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Subject: NEPA Task Force Notice and Request for Comments

09/23/02 01:25 PM

Dear NEPA Task Force:

Attached is a comment letter from the National Association of Home Builders (NAHB) on the National Environmental Policy Act Task Force Notice and Request for Comments. This document from Mr. J. Michael Luzier, Senior Staff Vice President for Regulatory Affairs, at NAHB, is being sent to you by electronic mail only. Please feel free to contact me if you have any questions or require additional information regarding this transmittal.

Charles E. Brown, Ph.D.

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J. MICHAEL LUZIER
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Advocacy Group

September 23, 2002

BY ELECTRONIC MAIL

NEPA Task Force
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Re: National Environmental Policy Act Task Force Notice and Request for Comments

Dear NEPA Task Force:

On behalf of the more than 205,000 members of the National Association of Home Builders (NAHB), I am pleased to submit these comments on the National Environmental Policy Act Task Force (NEPA Task Force) notice and request for comments that was published in the *Federal Register* on Tuesday, July 9, 2002. NAHB is a federation of more than 800 state and local home builder associations nationwide. Our members include individuals and firms engaged in land development, single and multifamily construction, multifamily ownership, building material trades, and commercial and industrial projects. Over 80 percent of our members are classified as "small businesses", and our members collectively employ over eight million people nationwide.

The National Environmental Policy Act (NEPA) most often affects our larger volume builders, particularly those constructing master planned communities and large multifamily developments. These entities are also subject to the broad array of state and local land use planning requirements and state NEPA-type laws that often impose overlapping and duplicative regulatory mandates on them. The cost of NEPA compliance in terms of preparation of documents and project delays can be severe. In addition, the residential construction industry can be substantially affected by NEPA in terms of road and highway construction, wetlands permitting, endangered species and critical habitat conservation, natural resources management and protection (including wildlife and fisheries). In sum, the NEPA process can impose significant regulatory burdens on our industry, and we are keenly interested in ways the NEPA Task Force can help streamline the process, reduce regulatory burdens, and serve as a model to both the federal agencies and states that are subject to the law's requirements.

We are encouraged by the preliminary steps the NEPA Task Force has taken in issuing its 1997 report on the status of NEPA, and we hope this current public comment exercise will lead to genuine reforms to the NEPA process that will help alleviate the regulatory burdens and project delays that have often been caused by the process. We also hope the NEPA Task Force will consider important legal and procedural reforms that protect developers from ongoing legal challenges intended only to harass and delay development projects. It is essential that the public has confidence that the process will lead to sound decision making and environmental protection, but also to finality of decisions made through the process. In response to the NEPA Task Force's request, NAHB is pleased to offer the following comments on the issues raised in the *Federal Register* notice.

Section A - Technology, Information Management, and Information Security.

A.1. Where do you find data and background studies to either prepare NEPA analyses or to provide input or to review and prepare comments on NEPA analyses?

NAHB has substantial experience in working with a host of environmental and land use regulations, and our members have participated in NEPA processes across the country. In addition, we have reviewed numerous NEPA documents and worked with a host of environmental databases and information management systems. A large amount of published data and information needed to prepare NEPA documents is available in state and federal governmental agency databases, as well as, libraries at universities. For example, the University of Oregon library has developed a resource, "Local Area Data for Oregon", that is primarily a bibliography of sources of information about environmental and socioeconomic topics relevant to the NEPA process. Also, one of the sources of information that is available is a guide to environmental impact statements (EISs), which includes a listing of all EISs available in the university's library collection, and links to other EIS databases. In the context of water, wetlands, and endangered species issues, which are of great concern to the residential construction industry, some of the primary agency sources include the U.S. Geological Survey, U.S. Fish and Wildlife Service, U.S. Forest Service, U.S. Environmental Protection Agency, and others. In addition, the Task Force should consider relevant private sector resources that include considerable information that may be available. For example, NAHB is the repository of large amounts of information concerning housing, economic forecasts, and other information that may be useful in assessing the economic impacts of federal activities. The Task Force should consider ways to provide additional information on how to identify and access these information resources to improve the quality of information being used under NEPA. At a minimum, regardless of where the data and background studies come from, they must meet the new federal Information Quality Guidelines, discussed in Comment A.2, below. All data and information should also be fully referenced and available for public viewing and scrutiny.

A.2. What are the barriers or challenges faced in using information technologies in the NEPA process? What factors should be considered in assessing and validating the quality of the information?

