

PUBLIC INVOLVEMENT NEPA REQUIREMENTS AND GUIDANCE INFORMATION PAPER

It is important to consider the CEQ public involvements guidance with the interruption of several court rulings in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts and agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Lastly, public involvement is not optional and just informing the public that an action will take place does not involvement the public.

1. NEPA THE LAW -

Sec. 102 [42 USC § 4332]

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, **shall be made available** to the President, the Council on Environmental Quality **and to the public** as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

2. 40 CFR 1500 REGULATIONS -

§ 1500.1 Purpose.

(b) NEPA procedures **must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken**. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

§ 1500.2 Policy.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

§ 1501.8 Time limits.

(c) State or local agencies or **members of the public may request** a Federal Agency to set time

limits.

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and **shall inform decisionmakers and the public of the reasonable alternatives** which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data.

§ 1502.8 Writing.

Environmental impact statements **shall be written** in plain language and may use appropriate graphics so that **decisionmakers and the public can readily understand them**. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk **without impeding agency and public review** of the action. The incorporated material shall be cited in the statement and its content briefly described.

§ 1505.1 Agency decisionmaking procedures.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decision-maker, **agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives**.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

- (a) Include appropriate conditions in grants, permits or other approvals.
- (b) Condition funding of actions on mitigation.
- (c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.
- (d) Upon request, make available to the public the results of relevant monitoring.**

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to Executive Order 12372 the Intergovernmental Review Process.

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

3. CEQ 40 QUESTIONS -

4a. **Agency's Preferred Alternative.** What is the "agency's preferred alternative"?

A. The "agency's preferred alternative" is the alternative which the agency believes would fulfill its

statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The concept of the "agency's preferred alternative" is different from the "environmentally preferable alternative," although in some cases one alternative may be both. See Question 6 below. **It is identified so that agencies and the public can understand the lead agency's orientation.**

6a. **Environmentally Preferable Alternative.** What is the meaning of the term "environmentally preferable alternative" as used in the regulations with reference to Records of Decision? How is the term "environment" used in the phrase?

The Council recognizes that the identification of the environmentally preferable alternative may involve difficult judgments, particularly when one environmental value must be balanced against another. **The public and other agencies reviewing a Draft EIS can assist the lead agency to develop and determine environmentally preferable alternatives by providing their views in comments on the Draft EIS.** Through the identification of the environmentally preferable alternative, the decisionmaker is clearly faced with a choice between that alternative and others, and must consider whether the decision accords with the Congressionally declared policies of the Act.

6b. **Who recommends or determines** what is environmentally preferable?

A. The agency EIS staff is encouraged to make recommendations of the environmentally preferable alternative(s) during EIS preparation. In any event the lead agency official responsible for the EIS is encouraged to identify the environmentally preferable alternative(s) in the EIS. In all cases, commentors from other agencies **and the public** are also encouraged to address this question. The agency must identify the environmentally preferable alternative in the ROD.

12a. **Effective Date and Enforceability of the Regulations.** What actions are subject to the Council's new regulations, and what actions are grandfathered under the old guidelines?

A. The effective date of the Council's regulations was July 30, 1979 (except for certain HUD programs under the Housing and Community Development Act, 42 U.S.C. 5304(h), and certain state highway programs that qualify under Section 102(2)(D) of NEPA for which the regulations became effective on November 30, 1979). **All the provisions of the regulations are binding as of that date, including those covering decisionmaking, public participation,** referrals, limitations on actions, EIS supplements, etc. For example, a Record of Decision would be prepared even for decisions where the draft EIS was filed before July 30, 1979.

13. **Use of Scoping Before Notice of Intent to Prepare EIS.** Can the scoping process be used in connection with preparation of an environmental assessment, i.e., before both the decision to proceed with an EIS and publication of a notice of intent?

A. Yes. Scoping can be a useful tool for discovering alternatives to a proposal, or significant impacts that may have been overlooked. In cases where an environmental assessment is being prepared to help an agency decide whether to prepare an EIS, useful information might result from **early participation by other agencies and the public in** a scoping process.

