

CQ506



"Liz Skipper"
<lskipper@sso.org>

09/23/02 12:50 PM

To: <ceq_nepa@fs.fed.us>
cc: "Max Peterson" <peterson@sso.org>, "Gary Taylor"
<gtaylor@sso.org>, "Paul Lenzini" <paulenzini@aol.com>
Subject: CEQ Notice and Request for Comments (NEPA Task Force); 67
Federal Register 45510; July 9, 2002



Lenzini Letter to CEQ.doc



NEPA Task Force.doc

00506

International Association of Fish and Wildlife Agencies

(Organized July 20, 1902)

Hall of the States

444 North Capitol Street, NW, Suite 544, Washington, DC 20001
(202) 624-7890 – Telephone; (202) 624-7891 – Fax; iafwa@sso.org
R. Max Peterson, Executive Vice President

September 23, 2002

NEPA Task Force
P.O. Box 221150
Salt Lake City, UT 84122
ceq_nepa@fs.fed.us

Re: CEQ Notice and Request for Comments;
67 Fed. Reg. 45510 (July 9, 2002)

“[W]e cannot allow NEPA to be bloated, and indeed enfeebled, by pushing the logic of Section 102(2)(C) to ridiculous extremes.”

- Judge Carl McGowan

“We reached those last days when we could endure neither our vices nor their remedies.”

- Titus Livy

Gentlemen and Ladies:

These comments on the referenced notice are filed by the International Association of Fish and Wildlife Agencies, an organization whose government members include the fish and wildlife agencies of all fifty states. Founded at Yellowstone in 1902, the Association has been, for one hundred years, a key instrumentality in coordinating the efforts of public administrative agencies responsible for protection and management of the fish and wildlife of North America. See 14. Con. Res. 419, 107th Cong., 2d Sess.

The International Association is composed, not of special interests, but of public agencies vested with legal authority and responsibility to protect and manage fish and wildlife for the benefit of present and future generations of their respective citizens. Having cognate, albeit more practical, environmental duties of their own, the government members

of the International Association readily support the goals of Congress in enacting the National Environmental Policy Act.

The instant comments address not the congressional policies animating NEPA, but address instead what NEPA has become. "[P]rocesses that have evolved to implement NEPA have often led to delay, confusion, and litigation" ¹ The Association has a particular concern with overapplication of NEPA to the Federal Aid in Fish and Wildlife Restoration Programs. Attempts during the previous administration to apply NEPA to ongoing wildlife restoration, particularly habitat management, have influenced state decision making. Not only have scarce resources that could have been deployed in the field been diverted to needless and costly environmental documentation, many states have restricted federal funding to "plain vanilla" projects for which there could be no conceivable allegation of NEPA noncompliance. In the process, the intent of Congress that the Secretary of the Interior cooperate with states in wildlife restoration ² is thwarted, financial resources apportioned to the states have been siphoned into needless environmental documentation, and the Federal Aid in Fish and Wildlife Restoration Acts abridged de facto.

¹ Testimony of Kathleen McGinty to Senate Committee on Energy and Natural Resources, Subcommittee on Oversight, October 19, 1995.

² The Pittman-Robertson Wildlife Restoration Act defines a wildlife restoration project as follows: "The term 'wildlife-restoration project' includes the wildlife conservation and restoration program and means the selection, restoration, rehabilitation, and improvement of areas of land or water adaptable as feeding, resting, or breeding places for wildlife, including acquisition of such areas or estates or interests therein as are suitable or capable of being made suitable therefor, and the construction thereon or therein of such works as may be necessary to make them available for such purposes and also including such research into problems of wildlife management as may be necessary to efficient administration affecting wildlife resources, and such preliminary or incidental costs and expenses as may be incurred in and about such projects." 16 U.S.C. § 669a (8). It will be observed that wildlife restoration in the statutory definition involves the active production of optimum habitat elements. Cheyenne Bottoms, actively managed by Kansas Wildlife and Parks, is the most important migration point for shorebirds in North America, with over 100 species nesting in the marsh and 63 species permanent residents. At Horicon Marsh in Wisconsin each fall, a half million Canada geese and 100,000 ducks rest during their migration south at this 50,000 acre marsh actively managed by Wisconsin DNR and the Fish and Wildlife Service. Both areas require development and maintenance of dikes to control water level, pumps and other water structures, nesting cover development, rough fish (carp) control, mechanical harvesting of dense mats of cattail, food plots and similar activities. This is wildlife restoration. It is an intensely practical enterprise involving minute particulars rather than generalizing demonstrations of the rational power. For an example of the latter, see Principles of Biodiversity Conservation (CEQ 1993), in Considering Cumulative Effects Under the National Environmental Policy Act, A-37. "Take a 'big picture' or ecosystem view" is the first principle there listed.