The NEPA Task Force should consider how the NEPA process will be affected by the new **Federal Information Quality Guidelines** currently being implemented by all federal agencies. These new information quality standards stem from Section 515 of the Consolidated Appropriations Act for FY 2001 (P.L. 106-554), which required the Office of Management and Budget (OMB) to issue government-wide guidelines for ensuring and maximizing the quality of information (including statistical information) disseminated by federal agencies. This legislation was intended to implement the information dissemination requirements of the Paperwork Reduction Act, 44 U.S.C. 3504(d)(1). OMB issued its final Information Quality Guidelines on February 22, 2002. Each federal agency is now in the process of developing their own implementing guidelines based on OMB's model. Each agency's guidelines must include "administrative mechanisms" that allow affected persons to seek and obtain correction of information that does not comply with the new federal information quality standard.

The guidelines establish quality standards for all information disseminated by federal agencies after October 1, 2002, regardless of when that information was first disseminated. The guidelines define four statutory terms for information quality: quality, utility, objectivity, and integrity. Agencies must implement "pre-dissemination" review processes for all information, and must also include "administrative mechanisms" that allow affected persons to seek and obtain the correction of information that does not comply with the OMB and agency standards.

The agencies guidelines must also provide additional "transparency" and "reproducibility" requirements for "influential" scientific, financial, or statistical information. "Influential" information is information that "will have or does have a clear and substantial impact on important public policies or important private sector decisions." Also, for risk assessments concerning human health, the environment, or safety, each agency must either "adopt or adapt" the more stringent information quality standards contained in the Safe Drinking Water Act of 1996 (SDWA). Information used and disseminated as part of the NEPA process will be covered by these new guidelines.

The NEPA Task Force should carefully consider how the new federal Information Quality Guidelines will affect the NEPA process, and how the new guidelines will apply to all data and reports that federal agencies both "disseminate" to the public and "use" as the basis for substantive decisions.

A.7 What factors should be considered in balancing public involvement and information security? As discussed in Comment A.2, above, the new federal Information Quality Guidelines specifically include new standards for the "integrity" of information being maintained and disseminated by federal agencies. These standards are now binding on all federal agencies through OMB's model guidelines, and should be incorporated by the NEPA Task Force in any subsequent guidance it issues. "Integrity"

is defined in the OMB model guidelines as referring to the "security" of information. Essentially, the new guidelines require that information be protected from unauthorized access or revision to ensure that it is not compromised through corruption or falsification. These new information quality guidelines apply to all information "disseminated" to the public as well as information "used" by the agencies as the basis for substantive decisions.

There tend to be two basic types of activities subject to NEPA: specific projects and programmatic actions. NAHB submits that there may be different considerations for each of these NEPA actions. For project-specific actions, we believe that some information is propriety and must remain that way. This information and subsequent information for security considerations includes business plans, pro forma, budgets, and other financial information, which does not belong in the public domain. In considering the programmatic impacts of federal actions, we believe that all information used to support the NEPA analysis should be fully available for public review and scrutiny.

Section B – Federal and Inter-governmental Collaboration.

General Comment on Reforms Related to Intergovernmental Collaboration and "Right-Sizing" the Scope of NEPA Analysis. Currently, the NEPA requirement to analyze federal permits needed for development, such as Section 404 permits under the Clean Water Act or Section 10(a) permits under the Endangered Species Act (ESA), has the effect of "federalizing" land use decisions on local, private development projects. This federalization of local land use decisions occurs because the requirements of NEPA to analyze the environmental effect of projects often are interpreted and either allow or require (depending on your perspective) a federal agency like the U.S Army Corps of Engineers to scope its NEPA document to cover the environmental effects of the entire development project, not just the environmental effect of the issuance of a permit for impacts to certain federally regulated resources, such as federal wetlands or listed species.

NAHB believes this interpretation is incorrect and urges the NEPA Task Force to clarify that the extent of any NEPA process is limited to only those areas over which federal jurisdiction is properly asserted. In this regard, a direct analogy can be made to the U.S. Army Corps of Engineers' scope of review under NEPA for Section 404 permits.