The regulations state that the scoping process is to be preceded by a Notice of Intent (NOI) to prepare an EIS. **But that is only the minimum requirement.** Scoping may be initiated earlier, as long as there is appropriate public notice and **enough information available on the proposal so that the public** and relevant agencies can participate effectively.

34b. May the **summary section** in the final Environmental Impact Statement substitute for or

constitute an agency's Record of Decision?

A. No. An environmental impact statement is supposed to inform the decisionmaker **before the decision is made**. Sections 1502.1, 1505.2. The Council's regulations provide for a 30-day period after notice is published that the final EIS has been filed with EPA before the agency may take final action. During that period, **in addition to the agency's own internal final review, the public and other agencies can comment on the final EIS prior to the agency's final action** on the proposal. In addition, the Council's regulations make clear that the requirements for the summary in an EIS are not the same as the requirements for a ROD. Sections 1502.12 and 1505.2.

4. CEQ MEMO -

MEMORANDUM: GUIDANCE REGARDING NEPA REGULATIONS [40 CFR Part 1500, 48 Fed. Reg. 34263 July 28, 1983]

Conflict of Interest Provisions

The purpose of the disclosure statement requirement is to avoid situations in which the contractor preparing the environmental impact statement has an interest in the outcome of the proposal. Avoidance of this situation should, in the Council's opinion, ensure a better and more defensible statement for the federal agencies. This requirement also **serves to assure the public that the analysis in the environmental impact statement has been prepared free of subjective, self-serving research and analysis.**

5. CASE-LAW - Representative cases

Oregon Environmental Council v. Kunzman, 614 F.Supp. 657 (D. Ore. 1985)

Worst case analysis required at the time (since rescinded) was a mandatory part of the EIS, **but was not "readable." One of NEPA's purposes is to inform the public of possible environmental consequences of actions.** NEPA requires that EISs be "readable" **and this requirement is not trivial.** Court invalidated EIS on that ground. **Agencies have a duty to provide the public with comprehensive information** regarding environmental consequences of a proposed action and **to do so in a readily understandable manner.**

Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972)

To insure that an agency balances environmental issues with its other mandates, NEPA section 102 requires agencies to prepare a "detailed statement." The apparent purpose to the **"detailed statement" is to aid in the agencies' own decisionmaking process and to advise other interested agencies and the public** of the environmental consequences of the planned action. The AEC's interpretation of its NEPA responsibilities was "crabbed" and made "a mockery of the Act." Section 102's requirement that the "detailed statement" 'accompany' a proposal through **agency review means more than physical proximity and the physical act of passing papers to reviewing officials. It is not enough that environmental data and evaluation merely "accompany" an application through the review process but receive no consideration from the hearing board** as contemplated by the AEC regulations.

Hanley v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973)

Determination of whether an EIS was required turns on meaning of **"significantly."** **Almost every major federal action, no matter how limited in scope, has some adverse effect on the human environment.** Congress could have decided that every major federal action should be the subject of an EIS, but by adding "significantly" Congress required that the agency find a greater environmental impact would occur than from "any major federal action." Court said that in deciding whether a major federal action will **"significantly"** affect the environment, an agency should be required to **review the proposed action in light of the extent to which the action will cause adverse environmental effects in excess of those created by existing uses** in the area affected. Agencies must affirmatively develop a reviewable environmental record for the purposes of a threshold determination under Section 102(2)(c). Before a threshold determination of significance is made, **the agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision.** (of significance)

United States v. 27.09 Acres of Land, 737 F. Supp. 277 (S.D.N.Y. 1990)

The USPS brought a **condemnation action** to acquire land owned by Westchester County, New York, for a postal facility. **The county resisted, arguing that the USPS could not condemn the land until it had completed its NEPA process.** An environmental assessment (EA) had been prepared for the site, but the USPS had begun the condemnation **proceeding for the property prior to completing the public comment period** as required by USPS regulations and prior to issuing a finding of no significant impact (FONSI) as required by the CEQ regulations. The county argued that the attempted condemnation of the site **represented a commitment of resources (\$10 million) that precluded unbiased consideration of other**, less damaging alternative sites and predetermined the outcome of the NEPA review. **The USPS responded that, while it must comply with NEPA prior to actual construction** of the facility, such compliance **need not precede condemnation** because the **agency may resell the land or put it to a different use** if it decides not to construct the facility there. The district court sided with the USPS, stating that the **condemnation action did not represent an irretrievable commitment of resources** and that if, once the NEPA process had been completed, the USPS decides not to build, the agency could dispose of the land or use it for a different purpose. **The court found that a condemnation action was separable from the issue of the use to which the land would be put.**

