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CQ77

August 22, 2002

BY FACSIMILE

NEPA Task Force
P.O. Box 221150
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Re: Comments in Response to Federal Register Notice of July 9, 2002: The NEPA Process and "Creeping Mitigation"

Dear Sirs:

I was pleased to learn that the NEPA Task Force was soliciting public comments as part of its mission to seek ways to improve and modernize the NEPA process. These comments fall under the last of the six categories, "Additional Areas for Consideration." They will discuss what I call "creeping mitigation" in the NEPA process.

"Creeping mitigation" is the phenomenon in which the NEPA process drives agencies to include extensive mitigation measures when they design projects, without regard to how much of this mitigation is necessary and how much might be unnecessary and excessive. This is an unintended consequence of the NEPA process. It leads to overly cautious design of Federally-sponsored projects, thus compromising their economic efficiency.

"Creeping Mitigation" Occurs When an Agency Adopts Substantial Mitigation Measures in a Project as a Means of Avoiding Having to Do an Environmental Impact Statement (EIS).

"Creeping mitigation" occurs because in the NEPA process agencies try to avoid the necessity of performing costly and time-consuming environmental impact statements (EISs). They can do this by mitigation of the project, so that only an environmental assessment (EA) will be required. If a project is on the borderline of needing an EIS, then it is a prime candidate for mitigation. "Creeping mitigation" takes place when the mitigation done for this purpose is disproportionate.

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At a seminar on NEPA in 1996 sponsored by the Environmental Law Institute (ELI),. speakers from the Justice Department and the Council on Environmental Quality (CEQ) explained that in the vast majority of cases, agencies sponsoring development projects satisfy their NEPA responsibilities with relatively short EAs instead of full-scale EISs. The figures cited at that time were that while there were about 500 EISs filed each year throughout the Government, these EAs numbered about 50,000 each year.

An EIS is required whenever the project will have "a significant impact on the human environment," but because EISs are so onerous to prepare, agencies much prefer to do EAs instead. NEPA allows EAs instead of EISs as long as the project will not have a "significant impact."

The problem is that many projects will indeed have a "significant impact" and thus require EISs. To avoid the EIS in these cases, the agency must be willing to mitigate the environmental effects so that the "significant impact" will be eliminated. So in a vast number of cases the agencies include this mitigation as an integral part of the project. This allows the agencies to do an EA, along with a "finding of no significant impact" (FONSI), instead of an EIS. This is called a "mitigated FONSI," since the project has been mitigated for the express purpose of qualifying for a FONSI.

By 1996 mitigated FONSIs had become a widespread means for agencies to circumvent doing an EIS. As the Solicitor of the Interior Department, John Leshy, observed in 1995, agencies "frequently use EAs to flesh out measures to mitigate the environmental effects of a proposal to a level where an EIS is not required."[1]

Moreover, policymakers in the Clinton Administration gave mitigated FONSIs their wholehearted approval, stating two reasons for this support. First, as Kathleen McGinty, Chair of the CEQ, pointed out, they lead to more mitigation, which she called "one of the primary goals of the NEPA environmental impact assessment process."[2] Second, as William M. Cohen, the Justice Department's head NEPA attorney at the time, remarked at the ELI seminar in 1996, mitigated

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1 Application of the National Environmental Policy Act: Hearing Before the Subcomm. on Oversight and Investigations of the Senate Comm. on Energy and Natural Resources, 104th Cong., 1st Sess. 60 (1995) (response of Mr. Leshy to written question 2 submitted by Senator Thomas).

2 Council on Environmental Quality: Hearing Before the Subcomm. on Oversight and Investigations of the Senate Comm. on Energy and Natural Resources, 104th Cong., 1st Sess. 55 (1995) (response of Ms. McGinty to written question 16 submitted by Senator Thomas).

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FONSIs enable agencies to work out their NEPA responsibilities without resorting to lengthy EISs. Mitigated FONSIs, he said with enthusiasm, are "NEPA in action" and having so many of them "is what NEPA is about."

One can conclude, therefore, that mitigated FONSIs have been changing the face of a vast number of projects by imposing extensive mitigation of environmental impacts. This mitigation occurs sporadically from project to project. It proceeds without any overall guidelines or oversight. As a result, while agencies are seeing to it that their projects receive enough mitigation to qualify for a FONSI, there are no guidelines to control how far agencies go in their prospective mitigation. If an agency imposes mitigation that is excessive for the situation, there is no check on the agency's discretion. This is "creeping mitigation."