The Federal Register notice indicates that the Task Force established by the Council on Environmental Quality (CEQ) has been convened for the worthy purpose of "[enhancing] the effectiveness and efficiency of the NEPA process." You will recall that in 1997 CEQ published a handsome document on recycled paper entitled "NEPA: A Study of Its Effectiveness After Twenty-five Years" (hereinafter "Effectiveness Study"). As the federal agency responsible for overseeing NEPA implementation, CEQ "wanted to see whether agency implementation of NEPA could be streamlined to make it more efficient"

CEQ's 1997 Effectiveness Study found, at iii, that "NEPA is a success," explaining that "frequently NEPA takes too long and costs too much," that "documents are too long and technical for people to use," that the EIS process "is still frequently viewed as merely a compliance requirement," and that in consequence "millions of dollars, years of time, and tons of paper have been spent on documents that have little effect on decisionmaking."³

As Pyrrhus is reported to have said, a few more successes like this and we are undone. Indeed, the conclusion of the Effectiveness Study (35) declares that "CEQ is embarking on a major effort to reinvent the NEPA process." The Effectiveness Study then lists certain technical difficulties which CEQ proposed to overcome in the near future.

It is by now a well-worn cliché that much environmental impact analysis has degenerated into defensive compliance for the purpose of developing a litigation record. Such documents are like a speech marked by punctilious grammatical accuracy, but having little meaning and no eloquence.⁴ We recently reviewed EIS Cumulative 2000, the latest compilation of environmental impact statements filed by federal agencies, to see just how lengthy these documents have become. The compilation, which abstracts all draft and final EISs, reveals that in the year 2000 the average length of a draft EIS was 493.65 pages.⁵

Why do federal agencies deem it advisable to buy protection against the enjoining of agency action (and the assessment of attorneys' fees) through the device of lengthy environmental documentation? On this question the 1997 Effectiveness Study is more

³ Effectiveness Study, 7. The Study found that some agencies "act as if the detailed statement called for in the statute is an end in itself, rather than a tool to enhance and improve decision-making. As a consequence, the exercise can be one of producing a document to no specific end. But NEPA is supposed to be about good decision-making -- not endless documentation." Effectiveness Study, iii. "NEPA is about making choices, not endlessly collecting raw data." Effectiveness Study, 28. It is interesting to contemplate how many forests have made the ultimate sacrifice in the service of "endlessly collecting raw [environmental] data."

⁴ "What is often lacking in EISs is not raw data, but meaning " Effectiveness Study, 28.

⁵ EIS Cumulative 2000, The Year in Environmental Statements, Cambridge Scientific Abstracts, Bethesda, MD. Final EISs contain responses to public comment and are lengthier. For 2000, the average length of an FEIS with appendices and comments was 742.27 pages. Our handwritten workpapers in deriving these averages are available to CEQ on request.

revealing than CEQ may think in that only a single reference is made in the entire study to “an agency’s mission,” that to be found in a discussion of adaptive management on the last page of the study immediately prior to the conclusion section. While agencies are obliged by NEPA to integrate environmental analysis into agency decision making, it was not the intent of Congress that NEPA abridge an agency’s mission but instead that it be evaluated in a new light. It is unwise for CEQ to be indifferent to the imperative of “an agency’s mission.”⁶

As the federal office responsible for overseeing NEPA implementation, it is the duty of CEQ to address the chasm that has developed between what NEPA has become and what NEPA was intended to be (hereinafter “the gap”). More specifically, we think the gap involves the increasing application of NEPA, for defensive purposes, to no- or low-impact projects never intended by Congress to be covered.