The Council on Environmental Quality (CEQ) has itself upheld the Corps' determination that the scope of Section 404 NEPA review is properly restricted to impacts of the specific activity requiring a Corps permit, and those portions of the project over which the Corps has sufficient control and responsibility. As CEQ found in its "Findings and Recommendations From U.S. Environmental Protection Agency Concerning Proposed Amendments to U.S. Army Corps of Engineers Procedures for Implementing the National Environmental Policy Act," dated June 8, 1987, the Corps' interpretation of its NEPA jurisdiction "is generally within reasonable implementing agency discretion...and policy and management considerations favor" the Corps' view. There is no reason why the scope of any NEPA review should differ from the scope of the Corps' NEPA review

for purposes of determining whether a “small federal handle” warrants federal review over the area of an entire project, or more broadly to areas that lie far offsite and are well beyond the control of the applicant or the Corps.¹

Interpretive case law is also instructive. *Sylvester v. United States Army Corps of Eng'rs*, 844 F.2d 394 (9th Cir. 1989), is on point. The Corps granted a permit to fill 11 acres of wetlands as part of a golf course, which was part of a larger planned resort. (*Id.* at 396.) In assessing the proper scope of environmental impacts under Section 404 and NEPA, the Corps analyzed the impacts of the golf course, *not the entire resort*. The court upheld the Corps' decision, reasoning it did “not understand how [the developer's] desire to place the course in a meadow that contains wetlands can federalize the entire resort complex.” (*Id.* at 401.) *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980), is also persuasive. There, the Corps properly limited the scope of a NEPA analysis to the 1.25 mile wetland segment within its jurisdiction, not an entire 67-mile transmission line. The court wrote that NEPA “cannot be considered a grant of legal control over the entire project,” that the “Corps' jurisdiction ... extends only to areas in and affecting navigable waters,” and thus that the “Corps did not have sufficient control and responsibility to require it to study the entire project.” (*Id.* at 272-73.) *See also Save the Bay, Inc. v. United States Army Corps of Eng'rs*, 610 F.2d 322, 327 (5th Cir.) (NEPA did not require Corps to consider entire chemical plant project when issuing a permit allowing only construction of a wastewater pipe from the plant), *cert. denied*, 449 U.S. 900 (1980).

Under these cases, required Corps' approvals did not federalize an entire project for NEPA purposes. The same result should hold true the NEPA process as applied to other statutes, as well. The Tenth Circuit has declared that the ESA does not enlarge the Corps' jurisdiction under the Clean Water Act. *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985). *See also Vieux Carre Property Owners v. Brown*, 875 F.2d 453, 460 (5th Cir. 1989) (in assessing scope of federal review under National Historic Preservation Act, ruling that “federal environmental protection statutes do not enlarge the Corps' jurisdiction”); *NRDC v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) (NEPA “does not work a broadening of the agency's substantive powers.... Whatever action the Agency chooses to take must, of course, be within its province in the first instance”); *Gage v. Atomic Energy Comm'n*, 479 F.2d 1214, 1220 n.19 (“NEPA does not mandate action which goes beyond the agency's organic jurisdiction....”)

CEQ has already evaluated the pertinent scope of review issues in light of many of the cases discussed above and “the ‘rule of reason’ expressed in those cases in its 1987 Findings. NEPA, the broadest federal statute in terms of requiring agencies to consider

¹The Corps' regulations state that NEPA review can be extended to an entire project but only “if sufficient federal control and responsibility over the entire project is determined to exist; that is, if the regulated activities, and those involving regulation, funding, etc, by other federal agencies, comprise a *substantial portion of the overall project*.” 30 C.F.R. Part 325, Appendix B, § 7(b)(C)(3) (emphasis supplied). NAHB submits that there is no reason why this same analysis should not apply to the scope of the Corps' review in the context of ESA Section 7 consultation as well.

all of the possible environmental consequences of its action, works no substantive expansion of any agency's jurisdiction. Any other interpretation would provide no limiting principle to restrain the injection of federal jurisdiction into every square inch of any private project that happens to include a federal nexus, such as a small pocket of wetlands, endangered species, or require federal funding; the agency would just consider *everything*.

Limiting the scope of review is not only consistent with CEQ policy and legal findings, it can serve to eliminate the federalization of private development projects and allow the local agencies to rightfully make decisions about land use, economic growth, and environmental protection.

This approach also would eliminate the need for federal agencies to analyze impacts outside of their expertise, such as impacts of the development project that are primarily of local concern, including traffic, fire and safety hazards, hazardous materials, and induction of job and population growth. While federal agencies are, as above, required to limit their NEPA reviews to the primary impacts of permit issuance, they are constantly under attack by environmentalists to broaden the scope of review exactly for the purpose of federalizing local land use determinations. The NEPA Task Force provides an opportunity to minimize this inappropriate use of NEPA and streamline the approval process. NAHB strongly urges the Task Force to do so.

Section C. - Programmatic Analysis and Tiering

C.2 Please provide examples of how programmatic analyses have been used to develop, maintain and strengthen environmental management systems, and examples of how an existing environmental management system can facilitate and strengthen NEPA analyses.

NAHB is concerned that programmatic analysis under NEPA may be used to undermine or supplant formal rulemaking requirements. For example, decisions made under NEPA can be hugely important and can effectively establish land use or other policy for years while effectively bypassing public involvement requirements.

