



State of Utah

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November 2, 2000

Willie R. Taylor, Director
Office of Environmental Policy and Compliance
1849 C Street, NW
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Washington, DC 20240

SUBJECT: National Environmental Policy Act Revised Implementing Procedures
State Identification Number: UT000911-070

Dear Mr. Taylor:

The Resource Development Coordinating Committee (RDCC), representing the State of Utah, has reviewed this proposal. Comments from State agencies are as follows:

Division of Wildlife Resources

In general, the Division finds some useful improvements contained within the proposed procedures. However, by the substantially increased workload which could have the effect of undermining and suppressing state-led fish and wildlife management activities when NEPA is invoked. These problems could be as prohibitive to ideal environmental restoration, and possibly contrary to the fundamental intent of NEPA (to provide a National environmental charter). More specific commentary will identify precise problems which we foresee, isolated by subheadings.

Defining the Proposal

The proposed rules need clarification in their application to federal aid programs and state projects or proposals. It is essential that in the application of the NEPA review process agencies clearly identify and understand the "proposal" before them. The "proposal" may often be much smaller in scope than some may initially believe. The Council on Environmental Quality (CEQ) identifies a "proposal" as one existing "at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." (40 CFR 1508.23). This definition may be useful when considering a proposed

project that offers meaningful alternatives. For instance, one can meaningfully determine whether land may be established and managed as a wildlife or fisheries project, or, perhaps a recreation area that offers a wide range of uses. The decision and alternatives available will be different when decisions on maintenance of an established project are made.

In many instances, an application for federal aid is for continued habitat or project maintenance activities. The property involved may well have been in existence and established well before the application, and often without the preparation of an environmental document, because the project or property was established prior to the enactment of NEPA. There may be a temptation later in the project management to apply NEPA to the project, not the maintenance activity. DWR suggests that is not appropriate. First, there should not be a retroactive application of the environmental law review to a previously established project. Second, in all likelihood, even though NEPA did not apply to that decision, it routinely has been made with full public input and discussion. State Fish and Wildlife Agencies do not act in a vacuum. Any project is normally established with full knowledge of the citizenry and with knowledge that subsequent long-term management must be applied and be consistent with the objectives and goals of the project. Today, perhaps 50 or more years later, the “proposal” before the federal agency should be continued habitat management. The decision to establish the project should not and cannot be reviewed through a subsequent grant application process. Only the maintenance is to be reviewed. Therefore, the proposed rules should clarify the distinction between applying NEPA to new proposals or projects versus continued and recurring maintenance designed and necessary to achieve the purposes and goals of the property or project involved. Previous property development and establishment decisions of a State should not be revisited through maintenance grant applications.

Along with, and in support of this theme, common law provides that decisions should not be revisited under NEPA unless the action constitutes a substantial change. The integrity of previous decisions must be maintained.

Section 1.4.C. Consideration of Externally Initiated Proposals

The language implies that the U.S. Fish and Wildlife Service (Service) must “encourage” applicants to incorporate environmental considerations into their planning processes as well as provide the U.S. Department of the Interior (Department) with necessary information to meet its own environmental responsibilities. Of course, “encourage” is a vague term. One could ask what are the consequences if environmental considerations are not included into state planning processes, especially if the state has no state NEPA-like law? In addition, what are the consequences of failing to provide the Service or Department information that will allow the federal agency to meet its own responsibilities?

This language ignores the fact that state processes routinely incorporate environmental considerations into their decisions and include consideration of scientific analysis and information in the decision-making. This language should be removed from the proposal as it is an affront to states and implies they must be “encouraged” to consider environmental impacts.

Section 2.3.A (4) Discretionary Authority to Require Environmental Documents

This provision authorizes decision-makers to require an Environmental Assessment (EA) when “extraordinary circumstances” exist, even if the categorical exclusions and exceptions do not require it.

This authority is so vague it merits removal. As an alternative and consistent with the detail in the categorical exclusions and exceptions, the “extraordinary circumstances” which would require the development of an EA should at least be detailed. Otherwise, this provision may be invoked anytime a decision-maker is uncomfortable or arbitrarily believes the development of an environmental document is a good thing to do.

Section 2.3.D Notice of Intent

This provision, hidden in the voluminous provisions, would require that a Notice of Intent (NOI) be published for EAs. The proposal cites 1508.22 as its authority. However, this proposed NOI requirement is inconsistent with the provisions of 40 CFR 1506.6 and 1508.22 (CEQ Regs.). Section 1508.22 requires a NOI only for an Environmental Impact Statement (EIS).

A NOI procedure for EAs would add an additional 90 to 120 days to any decision of the agency and is not required by the rules. If such a change is proposed, it should be proposed as a modification of the CEQ Regs., not the Department’s application of NEPA rules. Therefore, we request that the NOI requirement for EAs be removed.

Chapter 2; Appendix 2. Exceptions

Section 2.1, 2.2, 2.7, 2.8 and 2.9. Use of Modifier “Material”

The current exception regarding effects on public health or safety applies to “significant” effects. The proposal, 2.1, seeks to replace “significant” to “material.” The term “significant” is formally defined in the CEQ regulations and should not be changed or removed from the exceptions.