There would seem to be two approaches CEQ could take: it could acknowledge and attempt to rectify critical weaknesses in NEPA’s legal and institutional framework or it could embark on an effort to enhance the “efficiency” of the NEPA process. We thus read the Federal Register notice of July 9, 2002, with a deep sense of malaise, for it is evident that CEQ has embarked on the second and far easier course, viz., another “efficiency” drive.

The questions outlined in the notice are interesting but uncontroversial⁷ (what American institution could possibly be criticized for promoting efficiency), while vital issues go unaddressed. Certainly no effort is identified to address the gap. While the easier course, it is not promising, for it is likely to be no more successful than prior CEQ efforts to streamline and “reinvent” the NEPA process that have resulted in lengthier documents and more litigation.

The difficulty with the NEPA process is that, like any system established to address a “problem,” it expands and encroaches. While the original purpose was to integrate environmental analysis into decisions on major federal actions significantly affecting the quality of the human environment, the principal driving force for agencies now is avoidance of, or preparation for, litigation. The result is that the NEPA mandate has been expanded to include federal actions that do not significantly affect the quality of the human environment.

CEQ is complicit in the trivialization of NEPA because it has failed to implement the major distinction implicit in the statute. It has instead established a formal regulatory

⁶ Senate Majority Leader Daschle’s recent amendment to the Supplemental Appropriations Act to exempt timber sales and hazardous fuel projects in the Black Hills Forest from NEPA, the National Forest Management Act, and all pending or future appeals or lawsuits is perhaps nothing more than a cloud on the horizon.

⁷ In the context of the need for CEQ guidance on fundamental issues, the questions outlined in the July 9, 2002, Federal Register notice avoid completely the root causes of the NEPA problem. Thus, CEQ seeks to address improved information management technologies, improved interagency and intergovernment collaboration (including joint-lead processes), and reduction of redundant or duplicative analysis through programmatic and tiered analysis.

framework of universal application while opting to provide agencies the smallest possible degree of guidance in grappling with the substantive uncertainties of the statute. Thus:

- Where there is no major federal action significantly affecting the quality of the human environment, “there is no EIS obligation.” Fund for Animals, Inc. v. Jack Ward Thomas, 127 F.3d 80, 84 (D.C. Cir. 1997). Instead of attempting to offer guidance on what federal actions are significant, the CEQ regulations establish a hermetically sealed control system in which all federal actions are subject to NEPA. According to CEQ, any federal action not analyzed in an EIS must be assessed in an EA unless covered by a CATEX unless the CATEX is rendered inapplicable by an EXCEPTION. 40 CFR 1501.4(b).
- The statutory concept of “significant” impact “has no determinate meaning” and the CEQ regulations are “of little help” because, while ambitious, they are “nondirective.” River Road Alliance, Inc. v. Corps of Engineers, 764 F.2d 445, 449, 450 (7th Cir. 1985)(opinion of Posner, J.). At bottom, significant impact or significant effect is an empty concept that carries no intuitive, empirical or normative weight of its own. While devoid of meaning, the term “significantly” as used in section 102(2)(C) “can be isolated as a question of law.” First National Bank of Chicago v. Richardson, 484 F.2d 1369, 1373 (7th Cir. 1973). Although a court in a NEPA case is involved in examining facts to determine whether an action “significantly” affects the environment, that issue is one of law in the same sense that an appellate court may determine whether the evidence was sufficient for a reasonable jury to find a defendant guilty beyond a reasonable doubt.
- According to CEQ, the term “significantly” as used in NEPA requires consideration of both “context” and “intensity,” § 1508.27, and “controversy” is expressly listed as an “intensity” factor: “The degree to which the effects on the quality of the human environment are likely to be highly controversial.” § 1508.27(b)(4). Environmental plaintiffs regularly invoke this provision to argue that their own opposition to a project demonstrates “controversy” so as to tip the balance in favor of a full EIS. Courts have generally disfavored the notion of a “heckler’s veto” implicit in the regulation as out of keeping with a tradition of ordered government. But the matter is not free of doubt because of the improvident wording of the CEQ regulation.
- CEQ regulation requires agencies to adopt procedures to ensure that alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents. § 1505.1(e). According to CEQ, the phrase “range of alternatives” includes “all reasonable alternatives,” and these “must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them.” 46 Fed. Reg. 18026 (March 23, 1981). CEQ advises that what constitutes a reasonable range of alternatives “depends on the nature of the proposal and the facts in each case.” 46 Fed. Reg. at 18027. With such elliptical guidance from CEQ, it is a simple enough matter for

