United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

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PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM97-2

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Application of NEPA to Proposed Federal Actions in the United States with Transboundary Effects

On July 1, 1997, the Council on Environmental Quality issued guidance to the Federal agencies on the above subject. A copy is attached for your information and use.

The guidance reinforces the practice of analyzing reasonably foreseeable transboundary effects of proposed actions located within the United States as part of Federal agency NEPA documentation. Please circulate it widely within your bureau to all persons who work with the National Environmental Policy Act.

Attachment

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

MEMORANDUM TO HEADS OF AGENCIES ON THE APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT TO PROPOSED FEDERAL ACTIONS IN THE UNITED STATES WITH TRANSBOUNDARY EFFECTS

FROM: KATHLEEN A. MCGINTY
CHAIR

DATE: JULY 1, 1997

In recent months, the Council has been involved in discussions with several agencies concerning the applicability of the National Environmental Policy Act (NEPA) to transboundary impacts that may occur as the result of proposed federal actions in the United States. To set forth a consistent interpretation of NEPA, CEQ is today issuing the attached guidance on NEPA analysis for transboundary impacts. In it, we advise that NEPA requires analysis and disclosure of transboundary impacts of proposed federal actions taking place in the United States.

We recommend that agencies which take actions with potential transboundary impacts consult as necessary with CEQ concerning specific procedures, proposals or programs which may be affected.

COUNCIL ON ENVIRONMENTAL QUALITY GUIDANCE ON NEPA ANALYSES FOR TRANSBOUNDARY IMPACTS
JULY 1, 1997

The purpose of this guidance is to clarify the applicability of the National Environmental Policy Act (NEPA) to proposed federal actions in the United States, including its territories and possessions, that may have transboundary effects extending across the border and affecting another country's environment. While the guidance arises in the context of negotiations undertaken with the governments of Mexico and Canada to develop an agreement on transboundary environmental impact assessment in North America,[1] the guidance pertains to all federal agency actions that are normally subject to NEPA, whether covered by an international agreement or not.

It is important to state at the outset the matters to which this guidance is addressed and those to which it is not. This guidance does not expand the range of actions to which NEPA currently applies. An action that does not otherwise fall under NEPA would not now fall under NEPA by virtue of this guidance. Nor does this guidance apply NEPA to so-called "extraterritorial actions"; that is, U.S. actions that take place in another country or otherwise outside the jurisdiction of the United States[2]. The guidance pertains only to those proposed actions currently covered by NEPA that take place within the United States and its territories, and it does not change the applicability of NEPA law, regulations or case law to those actions. Finally, the guidance is consistent with long-standing principles of international law.

NEPA LAW AND POLICY

NEPA declares a national policy that encourages productive and enjoyable harmony

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[1] The negotiations were authorized in Section 10.7 of the North American Agreement on Environmental Cooperation, which is a side agreement to the North American Free Trade Agreement. The guidance is also relevant to the ECE Convention on Environmental Impact Assessment in a Transboundary Context, signed in Espoo, Finland in February, 1991, but not yet in force.

[2] For example, NEPA does apply to actions undertaken by the National Science Foundation in the Antarctica. Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993).

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between human beings and their environment, promotes efforts which will prevent or eliminate damage to the environment and biosphere, stimulates the health and welfare of human beings, and enriches the understanding of ecological systems.[3] Section 102(1) of NEPA "authorizes and directs that, to the fullest extent possible . . . . the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [the] Act."[4] NEPA's explicit statement of policies calls for the federal government "to use all practical means and measures . . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . ."[5] In addition, Congress directed federal agencies to "use all practical means . . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . . attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."[6] Section 102(2)(C) requires federal agencies to assess the environmental impacts of and alternatives to proposed major federal actions significantly affecting the quality of the human environment.[7] Congress also recognized the "worldwide and long-range character of environmental problems" in NEPA and directed agencies to assist other countries in anticipating and preventing a decline in the quality of the world environment.[8]

Neither NEPA nor the Council on Environmental Quality's (CEQ) regulations implementing the procedural provisions of NEPA define agencies' obligations to analyze effects of actions by administrative boundaries. Rather, the entire body of NEPA law directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, regardless of where those impacts might occur. Agencies

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[3] 42 USC 4321.

[4] 42 USC 4332(1).

[5] 42 USC 4331(a).

[6] 42 USC 4331(b)(3).

[7] 42 USC 4332(2)(C).

