

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Scott McCallum, Governor
Darrell Bazzell, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY 608-267-6897

September 18, 2002

CQ458

NEPA Task Force
P. O. Box 221150
Salt Lake City, UT 84122

7 pages

SUBJECT: Comments of the Wisconsin Department of Natural Resources in response to the
CEQ - Notice and Request for Comments - FR: July 9, 2002 (Volume 67, Number 131)

Dear Members of the NEPA Task Force:

We are pleased that the Council has recognized the need to improve and modernize NEPA analyses and to foster improved NEPA-related coordination among all levels of government and the public. In our view, there is a substantial need for improvement with respect to current NEPA practice. More specifically, we believe that the CEQ needs to engage in a comprehensive update of its increasingly stale 1978 NEPA Regulations. This revision process must reflect both the changes in federal environmental and resource management legislation that have occurred since 1978 as well as the collective NEPA-related experiences of the federal agencies and their state agency partners.

The fundamental goal of this long overdue revision of the CEQ NEPA Regulations should be to refocus the federal government's implementation of NEPA away from the present emphasis on unproductive process and documentation and toward meaningful environmental outcomes. The important purposes of NEPA are best achieved when the environmental analysis and public disclosure requirements of this landmark law are applied only to those federal decisions truly in need of further environmental analysis in a process emphasizing timely interagency collaboration. This collaboration must be accomplished with full knowledge of how the federal and state governmental agencies function and with the goal of avoiding unnecessary impact evaluation, documentation and public input processes.

Our read of the scope of your charge from the CEQ provides little comfort that the essential top-to-bottom overhaul of the application of NEPA to federal decision-making is likely to happen. While we appreciate this opportunity to offer constructive input on the issues your Task Force has been asked to address, we are disappointed that the Council is not being more aggressive in pursuit of needed change.

Following are our specific comments relating to the questions and issues of interest identified in the 7/9/02 Federal Register Notice:

A. Technology, Information Management, and Information Security

Federal agency implementation of NEPA would be enhanced with more consistent electronic capture and availability, in digital format, of federal agency environmental review documents and decisions. This should include all EAs, NOIs, and FONSI, as well as determinations on categorical exclusions, in addition to Environmental Impact Statements. These records may then be used for informational purposes in preparing documents. Relevant studies or literature on a subject may be discovered through a review of the documents. Also, categorical exclusions and decision-making processes may be modified based on this information. A recent attempt to obtain such information from a federal agency demonstrated that it was not available in retrievable form. States that have little NEPA's should also maintain good electronic databases on such documents.

The use of the Internet to distribute documents has been helpful. Also, video conferencing has allowed agencies to reach more of the public and provide information and opportunities to comment.

B. Federal and Inter-governmental Collaboration

This topic is particularly relevant for federal initiatives such as Fish and Wildlife Restoration grant programs that were established by Congress as state and federal agency partnerships.

1. What are the characteristics of an effective joint-lead or cooperating agency relationship/process?

First and foremost is trust and open communication between the involved agencies. Such a relationship requires the willingness of the federal agency to come to the table to discuss issues. It is important to recognize that with many of the existing federal agency/state agency relationships, states are often left to prepare NEPA documents for federal agencies. It's typically either that or risk so much delay waiting on the federal agency to draft the documents that it becomes impossible to complete the project. In those circumstances where states are the primary drafter of federal agency NEPA documents, the federal government ought to provide funding reimbursement for the state's effort.

If the state working in partnership with a federal agency has a little NEPA, the agency ought to place additional reliance on the state environmental analysis and review processes. Such state processes and programs are tailored for public involvement in the development of environmental analysis documents. Additional or redundant federal processes only serve to confuse the public and waste time and very limited federal resources. More diligent participation and cooperation on the part of the federal agencies would strengthen the joint-lead and cooperative relationships between state and federal agencies.

In states not having little NEPAs, there typically exist public participation processes that serve many of the same purposes as a NEPA process. As encouraged in the CEQ Regulations, Federal agencies need to give more credence and deference to state processes that address impacts and solicit the public's views about a project proposed on state lands. As an example, a state may have acquired land with a federal funding acquisition grant 20 or 30 years ago. With the grant came conditions on management of the property for the purpose for which it was acquired. If the acquisition and management project was subject to environmental review and/or public input and comment years ago, and the continued management is consistent with the acquisition and management plan developed and made available for public review, there should be no need for further NEPA review on a habitat maintenance grant years later. Under the current, restrictive interpretation and application of categorical exclusions, subsequent NEPA analysis may be required.

2. *What barriers or challenges preclude or hinder the ability to enter into effective collaborative agreements that establish joint-lead or cooperating agency status?*

Perhaps the largest barrier to effective NEPA implementation by federal agencies is the sheer volume of environmental documents currently prepared. The result is a dilution of a meaningful application of this landmark Act towards federal decision making. The spirit and intent of NEPA will be better served by concentrating review and analysis efforts on federal actions that truly require analysis of impacts on the human environment. One reason for this dilution is that federal agencies and their responsible personnel apparently continue to be unaware of, or have forgotten, guidance previously provided by the CEQ. This 2002 request for comments is remarkably similar to processes the Council embarked upon decades ago. The CEQ should reemphasize the guidance previously provided to federal agencies on these issues by incorporating such guidance into the formal CFR regulations.

