



CQ465

September 23, 2002

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

Re: *CEQ National Environmental Policy Act Task Force (67 Fed. Reg. 45510-12)*

TRANSMITTED BY E-MAIL, FAX AND FIRST-CLASS MAIL

Dear Council on Environmental Quality (CEQ) and NEPA Task Force:

On behalf of our approximately 1 million members and supporters, Defenders of Wildlife ("Defenders") appreciates the opportunity to comment upon the overall NEPA process – including documentation, coordination, publication and utilization of significant environmental information – and how it might be further improved. We incorporate by reference the group letter organized by the Natural Resources Defense Council regarding the importance of meaningful public participation, assessing long-term or cumulative environmental impacts, monitoring and data collection. In sum, we believe that NEPA is perhaps the most critical of all federal environmental laws, and assert its procedures are effective and efficient when intelligently utilized in good faith. The adage "don't fix what ain't broken" possesses poignant relevance here.

Introduction and Background

While we laud the purported aim of the Task Force "to seek ways to improve and modernize NEPA analyses and documentation and to foster improved coordination between all levels of government and the public," recent actions by the Bush Administration with regard to NEPA unfortunately taint our hope that this is the true purpose of the present endeavor. Just in the last month, the Administration has sought to emasculate NEPA's applicability in the U.S. offshore exclusive economic zone and the high seas and to authorize new unjustified loopholes in the national forest management process. These are not the only examples since the new Administration took office. The American people deserve better and the plain language of NEPA demands better.

The Federal Register notice listed six main issues, each with sub-issues or questions, for which comment is solicited: A) Technology, Information Management and Information Security, B) Federal and Inter-governmental Collaboration, C) Programmatic Analysis and Tiering, D) Adaptive Management/Monitoring and Evaluation Plans, E) Categorical Exclusions, F) Additional Areas for Consideration. As requested by the Federal Register notice, we will attempt to note the designated category number and letter in parenthesis when discussing our view of the present

National Headquarter:
 1101 Fourteenth Street NW
 Suite 1400
 Washington, DC 20005
 Telephone 202-682-9400
 Fax 202-682-1331
www.defenders.org
www.kidsplanet.org

00465

NEPA process, though we note many of our points hit several of your questions at once. For all of the real-life examples we will cite, plus the others we cannot possibly detail in this type of comment letter, we urge you to look at the data gathered by the Udall Institute for Environmental Conflict Resolution, which engaged in a similar NEPA-review exercise just months ago at the request of a group of bipartisan U.S. Senators.¹

This letter is organized around three central themes: 1) NEPA Can Reduce Delay, 2) NEPA Mandates Honest Information and Analysis, and 3) NEPA Demands Substantive Environmental Progress. As you well know, only in very limited instances does NEPA possess substantive legal requirements.² The whole point of NEPA is to improve the environmental decision-making process of the federal government. As the U.S. Supreme Court has stated, "NEPA has twin aims." First, it places upon agencies the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that agencies will inform the public that they have thoroughly considered all environmental concerns in the decision-making process. Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983). Indeed, Congress has made clear that all federal agencies use "all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources" on behalf of the environment. 42 U.S.C. § 4331(b). In exercising these means, the Federal Government, inter alia, "shall utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." 42 U.S.C. § 4332(a).

NEPA Can Reduce Delay

One way in which federal agencies, related agencies and private parties frequently delay their own work is by ignoring the requirement to integrate "the NEPA process into early planning." 40 C.F.R. § 1500.5 (a). Whether it is federal managers on public lands or international negotiators at the State Department, federal officials from federal agencies frequently do not comply with NEPA the required "fullest extent possible." 40 C.F.R. § 1500.6. (B1-3). Instead, we frequently see agencies either ignore NEPA or use its structure to reach pre-ordained results. Examples here include, but are not limited to:

- * complete lack of on-the-ground environmental analysis for various

The Udall Center also examined other independent reviews of the NEPA process over the years.

¹ See, e.g., 40 C.F.R. Part 1504; Clean Air Act, 42 U.S.C. § 7609 (Policy Review).

CQ405

public land actions, whether it be timber harvesting or trail/road construction in wildlife (e.g., lynx, grizzly bear, salmon) habitat, or oil and gas leases/actions on sensitive public lands;

- * shirking relevant environmental procedures with regard to federal road or other transportation infrastructure development;
- * failure to meaningfully incorporate endangered species or general environmental information into the U.S.-Canada softwood lumber negotiations and discussions;
- * refusal to prepare meaningful environmental analysis regarding the impacts of active sonar testing on sensitive marine wildlife and ecosystems, including the omission of relevant information; and
- * absence of any comprehensive environmental analysis regarding the impacts of dams and diversions upon the Colorado River, its habitat and its imperilled species.

