

Roger Hanson e-mail of March 12, 2007

Horst:

I have done a cursory review (not line by line) of the latest version but believe that my attached comments of April 24, 2006 are still generally applicable. With all the footnotes, this will be hard for many non-lawyers to follow and understand. Also, the writing leaves something to be desired.

Kind personal regards,

Roger Hansen

## COMMENTS

### **DRAFT COUNCIL ON ENVIRONMENTAL QUALITY “A CITIZEN’S GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT – HAVING YOUR VOICE HEARD”**

By

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## GENERAL COMMENTS

1. The Council on Environmental Quality (CEQ) is to be commended for taking the initiative to develop a Citizen’s Guide (“Guide”) to NEPA. While NEPA guides have been developed by some other agencies and organizations, the CEQ Guide will be considered by many to be the most “official” and authoritative and may well be interpreted as another CEQ “guidance” document. Thus, it should be particularly clear, precise, and understandable to the public. Also, it must be legally accurate.
2. Overall, this draft guide would not meet a rigorous test for meeting such criteria as clarity, precision, accuracy, clear format, and understandability. It is neither well written nor well organized. Most importantly, it does not really provide clear, cogent, and accurate *guidance* as to how citizens can become knowledgeable about and involved in the NEPA process. At the most, it is a “preliminary draft.”
3. The draft is not clear or understandable enough for the uninitiated and too simplistic for the knowledgeable. Efforts must be made to satisfy both types of audiences.
4. The authors of the Guide would be well advised to prepare a detailed *Annotated Outline* of the document to serve as a roadmap or blueprint for the Guide’s organization and contents before writing any section. Notations should be created for the content of each outline element. This would avoid the numerous redundancies, confusing feedback

loops, lack of context, unclear subheadings, and miscellaneous afterthoughts (e.g., Forest Service Pesticide Use) from which the draft Guide now suffers.

5. While the 36 footnotes are useful for lawyers who may want to check the legal authority for a particular statement or position, they cannot be relied upon to impart understanding to the lay public. A clearly written Guide should meet the test of understandability on its own, without all the footnotes. (Note: The use of lower case Roman numerals to number the footnotes, although derived from a computer program, is rarely used in the legal or technical literature. Conventional 1,2,3, etc. numbering should be used.)
6. While the CEQ regulations are often referred to and/or footnoted, few non-legal members of the public have any idea how to access 40 C.F.R. §§ 1500-1508. Why not reduce the font size and append the regulations in their *entirety* rather than only 40 C.F.R. Part 1508 in Appendix E. [The Appendix E reference is in error as it is *Part* 1508, not § (Section) 1508.]
7. Since so many people rely more on the internet than on hard copy references to anything, a number of useful web site addresses should be included in an appendix or even the main body of the Guide. Appendix B is a good appendix.
8. Almost all of the agency NEPA contacts in Appendix A are at the headquarters or Washington, DC level. However, it is not a good strategy for citizens in Pocatello, Denver, or wherever to start their agency contacts and inquiries at the DC level. They need to start with the *local* agency personnel who are responsible for NEPA compliance for a particular project and use a Washington contact only as a last resort. Also, most of the DC area contacts listed (if they can be reached) will only refer the interested citizen to the appropriate local contact – as they should.
9. The headings and subheadings do not all follow a logical organization. Some of the headings in boldface should be in italic and vice versa. Again, a well-crafted Annotated Outline would help enormously.
10. All of the CEQ guidance documents, and how to obtain them on or off the web, should be listed in an appendix. Merely including a bullet for “CEQ Guidance” in Appendix B is not enough for what is supposed to be a *guide*. Citizens need to know what the guidance addresses, at least generally. (Listing all of the “40 Questions” is not necessary.)
11. While including an extensive list of references to articles, conference proceedings, books, etc. on NEPA compliance and implementation would be overwhelming, a few “key” references should be included. For example: Daniel R. Mandelker, *NEPA Law and Litigation*, Thompson-West (2005); Ronald E. Bass, et al., *The NEPA Book*, Solano Press, 2001; and the U.S. Department of Energy (DOE) “Lessons Learned” Quarterly Reports.
12. Although this is only a draft, the graphics and illustrations are, so far, grossly inadequate and of poor quality. For example, there are many flow charts of the NEPA Process available that are better than the one selected.
13. Citizen “guidance” to “having your voice heard” is touched on here and there in various document sections. However, there should also be one clear, precise section on “How To Get Involved” which lists and briefly discusses all of the key elements of and opportunities for public involvement. (See Specific Comment No. 9 below.)
14. A Glossary of Terms would be preferable to relying only on Appendix E as some CEQ definitions are too complicated for neophytes. Also, some terms like “proposed action,”

“NEPA process,” “permitting,” and “environmentally preferred alternative” are not covered in in 40 C.F.R. Part 1508.

## SPECIFIC COMMENTS

These comments are by no means all inclusive. They only serve as examples of problems with the document.