a litigant to identify an unexamined alternative and allege that its omission was unlawful or belabor an alternative that was considered and allege that its consideration was inadequate. Absent regulatory guidance from CEQ, the mere allegation of such deficiencies is sufficient to avoid a motion to dismiss. When legal challenges are based in ideology – as many are – the generalized uncertainty that plagues the NEPA process facilitates the elevation of differences of philosophy into potential violations of law.⁸

- CEQ regulation requires not only that the proposed federal action be subject to environmental analysis, but also that connected (meaning “closely related”) actions, cumulative actions and similar actions be considered in an EIS (and by extension in an EA in order to ensure that a FONSI is based on a consideration “of all the relevant factors” in order to determine whether an EIS is necessary). § 1508.25. Are the terms “connected,” “similar,” and “related” synonyms or does each term have different content? The conventional test applied in determining which “closely related,” “cumulative,” or “similar” actions must be considered is the independent utility test, but it is not clear that “independent utility” exhausts these vague concepts of section 1508.25 and, in any event, the independent utility test may have been broadened in Thomas v. R. Max Peterson, 753 F.2d 754 (9th Cir. 1985). Moreover, the term “cumulative action” is defined in section 1508.25(a)(2) as an action which, when viewed with other proposed actions, “have cumulatively significant impacts.” By employing a concept devoid of meaning (“significant impact”), the definition of “cumulative action” is notably unhelpful in providing guidance. Even when CEQ has focused in on cumulative analysis, it has failed to provide guidance. In January 1997, CEQ published a lengthy study entitled “Considering Cumulative Impacts Under the National Environmental Policy Act.” Its contents included introduction to cumulative effects analysis, scoping for cumulative effects, describing the affected environment, determining the environmental consequences of cumulative effects, and methods, techniques and tools for analyzing cumulative effects. Nowhere does the study advise when cumulative effects analysis is necessary.
- The EA is a function of judicial review. NEPA does not require the preparation of an EA. Indeed, the 1971 CEQ Guidelines issued by Judge Train contain no reference to an environmental assessment. 36 Fed. Reg. 7724 (April 23, 1971). The statute notwithstanding, a 1993 CEQ survey estimated that about 50,000 EAs were being prepared annually. 1997 Effectiveness Study, 19. Instead of a statutory

⁸ Much public comment in NEPA analysis and litigation involves apocalyptic claims. Most predictions are dire and all indicators are down. Granted that the forms of popular government make necessary the use of words to influence political action, words do not take the place of realities and are themselves often debauched, with “propaganda” the inevitable consequence. The latest NRDC membership solicitation declares that “NRDC must proceed with our campaign for a sustainable energy future that reduces America’s dependence on oil, even as we work to stop Congress and the White House from handing over Greater Yellowstone and other natural treasures to the oil giants for exploitation.”

requirement, the EA is a judicial review requirement, an early NEPA case having held that GSA was required to “affirmatively develop a reviewable environmental record.” Hanly v. Mitchell, 460 F.2d 640, 647 (2d Cir.), cert. denied, 409 U.S. 990 (1972).⁹