When environmental analysis is not completed at an early appropriate time, conflict almost always ensues via litigation, public demonstrations or other time-burdening distractions. These delays are avoidable if the NEPA process is followed up front. In particular, we have seen many controversial issues – such as the new dolphin-safe tuna program developed by the Department of Commerce and other agencies – where “scoping” is not even utilized. (B2). This makes no sense, and seems to invite disagreement and division on complex natural resource issues.

Delay is reduced in the long run when environmental considerations are respected from the beginning of any project. This includes promptly identifying the lead agency and all cooperating (federal and non-federal) agencies, as well as all environmental documents (including previous NEPA or related documents) related to the action at hand so that tiering, where appropriate, can facilitate a final decision. (C1). Delay is similarly reduced, and environmental benefits simultaneously gained, when federal agencies prepare an E.I.S. when an environmental assessments (EA) is long, complicated, controversial, or otherwise is serving as a functional EIS (F). See, e.g., Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211-12 (9th Cir. 1998). An agency that purposely subverts the NEPA process not only deserves no sympathy, but should also be disciplined.

NEPA Mandates Honest Information and Analysis

There really is no excuse for a federal agency to present blatantly incorrect or dated information in a NEPA document. If the information is truly incomplete or

CQ405

unavailable, then the agency should say so. 40 C.F.R. § 1502.22. If information is dated, the agency should say that as well. The violation of NEPA occurs not when false information is given to the public per se, but when the false information is not properly buttressed with proper explanatory comments about the limits of such information. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b).

As one example, scientists do not always know exactly which wildlife species will be harmed by certain oil and gas drilling activities. But they know the proper scientific methodology that should be employed to ask the question. See, e.g., Wyoming Outdoor Council et al., 156 I.B.L.A. 347 (April 26, 2002)(ruling that Interior Department's environmental analyses of oil and gas leases are completely inadequate). Similarly, scientists do not always know exactly how certain fishing practices will harm non-target species. But they know the proper methodologies and models to use to make intelligent estimates. If more than one agency's official expertise is at issue, a lead agency should be clearly designated to identify (and ideally resolve) disagreements in interpretation or substance. Public comment is particularly useful in identifying information or information systems (grounded in modern technology or not) that might not be known to the agency. Defenders and our allies commonly possess unique or publicly unavailable data on many actions pertaining to biodiversity protection. (A3-4). See also CEQ, Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under the National Environmental Policy Act (January 1993). Other interest groups presumably possess expertise in their area of speciality.³ (A6).

Honest analysis entails not only accurate or correctly qualified information, but also transparency in making certain policy conclusions. One increasingly important aspect of sound environmental analysis is the use of cumulative impacts analysis. See, e.g., CEQ, Considering Cumulative Effects Under NEPA (January 1997). Here, the use of tiered documents can be very important to avoid repetition or needless paperwork. However, the analysis cannot be omitted or the overall environmental impact cannot be understood. One cannot understand the full impacts of a Department of Energy initiative on domestic oil production, for example, until one understands the related issues of public land protection, global climate change, wildlife conservation, clean air and water, and the feasibility and impact of plausible alternatives. Certain

³ Although we can theoretically envision the rare scenario where environmental information should not be released to the public, we strongly believe that an educated public will not only benefit the environment in the long run, but also benefit the response to any legitimate national security threat. (A7).

CO465

facts or analysis cannot be ignored simply because they do not fit a politician's personal or corporate agenda.

When an agency does not possess the information it obviously needs, it should bear the burden to find that information. An example here is the increasing use of satellite imagery for various environmental enforcement issues. Although we respect the potential national security issues associated with these technologies, there is no doubt that the use of satellites would help monitor actions on the high seas, in the atmosphere, in remote places and likewise. (A1-2). Modern technology is of little, or even detrimental, use to NEPA's purposes if such technology cannot be utilized to advance environmental protection.⁴

"Categorical exclusions" should only be granted when certain categories of action do not possess significant environmental impacts, either individually or cumulatively. We believe certain categorical exclusions are granted not because of their environmental qualities, but because of their overall political qualities. 42 U.S.C. § 4332(C). (E1-3). We have written to federal agencies as diverse as the Forest Service and Department of Transportation on the details regarding this issue, and would be happy to supply you with additional information if necessary.

NEPA Demands Substantive Environmental Progress

NEPA's ultimate purpose is "to foster excellent action" at both the programmatic and site-specific levels. 40 C.F.R. § 1500.1(c). As the CEQ regulations state, "The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* This is why Congress emphasized the federal agency duty to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E).

