponent.”] In

the case of an EIS for a National Pollution Discharge Elimination System (NPDES) permit, the applicant, aware in the early planning stages of the proposed project of the need for an EIS, contracts directly with a consulting firm for its preparation. See 40 C.F.R. 6.604(g). The “third party” is EPA, which, under Section 1506.5(c) must select the consulting firm, even though the applicant pays for the cost of preparing the EIS. The consulting firm is responsible to EPA for preparing an EIS that meets the requirements of the NEPA regulations and EPA’s NEPA procedures. It is in the applicant’s interest that the EIS comply with the law so that EPA can take prompt action on the NPDES permit application. The “third party contract” method under EPA’s NEPA procedures is purely voluntary, though most applicants have found it helpful in expediting compliance with NEPA.

If a federal agency uses “third party contracting,” the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency’s direction, so long as the agency complies with Section 1506.5(c). Federal procurement requirements do not apply to the agency because it incurs no obligations or costs under the contract, nor does the agency procure anything under the contract.”

“17a. **Disclosure Statement to Avoid Conflict of Interest.** If an EIS is prepared with the assistance of a consulting firm, the firm must execute a disclosure statement. What criteria must the firm follow in determining whether it has any “financial or other interest in the outcome of the project” which would cause a conflict of interest?

A. Section 1506.5(c), which specifies that a consulting firm preparing an EIS must execute a disclosure statement, does not define “financial or other interest in the outcome of the project.” The Council interprets this term broadly to cover any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients). For example, completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit. If a consulting firm is aware that it has such an interest in the decision on the proposal, it should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process.

When a consulting firm has been involved in developing initial data and plans for the project, but does not have any financial or other interest in the outcome of the decision, it need not be disqualified from preparing the EIS. However, a disclosure statement in the draft EIS should clearly state the scope and extent of the firm’s prior involvement to expose any potential conflicts of interest that may exist.”

In early 2008, the Forest Service deemed Rosemont Copper company’s “*Rosemont Copper Project, Mine Plan of Operation*” sufficient to initiate an environmental review pursuant to NEPA. The Rosemont Copper company recommended the Forest Service consider SWCA as the

third-party contractor to develop the environmental analysis and documentation for the Rosemont Copper Project proposal. With regard to such a recommendation, CEQ guidance at <http://ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm> states the following:

“There is no bar against the agency considering candidates suggested by the applicant, although the Federal agency must retain its independence. If the applicant is seen as having a major role in the selection of the contractor, contractors may feel the need to please both the agency and the applicant. An applicant's suggestion, if any, to the agency regarding the choice of contractors should be one of many factors involved in the selection process.”

Contractor Selection Criteria

In accordance with CEQ third-party contracting regulations and guidance above in conjunction with the Rosemont Copper company's recommendation, the Forest Supervisor considered the following criteria in selecting SWCA as the prime consultant for environmental review of the Rosemont Copper Project.

General Qualifications. SWCA is one of 655 Federal contractors listed on the GSA (United States General Services Administration) Schedule who are qualified to conduct NEPA reviews. (See website www.gsaadvantage.gov link to Multiple Award Schedule 899, Environmental Services. NEPA contractors are listed under 899-1.) There is no regulatory requirement for choosing a contractor on the GSA Schedule. Based on previous experience with SWCA as a consultant in other local NEPA reviews (e.g., electrical transmission routing and astrophysical research EISs) and its involvement in the NEPA review of another Arizona mine project, the Forest Supervisor considered SWCA qualified to conduct a NEPA analysis of the scope and complexity required by the Rosemont Copper Project proposal.

Location. To facilitate oversight of the NEPA review by Forest resource specialists, a Tucson-based environmental consultant was preferred. Qualifications of at least three other local environmental contractors were considered, but they were found to be either underqualified or already engaged in non-NEPA-related studies under contract to Rosemont Copper company that could prejudice their participation in the NEPA review.

Professional and Technical Expertise. SWCA's qualifications and experience were reviewed prior to selection. The Forest Supervisor determined that SWCA resource specialists, supplemented by other technical expertise available to SWCA through a well-developed network of environmental subcontractors, are fully capable of achieving the standard of excellence required by this NEPA review.

NEPA Experience and Previous Working Relationships. As evidence of its NEPA experience, SWCA offered the Forest numerous references to past NEPA reviews in which it had participated. These references included a previous working

relationship with the Coronado National Forest when SWCA served as a sub-contractor to the Department of Energy's primary contractor in the development of an EIS for Tucson Electric Power. As a cooperating agency in that project, Coronado National Forest staff, including the Forest Supervisor, worked closely with SWCA staff and directly observed their ability and competence in managing a complex NEPA review. SWCA also previously worked with the Forest on a NEPA review (environmental assessment) of the proposed VERITAS astrophysical project. In addition, the Forest NEPA Coordinator has had a positive working relationship with SWCA when it was the prime environmental contractor for several projects proposed by the Department of the Interior.

Conclusion

To ensure that SWCA will prepare an impartial, unbiased environmental impact analysis of the Rosemont Copper Project, the respective roles of the contractor, Rosemont Copper company, and Forest Service were defined in a Memorandum of Understanding (MOU) between the Forest Service and Rosemont Copper company, available at <http://www.fs.fed.us/r3/coronado/rosemont>. The MOU has been available for public inspection on the Coronado National Forest website for several months.

The Forest Service is fully aware that the Rosemont Copper company's proposal to construct an open-pit copper mine and associated ore processing facilities in proximity to and on National Forest System land is highly controversial and that some opponents of the proposal may view timely completion of the NEPA process as contrary to their interests. On the other hand, the Forest Service also recognizes that some advocates of the proposal view the rigorous NEPA review process as overly bureaucratic and weighed down by rules and regulations.

Despite the fact that these opposing views are commonly expressed during NEPA reviews of controversial projects, the Forest Service is obligated to maintain its independence, objectivity, and neutrality, and it must comply with all established legal mandates, among which are to carry out comprehensive NEPA reviews in an efficient and timely manner. To this end, the Forest Service will conduct the NEPA review of the Rosemont Copper Project in accordance with a timeline that is appropriate for the nature and scope of the proposal. The Forest Service will neither shortcut the legal process, nor will it impede it. Despite external pressure to modify the process to the benefit of one party or another, the Forest Service will, as strictly as possible, adhere to compliance with the CEQ regulations implementing the NEPA and other environmental laws of the United States.