We have seen instances where a federal agency involved in a federal agency/state agency decision-making process has chosen to develop environmental review documents itself, even though the state with a little NEPA has offered to work jointly with it and must develop its own environmental review documents. Federal agencies must refrain from involvement in such duplicative processes.

Various state representatives we have talked with share a belief that federal agencies, whether for NEPA compliance or otherwise, continue to demonstrate a disregard for state agency expertise or knowledge in a particular topical area. Again, the federal agencies should recognize and take advantage of state processes and expertise which are very likely closer to the project or action under review and the people interested in the project than the corresponding NEPA process. The provisions of 40 CFR 1506.2 (Elimination of duplication with state and local procedures) and 1506.3 (Adoption) seek this outcome. However, it remains apparent that some federal agencies are still not complying with this long-standing CEQ direction.

In the Memorandum of the CEQ regarding respondents to the August 14, 1981 Federal Register Notice, commenters noted this federal/state duplication and the reluctance of federal agencies to accept analysis of others, including state agencies:

"Of those commenters noting that duplication has not been sufficiently reduced, almost all mention that the problem is the refusal of federal agencies to accept compliance with state environmental requirements as satisfying federal requirements. They complain that they must prepare essentially the same information in two formats to satisfy state and federal procedures."

Again, 40 CFR 1506.2 addresses this issue. It seems that some federal agencies are reluctant to embrace the direction. There does not appear to be consistency between federal agencies as to the interpretation of NEPA and the CEQ regulations. Inconsistent interpretation and treatment merely results in confusion and, often, unnecessary work.

And, finally, again, states need funding if they are to be expected to continue to prepare federal NEPA documents. Funding should be earmarked and provided to appropriate state agencies as part of the overall federal project budget.

C. Programmatic Analysis and Tiering

1. *What types of issues best lend themselves to programmatic review and how can they best be addressed in a programmatic analysis to avoid duplication in subsequent tiered analysis?*

This is a topic that should be discussed by and between federal agencies and state agencies to determine where programmatic analysis can be used most appropriately. But, foremost to this discussion is the concept that programmatic analysis and tiering should have as a primary goal that a sound analysis in the document will eliminate or reduce the need for further environmental analysis on such activities except for extraordinary circumstances.

Based on our experience, a programmatic document that is too broad in the types of actions or in the geographic area it addresses is of little value. With an appropriate programmatic document, further tiered reviews may often be based on unique circumstances, such as an impact on threatened or endangered species. The programmatic review process may be useful if an adaptive management process can be included that will address sensitive concerns or areas in a way that further environmental review will not be necessary.

E. Categorical Exclusions

Generally, we must parrot comments CEQ received in response to the August 14, 1981 Federal Register Notice, when it asked: "Have categorical exclusions been adequately identified and defined?" The CEQ summary of these comments reads, in part:

"The response to this question was varied; however, there was considerable belief that categorical exclusions were not adequately identified and defined. Approximately one-half of the commenters indicate that categorical exclusions are not well identified and defined."

"Most commenters think that additional categorical exclusions are necessary. Many indicate that existing exclusions and/or their interpretations are too restrictive. They also believe that the current procedures to add categorical exclusions are cumbersome."

"A few of the comments indicate that agencies require too much paperwork to document that the proposal can be categorically excluded. Others indicate that agencies are being overly conservative in interpreting categorical exclusion criteria and are requiring environmental assessments because of the fear of litigation."

In A. Alan Hill's GUIDANCE REGARDING NEPA REGULATIONS, issued in the Federal Register in 1983, further germane direction was issued to federal agencies as follows:

"The CEQ regulations were issued in 1978 and most agency implementing regulations and procedures were issued shortly thereafter. In recognition of the experience with the NEPA process that agencies have had since the CEQ regulations were issued, the Council believes that it is appropriate for agencies to examine their procedures to insure that the NEPA process utilizes this additional knowledge and experience. Accordingly, the Council still strongly encourages agencies to re-examine their environmental procedures and specifically those portions of the procedures where "categorical exclusions" are discussed to determine if revisions are appropriate. The specific issues which the Council is concerned about are (1) the use of detailed lists of specific activities for categorical exclusions, (2) the excessive use of environmental assessments/findings of no significant impact and (3) excessive documentation.

The Council also encourages agencies to examine the manner in which they use the environmental assessment process in relation to their process for identifying projects that meet the categorical exclusion definition. A report (1) to the Council indicated that some agencies

have a very high ratio of findings of no significant impact to environmental assessments each year while producing only a handful of EIS's. Agencies should examine their decision making process to ascertain if some of these actions do not, in fact, fall within the categorical exclusion definition, or, conversely, if they deserve full EIS treatment.

As previously noted, the Council received a number of comments that agencies require an excessive amount of environmental documentation for projects that meet the categorical exclusion definition. The Council believes that sufficient information will usually be available during the course of normal project development to determine the need for an EIS and further that the agency's administrative record will clearly document the basis for its decision. Accordingly, the Council strongly discourages procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded."