- Categorical exclusions were intended originally to function as a structural procedure for avoiding NEPA documentation of no practical value. Under the heading “Categorical Exclusions,” CEQ in 1983 noted that agencies were requiring excessive environmental documentation for CATEXed projects and “strongly discourage[d] procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded.” 48 Fed. Reg. 34263(1983). Referring to CATEX paperwork the size of EAs, the 1997 Effectiveness Study (29) stated: “Even when an agency determines it wants an administrative record, there is rarely a need for a CATEX to be longer than one page in length.” More enamored of resource protection than resource management, the Fish and Wildlife Service in 1997 narrowed its “Resource Management” CATEXs, 516 DM 6, Appendix 1, and later the Department set out to broaden USDI-wide EXCEPTIONS in a proposal entitled “National Environmental Policy Act Revised Implementing Procedures.” 65 Fed. Reg. 52211 (August 28, 2000). While CEQ regulation (§ 1508.4) calls on agencies “to provide for exceptional circumstances in which a normally excluded action may have a significant environmental effect,” the Interior proposal would have established broad, undifferentiated classes of exceptions featuring per se rules unrelated to intensity of impact with the result that Fish and Wildlife Service CATEXs, already narrow, would be narrowed further by broadened EXCEPTIONS. Fortunately, the proposal was never made final.

The foregoing are some of the NEPA processes that have evolved that “have often led to delay, confusion, and litigation,” to quote Chairwoman McGinty. CEQ no doubt is aware of others. According to CEQ, “NEPA is about making choices, not endlessly collecting raw data.” Effectiveness Study, 28. We find this CEQ censure of federal agencies richly ironic. It must be evident that the protracted uncertainty and lack of predictability surrounding NEPA compliance has forced agencies into a mode of “endlessly collecting raw data,” as CEQ puts it so caustically. And this condition stems from the fact that CEQ has established a sealed system of universal NEPA coverage while choosing to provide the smallest degree of substantive regulatory guidance on the concepts that anchor the system. It is the system devised by CEQ that has facilitated uncertainty and litigation.

We realize that the lead agency is responsible for determining what issues are significant and what constitutes a reasonable range of alternatives, and we are also aware that

⁹ “A satisfactory explanation of agency action is essential for adequate judicial review, because the focus of judicial review is not on the wisdom of the agency’s decision, but on whether the process employed by the agency to reach its decision took into consideration all the relevant factors.” Asarco, Inc. v. EPA, 616 F.2d 1153, 1159 (9th Cir. 1980).

NEPA questions are fact specific and context sensitive. Nevertheless, because the congressional declaration of policy expressed in NEPA “is as broad as the mind can conceive,” First National Bank of Chicago v. Richardson, 484 F.2d at 1377, it is incumbent on CEQ to establish at least some principled content and not merely parrot the words of the statute. Otherwise, there is no single right answer to fundamental, threshold questions whose answers can go either way, the only problem being that, when their jurisdiction is invoked properly, judges are required to decide, as a matter of law, that the answer goes one particular way. That condition is grist for the litigation mill, and agencies have little choice but “the endless collection of raw data” as a consequence of CEQ abdication.

When Congress legislates, it anticipates the reduction of vague commands into rules. Indeed, were it not vague, much important legislation could never command majorities in Congress. As varied as are the federal actions that affect the environment, we can not accept that NEPA defies some substantive clarification. The system established by CEQ casts judges in the role of finders of fact instead of determiners of law, thereby destroying predictability and facilitating arbitrariness. Uncertainty is incompatible with the Rule of Law. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

The trick, as Justice Scalia observes, is to carry the general principle as far as it can go in substantial furtherance of congressional policy. *Id.*, 1183. If, because of uncertainty surrounding NEPA implementation, agencies find it necessary to buy protection and if, as a consequence, “millions of dollars, years of time, and tons of paper have been spent on documents that have little effect on decisionmaking,” Effectiveness Study, 7, logic suggests that CEQ clear away some brush in order to reduce the uncertainty that plagues NEPA implementation. And by this we mean authoritative rules, not guidance memoranda which have proved to be ineffective.

CEQ should take the lead in laying out boundaries of threshold issues that badly need clarification. After thirty years, “significant impact” must have some content, if only to say what it is not. As to “range of alternatives,” can that principle be carried no further by CEQ than to advise that it depends on “the facts in each case”? When is cumulative analysis required? Can “connected,” “similar,” and “related” be better defined in the NEPA context and should the doctrine of “independent utility” be codified? Why should a federal or state agency become a cooperating agency if its programs are subject to being enjoined because it became “intimately involved” in environmental analysis of another agency’s proposed action? If NEPA is being misapplied by application to low- or no-impact actions, why should CEQ not take regulatory action to revamp the categorical exclusion procedure so that it effectively fulfills its original purpose (of avoiding NEPA application to low- or no-impact actions)? Of what value is agency experience with recurring projects or is reanalysis always necessary? In sum, what is needed from CEQ is not a neutral stance, but guidance in the form of rules having explanatory power.

