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Subject: Comments for NEPA task force

CQ503

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Mr. Greczmiel and Task Force Members -- here are my comments.

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1725 New Hampshire Avenue, N.W.
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September 20, 2002

NEPA Task Force
Council on Environmental Quality
P.O. Box 221150
Salt Lake City, Utah 84122

Ladies and Gentlemen:

I have reviewed your request for comments on federal agencies' implementation of the National Environmental Policy Act which appeared in the July 9, 2002 Federal Register (Volume 67, Number 131) at pages 45510-45512. My comments follow.

In these comments, I make some reference to the Council on Environmental Quality's overall rules for implementation of the National Environmental Policy Act, found at Title 40, Code of Federal Regulations, Parts 1500-1508 (hereinafter "CEQ NEPA Rules"), with which I am familiar.

E. Categorical Exclusions. The Notice correctly states the concept of categorical exclusions (page 45512, under study area E) as articulated in the definitions section of the CEQ NEPA Rules, section 1508.4. Categorical exclusions are for actions which do not, individually or cumulatively, give rise to a significant impact. The CEQ NEPA Rules contemplate that these actions, as defined, cannot give rise to a significant impact. For this reason, we recommend that federal agencies (and CEQ, in its oversight role) be circumspect in contemplating actions they might wish to add to their lists of categorical exclusions. Comments on the first of the three questions follow.

1. What information, data studies, etc., should be required as the basis for establishing a categorical exclusion? The nature of this information will vary with the agency; but the agency's own experience with its past actions can be a significant guide. One key to evaluating such past actions is whether, over a period of years, a given type of agency action has given rise to cumulative adverse impacts (see CEQ NEPA Rules, section 1508.27(b)(1) for the proposition that effects can be beneficial and/or adverse) that are now apparent, and perhaps in need of attention or remediation. Where cumulative impacts appeared that were harmful to the environment, the action in question should not be added to the categorical exemptions list.

New mandates for agency actions need to be considered for their environmental impact and also for addition to the categorical exemptions list, where appropriate. For example, it may be appropriate, in the name of building security, to put up barriers around federal buildings in Washington and elsewhere; but the environmental impact of these structures ought to be examined with an eye toward maintaining the values of our

society and the beauty of its capital and other cities. Given the physical and aesthetic damage already done to Washington in the past 18 months, I don't think any categorical exclusions should be given for building security measures in Washington, at least, unless there is a maximum impact strictly defined into the exclusion. For example, physical changes for security should be categorically exempt only if they do not exceed a few cubic feet in size – say three feet up, out, or down and do not make visual impacts lasting more than one week. As a Washingtonian, I have had it with the avoidable damage done to this city in recent years, from tasteless redevelopment of commercial and residential areas, more recently from communications companies taking turns ruining streets and not putting them back in shape, and recently from security madness.

In short, agencies have to continue to strike a balance, in their use of categorical exemptions, between meeting immediate needs, including efficient agency and project management, and avoiding adverse environmental impacts that environmental analysis and public review might have identified and either stopped or allowed.

F. Additional Areas for Consideration. In regard to “the appropriate utility of and structure of format [sic] for environmental assessment documents” (Notice, page 45512, under study area F), I have the following comments.