In 1997, the U.S. Army Corps of Engineers Jacksonville District began a PEIS evaluation of the wetlands permitting program in Southeast Florida. It was hoped that the PEIS would address similar recurring issues that were surrounding the issuance of wetlands permits over the past couple of years and provide an outlet for discussion with the other agencies and the public. The reasons cited for completing the PEIS rather than addressing the issues using one of the other mechanisms available were the lack of local government support, the time it would take to complete a different process, and the difficulty of getting public involvement. Unlike several of the options, which were voluntary, the PEIS requires public involvement. The Corps believed that it could use this requirement to coerce involvement and help to ensure that decisions would be made after the "full input and participation of all interested parties." Unfortunately, this "public involvement" requirement is not as formal and rigorous as the notice and

comment process required by a rulemaking. It is these types of outcomes that raise our concern.

NAHB also strongly opposes using NEPA to federalize land use decisions that we believe should be left at the state and local level. These same concerns are raised in other programs, such as forestry management, where NEPA can be used to bypass rulemaking requirements and assert federal control over local decision making. For example, in "Final Environmental Impact Statement for Tusayan Growth – Kaibab National Forest (KNF)"¹, there seems to be significant federal influence exerted upon the development of private lands, ownership, community transportation, housing, and other community planning activities because these lands abut the KNF. The summary statements regarding the desired planning outcomes from the major federal action in this area are discussed in terms of several actions affecting the ownership and necessary procurement of nearby private lands. The acquisition of any private lands in light of the NEPA process applied to the Tusayan Growth Area involved a number of statutory and regulatory authorities that relate federal land use policy, land acquisition, and resource management, including the: (1) National Forest Management Act which regulates the process of preparing and implementing land and resource management plans for each forest; (2) Organic Act of 1916 which established resource management goals to be met by National Park Service and established some of the management tools to be used; (3) Federal Land Policy and Management Act with the authority to conduct land exchanges; (4) Federal Land Exchange Facilitation Act which recognizes land exchanges as "an important tool to consolidate land ownership for purposes of more efficient management"; and, (5) Townsite Act of 1906 which allows a government entity to purchase federal land at not less than fair market value and only for special public use. Because these statutes may be employed to obtain private land in any affected community, such as the Tusayan Growth Area, NAHB recommends that when these authorities are applied to private land acquisition in relation to the NEPA process, that the ensuing review process and statutory applications are consistent and fair to all affected local communities, and does not become a "federalization" process controlling major local land use policy and community development decisions.

In order to counter the potential for "federalization" of land use decisions, NAHB also recommends that the NEPA Task Force consider reforms that would excuse federal agencies, such as the U.S. Army Corps of Engineers, from preparing NEPA documentation where an equally stringent state process, such as the California Environmental Quality Act (CEQA), is already being completed. In other words, agencies should be allowed to rely on documentation from states with equally stringent processes, and this should be considered the functional equivalent of NEPA.

The NEPA Task Force should also ensure that additional guidance is prepared for federal agencies that explains how to complete a programmatic NEPA analysis. For example, while Programmatic Environmental Impact Statements (PEIS) are used extensively by

¹ U.S. Department of Agriculture, 1999, Final Environmental Impact Statement for Tusayan Growth, Coconino County, Arizona, 399 pages and Appendices.

the Forest Service in forest management, few other agencies have utilized this tool. Thus, there are no common methodologies for completing these statements, and those agencies that have not regularly used this tactic have operated by the seat of their pants. Lacking a standard procedure, the public is at a loss for knowing the status or next steps of the process, and their ability to fully participate is thus truncated. It is also not clear how, if at all, a programmatic NEPA analysis would impact a subsequent project. For example, if the Corps of Engineers completed a PEIS for the wetlands permitting program, as a whole, would the PEIS assume that certain mitigation ratios will be met or other activities taken to offset the environmental impacts of all subsequent projects without an independent review? These issues should be tackled by the Task Force to ensure that the process is predictable, practicable, and workable on a project basis, as well as on a programmatic basis. The NEPA Task Force should also evaluate the appropriateness of creating a categorical NEPA exemption for such permits.

Section D. - Adaptive Management/Monitoring and Evaluation Plans

D.2 How can environmental impact analyses be structured to consider adaptive management?

NAHB generally supports the concept of adaptive management because it offers the hope of flexibility and sound decision-making. However, like all flexible approaches, we are concerned that adaptive management can also be used to subject projects to open ended regulatory processes that never achieve finality. In order for real estate developers to invest in projects and risk capital, they must have certainty that at the end of the day there will be predictability and finality in the regulatory process. The NEPA Task Force must ensure that any flexible reforms have clear guidance, concise standards, and finality at the end of the day.