We now turn to the matters of “efficiency” which concern CEQ. First, with respect to the exploration of “opportunities for utilizing information management technologies to enhance the effectiveness and efficiency of the NEPA process,” we direct your attention to the comments of the Association’s NEPA in Federal Aid Work Group attached to this letter.

Second, concerning intergovernmental collaboration, we offer a case study relating to cooperating agency status. The case is Fund for Animals v. Jamie Clark, 27 F. Supp.2d 8 (D.D.C.). Without management, the bison herd at Grand Teton National Park has increased its numbers from about 25 in the early 1980s to approximately 435 in 1998, and the size of the herd grows at a rate of about 16 percent annually. Now a free-ranging herd in the Jackson Valley, the bison in 1985 discovered the elk feeding program at the nearby National Elk Refuge and now annually range onto the Elk Refuge when natural forage is exhausted in winter. The bison have also begun to range onto the nearby Bridger-Teton National Forest. Three jurisdictions are involved: the Park Service on park land, the Fish and Wildlife Service on the refuge, and the Wyoming Department of Fish and Game which possesses primary authority to regulate hunting on the Bridger-Teton.

In the early 1990s, NPS and FWS, as lead agencies, began preparation of a Long Term Bison Management Plan and Environmental Assessment. WDF&G and the Forest Service were invited to participate as cooperating agencies, and they accepted the invitation. The Long Term Plan eventually produced called for public hunting of bison on the Elk Refuge with hunters licensed by the State and hunting on the Bridger-Teton to reduce the size of the bison herd and maintain it well below the then-existing level. An animal protection organization sued to enjoin public hunting, and the district court subsequently did so, its injunction extending not only to the refuge, but also to the Bridger-Teton where hunting is subject to state jurisdiction. In one of the less thoughtful NEPA rulings of 1998, the district court (Urbina, J.) directed that the Forest Service close the Bridger-Teton to bison hunting -- not because prior approval of any federal agency is necessary for the state to license the hunting of bison on the forest -- but because the state had become "intimately involved in the discussion and planning of the hunt" and thus "cannot now claim to have no responsibility under NEPA." 27 F. Supp.2d at 12.

Of course, the whole point of being a cooperating agency is to become "intimately involved" in NEPA planning, but the district court invoked cooperating agency status as a basis to enjoin the state cooperator. On the strength of the district court's ruling, the Association has cautioned state government members to participate as cooperating agencies in NEPA analysis only for the most compelling of reasons.

Third, concerning programmatic analysis and tiering, the Federal Register notice suggests it may be possible "to reduce or eliminate redundant and duplicative analyses through the use of programmatic and tiered analyses . . ." It would be interesting to know whether there is on record any programmatic analysis which concluded that individual agency actions, environmentally benign in isolation, are environmentally malignant when considered in broader context. In any event, given the inherent difference between a programmatic analysis of broad issues and broad alternatives ("take a 'big picture' or ecosystem view") and the particularity of a site specific analysis, the prospect of reduction or elimination of redundant and duplicative analyses is not promising unless CEQ chooses some ordination of the matter by rule.

Twenty years ago CEQ was made aware of the view among respondents that “the second level EIS necessary for tiering is likely to repeat most of the information contained in the original EIS and force a reanalysis of the same issues.” CEQ Synopsis of Comments of Respondents to Federal Register Notice of August 14, 1981, 4. Once again, this view originated in the concern that a “tiered EIS” might be judged inadequate by the courts. *Ibid.* A forced reanalysis of the same issues may be redundant and it may be duplicative, but it may well be essential agency strategy so long as CEQ fails to provide regulatory guidance. For litigants motivated by ideology, it is likely that a study of tomatoes in my neighbor’s back yard may not be tiered to the findings of a prior study of the same variety in my back yard because of different street addresses.