This Guidance is consistent with the CEQ regulations that direct federal agencies to continue to review agency policies and procedures and revise them as necessary in consultation with the Council to ensure full compliance with the purposes and provisions of the Act (40 CFR 1507.3), and reduce excessive paperwork by using categorical exclusions (40 CFR 1500.4). It needs to be incorporated into the regulations.

1. What information, data studies, etc. should be required as the basis for establishing a categorical exclusion?

To prevent duplication and unnecessary analysis, categorical exclusions should be based on a broad array of criteria. Federal agencies should be able to identify categorical exclusions by referencing established lists of activities as well as through the application of criteria on a case-by-case basis as previously alluded to in the guidance issued by the CEQ. For instance:

Examples of types of agency actions that may already be included in a list of categorical exclusions

a. Recurring projects or actions that have historically been practiced or studied so extensively that experience shows there is no need for further study. Even though the federal agency may not have experienced decision-making on a certain action, for NEPA and categorical exclusion purposes, a state should be allowed to demonstrate extensive experience with the action and justify why it should be treated as a categorical exclusion.

b. Recurring projects or actions that have continually demonstrated no or low impacts and, therefore, no need for environmental analysis.

Examples of types of agency actions not included in a categorical exclusion list

a. Projects or actions that have been analyzed in other federal or state processes that provide adequate public information and analysis of impacts. For example, the acquisition of land often includes a master plan public review and comment process. In other cases, studies or other kinds of information demonstrate no need for further analysis. The use of information, data or studies to make this determination should not be limited.

As indicated in the comments received in response to the 1981 Federal Register notice, CEQ should allow categorical exclusions based on information and a finding consistent with the definition in 40 CFR 1506.4. It is impossible to anticipate all the types of actions that will come before the agency for a decision. Many, on their face, will not demand further environmental analysis. However, the current process of establishing action lists for categorical exclusion results in very limited lists and very infrequent updating. As in an adaptive management concept or process, agencies must have the ability to determine no environmental analysis is needed on minor projects that clearly have little or no impact on the environment.

2. What points of comparison could an agency use?

Categorical exclusions established by a federal agency, e.g. the Department of Interior and its Services, should apply to decisions throughout that Department. We recommend that agencies within the same department begin developing new lists of categorical exclusions by reviewing the categorical exclusions lists previously promulgated by the other agencies in the department to determine their applicability.

In addition, lists of categorical exclusions should also include program specific elements. The Fish and Wildlife Service, for instance, has only one set of categorical exclusions for the agency. There should be more specific categorical exclusions tailored to the particular program, such as refuge management or federal aid.

3. Are improvements needed in the process that agencies use to establish a new categorical exclusion?

Absolutely. We are unaware of any established process within many federal agencies, including the Department of the Interior, Fish and Wildlife Service, for periodically reviewing and updating categorical exclusions. We recommend such review processes be implemented immediately at the direction of the Council. Such a review ought to include a solicitation to state partners for suggested categorical exclusions, with substantial deference given for the state partners who will have the most knowledge and experience about activities subject to federal review. Categorical exclusion lists must be revisited on a periodic basis such as every five years in order to reflect the current decision-making environment.

Categorical exclusion treatment should be granted for actions not included on an established list but otherwise qualifying for such treatment through demonstrated experience and knowledge of the action.

The process of updating and expanding agency lists of categorical exclusions must also include the lists of "exceptions to categorical exclusions". Currently, the exceptions are so broad that categorical exclusions may be of little real value. We recommend that "exceptions" be more specific and limited in scope. Much of the problem may be in interpretation, but clarification is necessary so as not to end up with absurd results and unnecessary environmental analysis. For instance, federal agencies currently may require further environmental analysis for an activity that may include a wetland or flood plain, even though the activity will have no adverse effects on these resources or may be taken for the protection and maintenance of the wetland or flood plain.

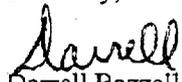
F. Additional areas for consideration

To limit duplication, the NEPA formats established by agency guidelines, not federal law or administrative rules, should allow use of little-NEPA state environmental review documents. The states, after all, will probably be the primary author anyway and the public will be familiar with the state format. At the very least, the federal agencies ought to be amenable to modifications in format that both the federal agency and state feel appropriate to achieve the purposes of NEPA and the little NEPA.

It is our observation that federal agencies are increasingly likely to require states receiving grant monies to prepare an EA for actions that are appropriate for categorical exclusion treatment. This is particularly true if there is any opposition to a state project proposed for federal funding. The mere fact that there are those opposed to the project should not be the basis for determining that a controversy exists and further documentation is needed. The federal agency must assure that controversies relate to scientific and biological disagreements rather than merely philosophical disagreements.

In closing, we reiterate our position that the CEQ must once again direct federal agencies to develop and use more and better defined categorical exclusions and be more diligent in reducing needless environmental analysis and paperwork. We stand ready to work with the federal agencies to address their NEPA responsibilities in a manner that fully complies with the law and CEQ direction.

Sincerely,


Darrell Bazzell
Secretary