1. Pages 1-5. The first 4 ½ pages including Figure 1 serves as an overly long introduction. The **Purpose of the Guide** or simply “Purpose” should be clearly stated in 1 or 2 paragraphs. *Background on NEPA* and *Navigating the NEPA Process* belong under a major heading such as **Introduction to NEPA**. This discussion is out of place under “Purpose.”
2. Page 1, Para. 4. It is arguable that “NEPA was the first major environmental law in the United States.” Saying that “NEPA is the nation’s most comprehensive legislative and public policy statement on protection of the environment” is preferable. Also, saying that NEPA was “signed into law on January 1, 1970” on page 1 and “enacted in 1969” on page 5 is confusing to non-lawyers. “NEPA was enacted by Congress in 1969 and signed by President Nixon on January 1, 1970” would be clearer.
3. Pages 2 and 11. EPA’s role is exaggerated and inaccurate and should be distinguished from CEQ’s role. CEQ and individual federal agencies are responsible for regulating the implementation of NEPA in all of its aspects. EPA is responsible for complying with NEPA for its own proposals, reviewing those portions or elements of NEPA documents within its jurisdiction, and serving as an EIS repository and notification agency. EPA is *not* responsible for assisting federal agencies in improving their NEPA process nor does it generally play a “critical role” in the NEPA process. Clarifying EPA’s role is particularly important given that many people (including some lawyers) are not familiar with CEQ’s role and even refer to NEPA as the National Environmental *Protection* Act, thinking the Act established EPA or that EPA administers NEPA.
4. Page 2 and elsewhere. CEQ’s role and the 40 C.F.R. Parts 1500-1508 regulations highlights must be included up front in the main body of the document and not merely in appendices or footnotes. This can be accomplished by giving a brief summary of each of the nine parts – 1500 through 1508 – in about 1 ½ pages. (The author of these comments has prepared such a summary.) This is *critical* because individual federal agencies emphasize and reference their own NEPA implementing procedures, often ignoring the CEQ requirements which take precedence.
5. Page 4, para. 2 and Page 5, para. 2. Neither NEPA nor the CEQ regulations require agency decision-makers to “balance” social, economic, national security, and other concerns with environmental protection. The NEPA § 101(b)(5) reference to achieving a “balance between population and resource use” to permit high living standards cannot be interpreted this broadly. NEPA § 102(2)(B) does not require that agencies *balance* “unquantified environmental amenities and values” with economic and technical considerations. While the NEPA process may sometimes achieve such a balance, interpreting NEPA as a balancing process is merely an opinion of the authors.
6. Page 4, para. 6. Private individuals and companies receive permission or authorization to undertake projects on federal land through licenses, permits, concurrences, consultations,

rights-of-way, and other approvals. Thus, “permitting” has a specific legal connotation and does not include, and should not be equated with, all types of approvals. This term should be explained in a Glossary.

7. Page 5, para. 3. This paragraph is one of many that needs rewriting. The key component of the current “environmental streamlining” movement is to: “Integrate the requirements of NEPA with other planning and environmental review procedures. . .so that all procedures run concurrently rather than consecutively” as required by CEQ in 40 C.F.R. §§ 1500.2(c) and 1502.25. The “other environmental review requirements” should be expanded to include: Fish and Wildlife Coordination Act; Clean Air Act; Clean Water Act (§ 404 on permits to protect wetlands); and Resource Conservation and Recovery Act (RCRA). The reference to the “Environmental Justice Executive Order” is incorrect when given as a title. E.O. 12896 of February 11, 1994 is titled “Federal Actions to Address Environmental Justice in Minority and Low-Income Populations.”
8. “The Mechanics of the NEPA Process Demystified” section promises much more than it delivers. Pages 5 through 11 contain discussion that is often confusing, legally inaccurate, incomplete, or unnecessary. Examples:
  - As noted earlier, the appropriate agency initial NEPA points of contact are not at the Washington, D.C. levels listed in Appendix A but are at the *local* (district, regional, state) levels for citizens who want to become involved.
  - Most citizens do not have the foggiest notion of how to access and use the *Federal Register* and Appendix D is no help as written.
  - Most citizen users of the Guide will not have to deal with emergency situations or classified material. It would be better to discuss this very briefly, if at all, at the end of the document.
  - The regulatory basis for CEs – 40 C.F.R. § 1507.3(b)(2) – should be explained. It should also be noted that most agencies prepare lists not only of CEs but of actions generally requiring an EIS or EA.
  - The purpose of an EA is to determine whether to prepare an EIS or a FONSI, of which determining “significance” of effects and alternatives is a part.
  - The four items listed as the contents of an EA do not track with the CEQ definition in 40 C.F.R. § 1508.9.
  - Under the EA discussion, “Army” should be changed to U.S. Army Corps of Engineers (USACOE) with which citizen groups work most frequently.
  - Under the EIS discussion, *Notice of Intent* and the *Public Scoping Process* should be discussed under separate headings.
  - Commenting (40 C.F.R. Part 1503) and public review requirements and opportunities for the DEIS are not even covered under the EIS discussion in pages 8-11. This approaches a “fatal flaw” omission.
9. “When and How to Get Involved” needs a lot of work including a total rewrite. Many essential elements are not covered such as: making agency contacts; obtaining agency NEPA procedures; knowing the CEQ regulations and guidance; participating in scoping meetings; types of public participation devices (public hearings, public meetings, workshops, open houses, citizen advisory groups, etc.); DEIS commenting process; agency responses to comments; appeals of agency decisions; etc., etc.

10. The purpose of the inserted rectangles on pages 13 and 14 (“Forest Service Pesticide Use in the Pacific Northwest” and “Public Comment Periods”) is not clear. The pesticide “collaboration” example is may be interpreted by some environmental groups as a political statement.
11. The “summary” of opportunities for public participation in the NEPA process at the bottom of page 13 is grossly inadequate. There are many more “places” for public involvement and each should be briefly discussed in turn. Also, this summary identifies some “places” that haven’t been discussed in the draft Guide.
12. The final section on “What If Involvement Isn’t Going Well?” contains advice that should occur much earlier. Also, this four-page discussion occurs *after* the so-called summary.