

BUDD-FALEN LAW OFFICES

L.L.C.

ATTORNEYS FOR THE WEST

300 EAST 18TH STREET • POST OFFICE BOX 346

CHEYENNE, WYOMING 82003-0346

TELEPHONE: 307/632-5105

TELEFAX: 307/637-3891

WWW.BUDDFALEN.COM

KAREN BUDD-FALEN

BRANDON L. JENSEN¹

KATHRYN BRACK MORROW^{1,2}

¹ ALSO LICENSED IN COLORADO

² ALSO LICENSED IN NEW MEXICO

FRANKLIN J. FALEN

LAURA C. ROWE

ABIGAIL M. JONES^{3,4}

³ ALSO LICENSED IN NEW YORK

⁴ ALSO LICENSED IN NEW JERSEY

MEMORANDUM

TO: INTERESTED PARTIES

**FROM: KAREN BUDD-FALEN
BUDD-FALEN LAW OFFICES, LLC**

DATE: MARCH 16, 2011

RE: OPINION EDITORIAL - PETITIONS FOR SOLUTIONS

There is no doubt that American businesses, private property owners, rural tax bases and federal/public lands users are under attack by small, vocal and radical environmental groups and by a federal bureaucracy who uses its power to write rules, regulations, policy memorandums, handbooks and manuals to control every aspect of our lives. To survive, we have to not only complain about these abuses but we have to affirmatively work for solutions to save our homes, jobs, property rights, communities and families. While landowners, businesses and local governments have not been as rambunctious at filing petitions and litigation (or getting paid to file petitions and litigation against the federal government), we have to change that mind set to survive. Some of our concern is over financial expenses; some of our concern is that businesses, landowners and local governments are already strapped and simply working to survive; and some of our concern is that we do not understand the process to make our voices heard. But we have to be heard. Regardless of who is elected and “in charge” in Washington D.C., we have to be heard. We are fighting for our livelihoods, families, communities, counties and homes.

One of the ways to be heard, and force the federal agencies to respond to our voices, is to “petition” the federal agencies to adopt, modify or repeal rules and regulations which stymie our businesses, local tax bases and property rights. Although Congress passes laws, federal agencies supply the definition and implementation for those laws. Importantly once Congress delegates the ability to write regulations to an agency, Congress does not review those regulations. Thus bureaucrats we don’t elect and can’t fire govern our lives with rules, regulations, memos, policies, handbooks and manuals.

Both the federal statutes and agency rules and regulations have exponentially exploded in size and scope. In 1925, there was one single volume which contained all federal statutes governing this Nation; in 2010 there are 50 titles. As for agency regulations, in 1970 there were only 54,834 pages in the Code of Federal Regulations; in 1998, the regulations adopted by federal agencies numbered 134,723 pages; and in 2009, the number of pages exponentially expanded to 163,333 pages of regulations with which each American has to comply. [See About.com/US](http://About.com/US) government info. And these pages do not even count the number of pages of memos, Executive Orders, handbooks, policy guidance and other red tape. Make no mistake, it is details of implementation of the laws passed by Congress which govern our lives and we have to change those regulations to survive.

The Administrative Procedure Act (“APA”) sets forth the requirement allowing local governments, profit and nonprofit organizations and individuals to petition any federal agency for rulemaking on any subject regulated by federal statutes. 5 U.S.C. § 553(e). Importantly, the federal agencies are MANDATED to respond to such petitions. Are you guaranteed that the response will be the action you want the federal agencies to take? No. But, you are guaranteed that your position will be considered and a response will be issued. If the agency refuses to respond, you have the opportunity to force a response by proceeding to federal district court.

In other words, for every radical, job-killing, property-taking, petition that is filed to increase bureaucratic power, American citizens, businesses, organizations and local governments can file petitions with a request to eliminate needless and idiotic red tape or to make rules that support businesses, communities and Constitutional freedoms. Consider the types of rulemaking petitions filed by radical environmental groups in the past. These include petitions to list the Giant Palloose earth-spitting worm as a threatened or endangered species under the Endangered Species Act (“ESA”); petitions to eliminate lead in ammunition under the Toxic Substance Control Act; petitions to change water quality criteria under the Clean Water Act to something that does not exist in nature regardless of the uses that are eliminated; petitions to repeal turtle collections laws in individual states; petitions to eliminate dust in the air even if the dust exists naturally; petitions to regulate cows from “passing gas” under the Clean Air Act; petitions to require permits if animals urinate in streams under the Clean Water Act; and any other petition under any federal act you can imagine. Based upon past analysis of the attorneys fees payments to radical environmental groups, one of the biggest “contributors” to their coffers are fees from the federal government when the government does not timely respond to petitions for rulemaking.

To respond to this regulatory onslaught, I believe that we need to start filing petitions to bring reality, common sense and science into federal agency decisions, petitions to stop the government from requiring that nature cannot “take its course,” and petitions to stop the government from elevating reptiles, invertebrates and other species above human beings. Once these petitions are filed, the federal government is

mandated to consider and respond to them. If the government does not respond in a timely matter, we can litigate and request attorneys fees.

Once a local government, group or citizen selects an issue, the question is, “what is included in a petition for rulemaking?” While there is no form for a rulemaking petition under the APA, there are some guidelines. These are:

1. The petition should specify that it is being filed under the rulemaking provisions in the APA, 5 U.S.C. § 553(e).
2. The petition cannot specifically request a rulemaking that directly violates a Congressional statute. For example, a local government could not petition for a rulemaking to eliminate a previously Congressionally-designated wilderness, although a petition could request rulemaking regarding how a wilderness is managed; an individual could not petition for a rulemaking to require grazing be eliminated on BLM lands, although a petition could request repeal of the regulatory requirement that allows radical environmentalists to have standing to challenge the simplest of BLM authorizations; a nonprofit organization could not petition for rulemaking to stop all listing of species under the Endangered Species Act (“ESA”), although a petition could request that an individual species be delisted because it does not meet the criteria set forth in the ESA.
3. The petition for rulemaking should include a justification or reason (including any scientific, economic, or cultural data) for the requested action. While a petition would not be rejected if it simply requested a result and did not include a rationale for the request, clearly a petition with scientific, economic, legal or other rationale is more likely to be favorably considered.

What happens after a petition is filed? Again, the federal agencies have to respond to petitions for rulemaking. Next, if a petition is rejected, the federal government has to give a reason. If the petition is ignored or if the petitioner disagrees with the reason given by the federal agency, litigation in the federal district court can be filed.

The right to “petition for the redress of grievances” is guaranteed by the Bill of Rights to the U.S. Constitution which states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.” For too long, this right to petition has only been used by those who would add regulations and requirements that are destroying rural America, our way of life, our economies, our local governments and our property rights. We can no longer hope that regulatory agencies and the federal government simply protect our businesses and property. We have been silent too long. We have to fight back and acting on our right to petition the government for a redress of grievances is one way to fight back. -END-