Section E. - Categorical Exclusions

NAHB generally supports the concept of "categorical exclusions" and applauds the NEPA Task Force for considering them. We believe categorical exclusions can help streamline regulatory processes, lead to efficiencies, and reduce compliance costs. Categorical exclusions can also help eliminate barriers caused by permitting delays. We also support agencies sharing information and recommend that standards for determining categorical exclusions be established and disseminated to the public. The NEPA Task Force should establish clear guidance for how agencies should identify and evaluate categorical exclusions. The standards should be clear and consistent across the agencies. The most important thing our members require is clarity and certainty in the regulatory process. We need to know the likely outcome and the path for getting there. NEPA should not be open-ended and/or used to impose undue regulatory burdens on agencies or the private sector.

NAHB also takes this opportunity to make the Task Force aware of a pending US Environmental Protection Agency (EPA) regulation that has the potential to trigger NEPA for General Construction Permits (CGPs) issued under the Phase I NPDES permit

regulation. Currently, "storm water permits issued under the CGP does not trigger such an assessment because the permit does not regulate any dischargers subject to New Source Performance Standards under section 306 of the Clean Water Act, and is thus statutorily exempted from NEPA." (63 FR 7907, February 27, 1998) However, EPA has proposed Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development (67 FR 42644, June 24, 2002), which when finalized has the potential to trigger NEPA for all storm water permits issued under the CGP. NAHB urges the Task Force to discuss the economic ramifications of potentially requiring NEPA for all new construction covered under the CGP (should EPA expand its proposal to redefine "new source" to include all construction projects -- an option subject to a request for comments) and to consider seriously making a recommendation to exempt any such category of "new sources" from NEPA requirements."

Section F. - Additional Areas for Consideration

The NEPA Task Force should also consider the following legal and procedural reforms to the NEPA process:

1. **Statute of Limitations.** NEPA should include a statute of limitations, preferably thirty (30) days, commencing upon issuance of the Record of Decision. This would mirror the California Environmental Quality Act's (CEQA) statute of limitation and would help instill public confidence in the fairness and ultimate finality in the process.
2. **Venue for Lawsuits.** NEPA lawsuits should be allowed to be removed to the District Court where the property at issue is located, rather than requiring that all cases be heard in Washington, D.C. Requiring the project proponents to travel to Washington, D.C. to participate in a legal action concerning their project is a huge burden and puts them at a distinct disadvantage. It makes sense to allow these cases to be removed to the venue where the property is located.
3. **Treat Project Applicants as Indispensable Parties to Any Law Suits.** NEPA should require that any applicant and/or recipient for federal permit or approval that is challenged under NEPA be considered an indispensable party and must be named in any NEPA lawsuit. Current case law is divided on this issue, and therefore NEPA law may not allow intervention by applicants/recipients.
4. **Exhaustion of Administrative Remedies.** For any project approval, permit, or agency decision for which public notice is provided, NEPA should require participation during any public comment period and exhaustion of administrative remedies by the party filing of lawsuit. To exhaust remedies, the litigant should be required to participate in the NEPA process by submitting comments on the proposed action under NEPA, and the litigant should be required to actually raise the issues later sued on during the comment period. In addition, NEPA should expressly mandate that all comments must be received by the end of the comment period. Comments are routinely submitted after the expiration of the comment period, and

while courts are divided, the agency is often required to have considered and addressed the comments anyway.

5. **Plaintiffs Should Pay for Administrative Record.** NEPA should require that plaintiffs pay the cost of preparing the administrative record (either in advance, such as with the California Environmental Quality Act (CEQA), or, if unsuccessful, following trial. This would greatly discourage frivolous lawsuits designed simply to delay or interfere with a project. It would also greatly reduce cost burdens of the agency.
6. **The New Federal Information Quality Guidelines Apply to All Federal Agencies.** Finally, as discussed in Comment A.2, above, the new federal Information Quality Guidelines establish quality standards for all information used and disseminated by federal agencies. The NEPA Task Force should make it clear that all information included in all NEPA documents is subject to the new information quality standards.

Thank you for the opportunity to comment on the NEPA Task Force's notice and request for comments. Please feel free to call either me at (202) 266-8335 or our Regulatory Counsel, Bruce Lundegren, at (202) 266-8305 if you have any questions or require additional information.

Sincerely,

/Signed/

J. Michael Luzier
Senior Staff Vice President for
Regulatory Affairs