Fourth, concerning the concept of adaptive management in NEPA compliance, the 1997 Effectiveness Study pointed out that a major difficulty with the traditional environmental impact analysis process is that it is a “one-time event.” That is, “results from intensive research, modeling, and other computations or expert opinions are analyzed, the analysis of potential environmental impacts is prepared, mitigation measures are identified, and a document is released for public review.” Effectiveness Study, 32. Unfortunately, CEQ lamented, “most often the process ends there,” with adequacy of environmental protection depending solely on the accuracy of the predicted impacts and the expected mitigation results. *Ibid.* According to CEQ, adaptive management may be the answer to this conundrum:

Where resources are not likely to be damaged permanently, where a project may be modified once begun, and where there is an opportunity to repair past environmental damage, an adaptive environmental management approach may be the best means of attaining both NEPA’s goals and an agency’s mission.¹⁰

According to CEQ, “[B]y incorporating adaptive management into their NEPA analyses, agencies can move beyond simple compliance and better target environmental improvement.” Effectiveness Study, 33. But the hard truth is that NEPA is a procedural statute, not a substantive statute. As Justice Stevens made painfully clear, to our regret, for a unanimous Court in the Early Winters case:

In this case, for example, it would not have violated NEPA if the Forest Service, after complying with the procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd.

¹⁰ Effectiveness Study, at 33. This, the only reference in the Effectiveness Study to “an agency’s mission,” is to be found in a section proposing an expansion of NEPA applicability.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989). If CEQ wishes to employ adaptive management to shade a procedural statute into a substantive statute, it would be well to seek amendment by Congress.

Fifth, categorical exclusions. As we believe, uncertainty surrounding fundamental concepts that anchor the NEPA system has broadly impaired agency compliance, including categorical exclusions. In our experience, owing to uncertainty Fish and Wildlife Service CATEXs overapply NEPA through narrow definitions of categories of action relating to management of fish and wildlife, especially habitat management, which experience demonstrates is essential for healthy wildlife populations of both game and non-game species.¹¹ At the same time, the previous administration sought to establish as Department-wide EXCEPTIONS broad, undifferentiated classes featuring zero tolerance, per se rules unrelated to intensity of impact even though CEQ regulation requires consideration of “intensity,” which in turn refers to severity of impact. § 1508.27(b). The notion of “exceptional circumstances” in which a normally excluded action may have a significant environmental effect, § 1508.4, is at odds with EXCEPTIONS which are per se rules unrelated to intensity of impact, i.e., unrelated to “the facts in each case.”

Neither should NEPA be enlisted in enforcement of federal policy unrelated to the environment. One of the department-wide EXCEPTIONS proposed by USDI in August 2000, proposed new EXCEPTION 2.13, would have required environmental documents for [all] actions which may “Restrict access to and ceremonial use of Indian sacred sites by Indian religious practitioners or adversely affect the physical integrity of such sacred sites (EO 13007).” 65 Fed. Reg. 52211 (August 28, 2000). We have nothing against sacred sites, but doubt whether the preservation of religious practices is a proper object of NEPA. In like manner, EXCEPTIONS should not be employed to extend Davis-Bacon wage rates.

We appreciate the opportunity to submit these comments. Twenty years ago a wise judge warned of the danger of overburdening NEPA by spreading its mandate too widely: “[W]e cannot permit NEPA to be bloated, and indeed enfeebled, by pushing the logic of Section 102(2)(C) to ridiculous extremes.” Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1246 (DC Cir. 1980)(opinion of McGowan, J.). The system is approaching that point, and whether we can endure the necessary remedies remains to be seen.

Sincerely,



R. Max Peterson, Executive Vice President
International Association of
Fish and Wildlife Agencies

¹¹ An example of Le Chatelier’s Principle that systems tend to oppose their own proper functions. Gall, J., *Systemantics* 23, Quadrangle/New York Times Book Company, Inc. 1977.

CQ500

September 5, 2002

CA506

Comments of the IAFWA's NEPA in Federal Aid Work Group in response to the CEQ - Notice and Request for Comments – FR: July 9, 2002 (Volume 67, Number 131)

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.

00506

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.

09506

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.