NRDC v. Hodel, 865 F.2d 288 (D.C. Cir. 1988)

"We reject the Secretary's contention that he need not consider partial conservation alternatives at all because the nation's energy demands are likely to increase even with gains in

energy conservation and development of alternative energy sources. **This argument proves too much because it would relieve the Secretary of his duty under NEPA to consider alternatives altogether....** Moreover, the Secretary's argument overlooks the reasons for NEPA's requirement that agencies consider alternatives. **The purpose is not merely to force the agency to reconsider its proposed action, but, more broadly, to inform Congress, other agencies, and the general public** about the environmental consequences of a certain action in order to spur all interested parties to rethink the wisdom of the action.... The continuing need for development of the OCS, however, reduces the scope of the required consideration.... In these circumstances, NEPA's informational function is served by a less searching treatment of alternatives than otherwise required."

Robertson v. Methow Valley Citizens Council, U.S., 109 S. Ct 1835 (1989)

NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in an EIS a fully developed mitigation plan. Although the EIS requirement and NEPA's other 'action-forcing' procedures implement the statute's sweeping policy goals by ensuring that agencies will **take a "hard look" at environmental consequences** and by guaranteeing broad public dissemination of relevant information, it is well-settled that NEPA itself does not impose substantive duties mandating particular results. "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed - rather than unwise - agency action." **One important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental effects.** The requirement that an EIS contain a detailed discussion of possible mitigation measures flows from the language of NEPA and the CEQ regulations. Omission of a reasonably complete discussion of possible mitigation measures would undermine the "action-forcing" function of NEPA. Without such a discussion, **the public would be unable to adequately** evaluate the severity of the adverse effects. **"There is fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other."** Finally, "...[I]t would not have violated NEPA if the Forest Service, after complying with the Act's procedural requirements, had decided that the benefits [from skiing justified special use permit issuance] **not withstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd."**

Atlantic Terminal Urban Renewal Area Coalition v. New York City Department of Environmental Protection, 705 F. Supp. 988 (D. N.Y. 1989)

The court addressed issues concerning **statutory delegation of NEPA responsibilities** and the **necessity for NEPA litigants to participate in administrative proceedings**. Plaintiffs in Atlantic had contended that even though HUD had properly delegated authority for preparation of EISs to a local government that HUD was still responsible for the substantive adequacy of the EIS. The court disagreed, stating that **the Housing and Community Development Amendments of 1981 intended that where HUD had delegated the responsibility for the EIS to the local agency it is that agency that is legally responsible for the adequacy of the EIS and not HUD**. The local government defendants in Atlantic then argued that because the **plaintiffs had failed to raise NEPA objections during the EIS public hearing and commenting process**, the **plaintiffs were precluded from bringing suit**. **The court disagreed** and held that neither the judicial doctrines of **laches nor preclusion, could be utilized to bar plaintiff's action**. The court cited several cases for the proposition that laches and failure to exhaust administrative remedies are not favored in NEPA cases "given the public interest in a sound environmental analysis and the long-term consequences of any poorly considered action.