1. Significant Impacts Threshold. There are long-standing discrepancies between what different federal agencies consider to be the “significant impacts” threshold for determining whether to prepare an Environmental Impact Statement (EIS) instead of an Environmental Assessment (EA). For example, most airport projects, ranging from small local airports to large ones, receive funding assistance from the Federal Aviation Administration; and FAA rules apparently require nothing more than an EA for projects ranging from a small runway extension to a plan encompassing multiple runways, taxiways, hangars, and auxiliary facilities. The Newport News-Williamsburg International Airport's development plan, for which an EA was published in the spring of 2001, is an example of the latter. That Plan contemplates 22 separate projects in and adjacent to the airport's property, which covers extensive acreage abutting the City of Newport News, local creeks and wetlands, and suburban areas. Assuming the projects are completed as planned, the heavily populated area will be subject to large and sustained increases in air pollution, noise, and threats to surface water quality. In contrast, the National Park Service prepares EISs for construction of a few additional features in National Park units. I know that federal agencies promulgate their own rules implementing NEPA, and do not objection to differing interpretations of the “significant effects” definition in section 1508.27 and the concept of “major Federal action” in section 1508.18 of the CEQ NEPA Rules. However, CEQ should enforce some minimum standards in its oversight role, and require federal agencies to make those distinctions in keeping with the policies of the Act. These policies include but are not limited to the fostering of public involvement in decisions affecting environmental quality, and helping public officials make decisions and take actions that protect the environment (see sections 1500.2(f), 1500.2(a), and 1500.1(c) of the CEQ NEPA Rules).

As you know, public involvement in the NEPA process is more extensive for EIS review than it is for review of Environmental Assessments. An agency preparing an EIS must invite public comments, among others (CEQ NEPA Rules, section 1503.1(a)(4)); the agency need not do this for an EA. Federal agencies, particularly those constructing or facilitating the construction of projects with large impacts on natural resources, should be required to define "significant impacts" of their activities so that large undertakings get adequate public and agency review. Otherwise, the process works against effective public and agency review of such projects, and unfairly as to agencies whose activities give rise to lesser impacts upon the human environment (and, perhaps not incidentally, receive vastly smaller appropriations every year).

2. Structure, Format, Timing of Environmental Assessments. Environmental assessments should be organized like an Environmental Impact Statement, with chapters on the project description, purpose and need, affected environment, alternatives, and environmental consequences as well as the Finding of No Significant Impact where that is the result. (Where it isn't, the agency will typically prepare an EIS rather than publishing the EA.)

In addition, for federal projects taking place in any state's coastal zone, as defined pursuant to the Coastal Zone Management Act and the State's program, the agency should include an identifiable CZMA Consistency Determination (if a federal agency action) or Certification (if a federally funded or permitted action) pursuant to the Federal Consistency Regulations implementing the Act. These Regulations (15 CFR Part 930) allow for interaction between the consistency review process and the NEPA process (see 15 CFR Part 930, section 930.37). In this regard, the EA or EIS may contain several pages constituting the Consistency Determination or Consistency Certification; the conclusions in these statements may be based, in part at least, upon the material in the rest of the EA or EIS.

Federal agencies usually require a 30-day comment period, and no public hearings, for an Environmental Assessment. The NEPA rules do not specify a time frame for public and agency comments on EAs, although they require that 45 days be allowed for comments on Draft EISs (CEQ NEPA Rules, section 1506.10(c)). Consistency review procedures under the Coastal Zone Management Act allow 60 days for state coastal agencies' review of consistency determinations (15 CFR Part 930, section 930.41(a)); these reviews include a public notice component. Accordingly, inclusion of a consistency determination in an EA or EIS may make it necessary to provide additional review time; but such inclusion will typically also preclude a separate review effort by the federal agency and the affected state agencies. The longer review period will allow a more thorough review by states and local governments. More to the point, it will do the same for the public, whose schedules do not easily incorporate shorter review times. Some will complain about efficiency and urge the need for speed; but NEPA's purpose is to foster decisions, based on understanding of environmental consequences, that protect, restore, and enhance the environment (see CEQ NEPA Rules, section 1500.1(c)).

3. *General Comments.* Some people still look upon NEPA and other environmental laws as obstacles to development, fiscal health, or national security in times which seem to call for rapid action by both government and the private sector. Some of the comments you have received (on CEQ's web site) suggest as much. You will doubtless get more such comments from lobbyists and their allies in government entities in this review. I would remind you and others that environmental review and the protection of our planet to which it contributes – by asking the national government and others to stop and think what they are doing -- is more critical now than it was at the time NEPA was passed and signed by Americans in 1969. Our citizens, present and future, still depend on it.

Thank you for the opportunity to comment.

Sincerely,

Paul K. Macomb