For example, federal agencies such as the Department of Transportation (DOT) are clearly on notice that road construction and maintenance can cause a number of environmental problems – from ecosystem fragmentation and alien species invasions to various forms of pollution and direct wildlife kills. By reducing the impact of surface transportation on healthy wild habitats through avoidance and enforceable minimization or mitigation, by supporting environmentally-friendly transportation

⁴ To answer a specific question asked by the Task Force, Defenders does not have one preferred method of conveying or receiving information, though we expect the information to be timely and to be reasonably accessible to us. (A5). Up to date agency web sites, with applicable information, is always a useful tool. (A6).

CO405

alternatives that reduce harmful road construction and usage, and by and incorporating wildlife and natural resource conservation into transportation planning, DOT and other agencies could achieve win-win scenarios – but only if there is a genuine desire to do so. Otherwise, the Administration can attempt to weaken NEPA requirements for transportation through “streamlining” or other mechanisms, but the negative environmental impacts will accumulate, and transportation problems themselves will only accelerate as more roads become more congested with an even greater backlog of maintenance projects.

“Excellent action,” or lack thereof, is also at issue with some other current examples:

- * whether the State Department and other agencies will utilize and follow NEPA procedures in making decisions on international agreements pertaining to subjects such as climate change, natural resource commodities, and terrorism;
- * whether the Federal Communications Commission will utilize and follow NEPA procedures in approving and placing cell towers, which are known to have deleterious impacts in migratory birds, certain bats and other wildlife species and environmental values;
- * whether the Border Patrol will utilize and follow NEPA procedures in attempting to make our borders with Mexico and Canada safe for our citizens without causing permanent environmental damage (e.g., habitat loss, wildlife takes, pollution impacts);
- * whether the Interior Department will utilize and follow NEPA procedures in issuing habitat conservation plans and agreements under the Endangered Species Act, with associated “take” permits, and revisit those permits when new ecological information is presented⁵;
- * whether the Agriculture Department will utilize and follow NEPA procedures in shaping the new conservation and subsidies programs under the Farm Bill in order to maximize benefits for the environment and sustainable farming practices;

⁵ In response to the Task Force’s questions on adaptive management, we believe “significance” must be the guide in determining when to do additional environmental review of a modified agency action. Adaptive management, at its heart, is about improving environmental management plans based on additional information and, thus, is useful for most federal environmental decisions. (D1-4).

CQ 465

- * whether the Department of Transportation and other agencies will utilize and follow NEPA procedures in constructing a 21st century transportation network that is both effective and environmentally sustainable;
- * whether the nation's public land agencies and managers will utilize and follow NEPA procedures to take actions that advance native biological diversity conservation, pursuant to their different organic statutes and authorities, including those actions associated with massively increased oil and gas proposals throughout the country (on private and public lands alike); and
- * whether the Army Corps of Engineers and E.P.A. will utilize and follow NEPA procedures to sufficiently protect locally, regionally and nationally important wetlands.

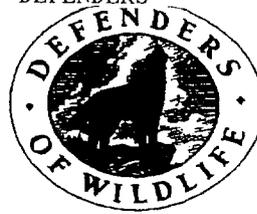
Conclusion

We hope you find these comments helpful to you as this Administration reviews NEPA process, procedures and results. Because so many of these topics are driven by large amounts of factual detail, which necessarily drives most NEPA implementation issues, we would be pleased to provide you with more information about any of our examples at your request. We believe the success stories associated with NEPA could fill many pages, and we are grateful that Congress and President Nixon saw fit to pass it over thirty years ago.

Sincerely,



William J. Snape, III
Vice President and Chief Counsel



CD 405

FAX TRANSMISSION

DEFENDERS OF WILDLIFE
1101 Fourteenth St., NW, Suite 1400
Washington, DC 20005
<http://www.defenders.org>

Date: 9/23/02

To: NEPA Task Force

Fax: (801) 517-1021

Company: CEQ

Phone: _____

From: William Snape

Phone: (202) 682-9400, ext. _____

Fax: (202) 682-1331

Number of pages to follow: 7

COMMENTS:

The documents accompanying this telecopy transmission contain information from sender which is confidential and/or privileged. This information is intended to be for the use of the individual or entity named on this transmission sheet. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited, and may constitute an invasion of the privacy of the intended recipient. If you have received this telecopy in error, please notify us by telephone (collect) immediately so that we can arrange for the destruction of the communication or for retrieval of the original document at no cost to you.