Proposed exceptions 2.2, 2.7, 2.8, and 2.9 should be modified to require that there be not only

a “significant” adverse effect, but that the exception not apply if an approval to engage in the activity affecting the resource has been approved by the appropriate federal agency. It is seldom that any land disturbance activity will not cause some adverse effect, based on someone’s concern. For instance, a habitat maintenance activity will normally determine the types of plant communities or fauna that will persist. Not all persons will agree with the habitat decision and argue that there will be “adverse” effects.

In addition, the exceptions should not apply to actions that are permitted through appropriate legal processes and should be modified to provide so. This includes actions that may affect unique geographic characteristics as historic or cultural resources, wetlands, floodplains, and threatened and endangered resources. The law, in most cases, provides processes where projects affecting the resources may be authorized with the commitment of appropriate mitigation, habitat conservation, etc. Those permit or approval processes are subject to NEPA and Section 7 of the Endangered Species Act and should not trigger an EA under a grant application process for federal aid.

Proposed 2.14 and 2.15. Noxious Weeds and Invasive Species

Invasive plants and noxious weeds present various problems nationwide. There may be no agreement between the federal government and states of the extent of the problem or even the definition. The Executive Order addressing them does not clearly define them.

For instance, any definition should ensure that planting common agricultural crops for wildlife food plots is not eliminated or requires the preparation of an EA. Also, “non-native” species could arguably include commonly hunted species or species stocked and fished in a state.

The threat of, or contribution to, such an occurrence should not, in and of itself, require the preparation of an EA. The mere conduct of restoration activities, such as prescribed burning, or protection measures for the resource, including firebreak maintenance, can encourage invasive species or noxious weed development. However, property management can address the issue. Also, wildfire occurrence will create problems regarding invasive species. Therefore, various well-intended and routine property management activities may “contribute” to invasive species. If there is a need to address the issue, any exception should only apply if the activity is inconsistent with a state plan or it has not been addressed by the state applicant for the activity involved.

Chapter 8. Categorical Exclusions

The proposal indicates that this chapter is not subject to comment. The categorical exclusions apparently were commented on about three years ago. Due to questions that have arisen during

this present review of NEPA application, the exclusions for the federal aid programs should once more be opened for comment. The increased attention recently given to the categorical exclusion process, and the exclusions themselves, provided the opportunity for this agency to focus on them and develop proposed, and needed, changes.

In summary, the proposed rules should be revised to allow states to continue to utilize federal aid funds without the addition of tasks and procedures that will only serve to provide additional documentation and procedures. The existing procedures and NEPA compliance process is adequate. If there are concerns about assuring compliance with process and law, the record can be adequately developed without increasing the obligations on the states by modifying the application and NEPA compliance process or increasing the number of EAs. The use of categorical exclusions to reduce unnecessary paperwork and review is a sound process. It should continue to be encouraged, rather than tinkered with, as the proposed rules would do. Documentation of compliance is necessary, and perhaps the reviewing federal agency should devote more attention to this area. That documentation, however, should not consist of the development of an EA which, under the current rules, would not be required.

Governor's Office of Planning and Budget

In the proposed rule, on 52212, the language in #1.2D seems overly-broad:

"D. To consider and give important weight to environmental factors, along with other essential considerations, in developing proposals and making decisions in order to achieve a proper balance between the development and utilization of natural, cultural, and human resources and the protection and enhancement of environmental quality;"

This appears to give the agency license of unusual latitude. There don't appear to be many limits here, and the full scope of authority is unclear. Criteria should be established to allow for a more quantitative evaluation.

In section 1.4(A)(1), the language states:

"In the management of the natural, cultural, and human resources under its jurisdiction, the Department must consider and balance a wide range of economic, environmental, and social objectives at the local, regional, national, and international levels, not all of which are quantifiable in comparable terms."

The phrase "...not all of which are quantifiable in comparable terms..." lacks enough specificity to render a useful meaning. Clearly, unless a regulatory position is "quantifiable in comparable terms", that is -able to be defined and articulated so as to set a standard, a regulated entity can

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too easily mis-interpret it. Concern exists that the above phrase may grant the Department of Interior some ability to promulgate a later decision under it's guise.

In that same context, the next sentence of the paragraph states:

"In considering and balancing these objectives, Departmental plans, proposals, and decisions often require recognition of complements and resolutions of conflicts among interrelated uses of these natural, cultural, and human resources within technological, budgetary, and legal constraints."

Note that the word "complement", in its singular version, denotes meanings like "finishing" or "completing". But that word doesn't have a "plural" use, according to a current un-abridged dictionary. Even without the phrase "of complements and", the reader is unsure. This usage is too vague.

In Section-2.1, paragraph (C) authorizes Department Bureaus to:

" ... revise or amend program regulations, requirements, or directives to insure that private or non-Federal applicants are informed of any environmental information required ...".

This seems overly "open-ended". Are "program regulations, requirements, or directives" only those promulgated internally within the department, or could they include others promulgated through the Federal Register and codified in the C.F.R.? Would bureaus have discretion to insure that some applicants are "more" informed than other applicants?

The Committee appreciates the opportunity to review this proposal. Please direct any other written questions regarding this correspondence to the Utah State Clearinghouse at the above address or call Carolyn Wright at (801) 538-1535 or John Harja at (801) 538-1559.

Sincerely,

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