"Creeping mitigation" thus can have an insidious role in making development projects on Federal lands smaller in scope and less productive. While agencies may consider this a reasonable trade-off in order to avoid a full-scale EIS, the result is that projects are scaled back to the detriment of economic benefit. There is a danger that the mitigation called for under mitigated FONSIs may be excessive and not genuinely needed in order to protect the environment in the case of the specific project.

Agencies' Aversion to Litigation under NEPA Contributes to "Creeping Mitigation"

When agencies pursue mitigation to take advantage of the "no significant impact" loophole to avoid doing EISs, the level of mitigation to qualify for a mitigated FONSI must meet a high standard of legal defensibility. If there is a possibility that the proposed mitigation will not completely eliminate the threat of a "significant impact," then critics of the project will be able to sue and claim that an EIS should be written instead of an EA. This is a common type of lawsuit brought under NEPA.

This means the agency necessarily puts aside its objectivity about how much mitigation is actually required to cover the environmental risks of the specific project. As the agency strives, in Solicitor Leshy's words, to "mitigate...to a level where an EIS is not required," the agency will have an inherent bias in favor of providing more, rather than less, mitigation in order to provide a margin of safety. This can easily lead to mitigation that is disproportionate to the actual conditions of the project in question.

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"Creeping Mitigation" Is an Aberration under NEPA.

It would be fairer, and much more in the spirit of NEPA itself, if the level of mitigation applied to the project was just the amount that the agency concluded was necessary based on an objective analysis of the project itself. Some career NEPA professionals in the Government have already expressed this view. In 1992 CEQ made a survey of how agencies were using EAs and one Federal agency submitted a pointed comment on mitigated FONSIs. Agencies, the commenter said, needed to "clearly focus on the proposed action and its environmental effects" instead of using the mitigated FONSI merely as an attempt to avoid doing an EIS.[3]

Moreover, as far as NEPA's basic function is concerned, "creeping mitigation" is an aberration. The courts have made it clear that the intent of NEPA is not to coerce agencies to adopt mitigation measures. The Supreme Court ruled, in its 1989 Methow Valley decision, that NEPA is a procedural statute that does not govern how the agency decides to carry out a project. In particular, NEPA does not mandate that a project have mitigation. It requires only that mitigation be discussed in the NEPA document.[4]

Project Applicants and the Public Need to Be Able to Scrutinize "Creeping Mitigation"

When an agency works out a mitigated FONSI in a disputed project, it is striking a deal similar to a plea bargain by a defendant in a criminal case. The agency makes a preemptive compromise to make its project less environmentally objectionable in return for having a lighter NEPA compliance burden. To be realistic, as long as EISs will be more burdensome to prepare and more time-consuming than EAs, a mitigated FONSI may frankly be the better choice not only for the agency but also for the private project applicant.

However, because of the impact that mitigated FONSIs can have on the planning of projects, private project applicants and the public at large have a stake in the agency's decision to mitigate in order to have a FONSI. This part of the agency's planning process should be disclosed to the public so that the public can at least be aware of and scrutinize the tradeoff being made.

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[3] Blaug, Use of the Environmental Assessment by Federal Agencies in NEPA Implementation, 15 Environmental Professional 57, 60 (1993).

[4] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351-3 (1989).

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Conclusion

Mitigated FONSIs have helped simplify the NEPA process by permitting wider use of EAs instead of EISs. However, with the practice of mitigated FONSIs has come "creeping mitigation" that risks placing unnecessary restrictions on worthwhile resource development projects. Mitigation measures ordered by agencies should be tailored to what is absolutely required, not pumped up to meet an artificially high standard just to avoid an EIS and to build a defensible position for not having an EIS in case there is litigation. As projects are proposed and run through the NEPA process, agencies need to make clear to the public the pros and cons of mitigated FONSIs. While mitigation of projects is a legitimate, inevitable by-product of EAs and mitigated FONSIs, there is a need to understand and monitor "creeping mitigation" so that it does not distort the NEPA process.

Respectfully submitted,

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June 10, 2002

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RE:

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