Hudson River Sloop Clearwater Inc. v. Navy Department. No. 89-6121 (2nd Cir. 1989)

On July 29, 1983 the Navy announced that it had chosen Staten Island, New York as its preferred site for the new homeport for an American battleship, the U.S.S. Iowa, and its accompanying six ship surface action group. **Some of the ships to be berthed at the Staten Island Homeport are capable of carrying nuclear weapons**. The Navy issued its Final Environmental Impact Statement (FEIS) on February 1, 1985. **The FEIS did not discuss nuclear weapons or the environmental impact of deploying them**, except to state that national security interests preclude the Navy from confirming or denying the presence of nuclear weapons aboard any particular U.S. Navy ship. **Plaintiffs assert that the Navy failed to comply with NEPA's public disclosure requirement** in its FEIS by failing to discuss the environmental impact of stationing nuclear weapons in New York Harbor. The court ruled that the Environmental groups and New York officials opposed to Navy Department's construction of homeport in New York Harbor **may not have access to classified report** to show that Navy failed to incorporate requirements of National Environmental Policy Act in decision-making process, **because Congress did not intend to have NEPA used as way to force the government to release information that Congress has already indicated should be kept secret**.

LaFlamme v. Federal Energy Regulatory Commission, No. 85-7571 (9th Cir. 1988)

Plaintiff petitioned for review of order issued by the Federal Energy Regulatory Commission (FERC) filed in September 1983 granting a license to construct and operate a hydroelectric power project on the South Fork of the American River. **None of the responding state or federal agencies objected to the license or recommended any special conditions**. However, the public response was overwhelmingly negative. **FERC violated National Environmental Policy Act by licensing California hydropower project without first preparing environmental impact statement considering site-specific environmental impacts** of project, because individual challenging license **raised substantial questions** about whether project would affect recreational use and visual quality in project area, but FERC **failed to explain how proposed mitigation measures would address individual's concerns**. Agency's reliance on post-licensing recreation study did not satisfy NEPA's requirements, because **consideration of impacts must take place before agency makes decision**.

Natural Resources Defense Council v. Lujan, 768 F.Supp. 870 (D.D.C. 1991)

In a motion to dismiss, defendants argued, among other things, that plaintiffs lacked standing under NEPA, that the NEPA claims plaintiffs sought to raise were not justiciable under the separation of powers doctrine, and that a statutory conflict between the Alaska National Interest Lands Conservation Act (ANILCA) and NEPA prevented defendants from revising the 1987 LEIS. **The court held that plaintiffs had standing to challenge the adequacy of the LEIS under NEPA and issued a declaratory judgement that defendants had violated NEPA** by not issuing the 1991 report as a supplemental LEIS. On the separation of powers argument, the court ruled that the exercise by the Congress of its legislative powers would not nullify any declaratory relief the court might grant. **A legislative EIS is not simply a legislative aid but rather serves in part to ensure that the public has an opportunity to participate meaningfully in decisionmaking at the administrative and legislative levels.** Accordingly, the court held that the requirement of an adequate EIS for legislative proposals can be enforced by a private right of action. The court also rejected defendants' argument that ANILCA overrides or repeals NEPA, thus precluding the revision or supplementation of the 1987 LEIS. **ANILCA by its terms does not repeal NEPA, and repeal by implication is disfavored.** In the context of NEPA, which requires federal agencies to comply with its **mandate to "the fullest extent possible," courts have been especially reluctant to hold that another statute overrules it.** The United States has filed a notice of appeal.

Alabama v. EPA, 911 F.2d 499 (11th Cir. 1990)

NEPA is the general statute forcing agencies to consider the environmental consequences of their actions and to allow the public a meaningful opportunity to learn about and to comment on the proposed actions. If there were no RCRA, NEPA would seem to apply here. But **RCRA is the later and more specific statute directly governing EPA's process for issuing permits to hazardous waste management facilities.** As such, **RCRA is an exception to NEPA and controls here.**

Greenpeace Inc. v. Waste Technologies Industries. U.S. District Court, Northern District of Ohio (37 ERC 1736) No. 4:93CV0083, 1993.

Greenpeace alleged that the district court had jurisdiction over EPA actions related to RCRA because the agency's was required to **provide meaningful public participation** in the agency decision-making process. **Greenpeace argued that the federal permitting and approval of the waste facility was a major federal action.** The district court dismissed the NEPA claims, **noting that NEPA requirements do not apply to federal agencies actions under environmental statutes, such as RCRA that mandate specific procedures for considering environmental effects.** The court referred to the **"functional equivalent test"** that more recent and specific environmental statutes provide for orderly consideration of diverse environmental factors.

6. Prepared by D. Reinke, 703-641-1100