[8] 42 USC 4332(2)(F).

must analyze indirect effects, which are caused by the action, are later in time or farther removed in distance, but are still reasonably foreseeable, including growth-inducing effects and related effects on the ecosystem,[9] as well as cumulative effects.[10] Case law interpreting NEPA has reinforced the need to analyze impacts regardless of geographic boundaries within the United States,[11] and has also assumed that NEPA requires analysis of major federal actions that take place entirely outside of the United States but could have environmental effects within the United States.[12]

Courts that have addressed impacts across the United States' borders have assumed that the same rule of law applies in a transboundary context. In Swinomish Tribal Community v. Federal Energy Regulatory Commission,[13] Canadian intervenors were allowed to challenge the adequacy of an environmental impact statement (EIS) prepared by FERC in connection with its approval of an amendment to the City of Seattle's license that permitted raising the height of the Ross Dam on the Skagit River in Washington State. Assuming that NEPA required consideration of Canadian impacts, the court concluded that the report had taken the requisite "hard look" at Canadian impacts. Similarly, in Wilderness Society v. Morton,[14] the court granted intervenor status to Canadian environmental organizations that were challenging the adequacy of the trans-Alaska pipeline EIS. The court granted intervenor status because it found that there was a reasonable possibility that oil spill damage could significantly affect Canadian resources,

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[9] 40 CFR 1508.8(b).

[10] 40 CFR 1508.7.

[11] *See, for example,* Sierra Club v. U.S.Forest Service, 46 F.3d 835 (8th Cir. 1995); Resources Ltd., Inc. v. Robertson, 35 F.3d 1300 and 8 F.3d 1394 (9th Cir. 1993); Natural Resources Defense Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988); County of Josephine v. Watt, 539 F.Supp. 696 (N.D. Cal. 1982).

[12] See Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978); NORML v. Dept. of State, 452 F.Supp. 1226 (D.D.C. 1978).

[13] 627 F.2d 499 (D.C. Cir. 1980).

[14] 463 F.2d 1261 (D.C. Cir. 1972).

and that Canadian interests were not adequately represented by other parties in the case.

In sum, based on legal and policy considerations, CEQ has determined that agencies must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States.

PRACTICAL CONSIDERATIONS

CEQ notes that many proposed federal actions will not have transboundary effects, and cautions agencies against creating boilerplate sections in NEPA analyses to address this issue. Rather, federal agencies should use the scoping process[15] to identify those actions that may have transboundary environmental effects and determine at that point their information needs, if any, for such analyses. Agencies should be particularly alert to actions that may affect migratory species, air quality, watersheds, and other components of the natural ecosystem that cross borders, as well as to interrelated social and economic effects.[16] Should such potential impacts be identified, agencies may rely on available professional sources of information and should contact agencies in the affected country with relevant expertise.

Agencies have expressed concern about the availability of information that would be adequate to comply with NEPA standards that have been developed through the CEQ regulations and through judicial decisions. Agencies do have a responsibility to undertake a reasonable search for relevant, current information associated with an identified potential effect. However, the courts have adopted a "rule of reason" to judge an agency's actions in this respect, and do not require agencies to discuss "remote and highly speculative consequences".[17] Furthermore,

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[15] 40 CFR 1501.7. Scoping is a process for determining the scope of the issues to be addressed and the parties that need to be involved in that process prior to writing the environmental analyses.

[16] It is a well accepted rule that under NEPA, social and economic impacts by themselves do not require preparation of an EIS. 40 CFR 1508.14.

[17] Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974). See also, Northern Alaska Environmental Center v. Lujan, 961 F.2d 886, 890 (9th Cir. 1992); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992); San Luis Obispo Mothers for Peace v. N.R.C., 751 F.2d 1287, 1300 (D.C. Cir. 1984); Scientists Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

CEQ's regulation at 40 CFR 1502.22 dealing with incomplete or unavailable information sets forth clear steps to evaluating effects in the context of an EIS when information is unobtainable.[18] Additionally, in the context of international agreements, the parties may set forth a specific process for obtaining information from the affected country which could then be relied upon in most circumstances to satisfy agencies' responsibility to undertake a reasonable search for information.

Agencies have also pointed out that certain federal actions that may cause transboundary effects do not, under U.S. law, require compliance with Sections 102(2)(C) and 102(2)(E) of NEPA. Such actions include actions that are statutorily exempted from NEPA, Presidential actions, and individual actions for which procedural compliance with NEPA is excused or modified by virtue of the CEQ regulations[19] and various judicial doctrines interpreting NEPA[20]. Nothing in this guidance changes the agencies' ability to rely on those rules and doctrines.

INTERNATIONAL LAW

It has been customary law since the 1905 Trail Smelter Arbitration that no nation may undertake acts on its territory that will harm the territory of another state[21]. This rule of

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[18] See Preamble to Amendment of 40 CFR 1502.22, deleting prior requirement for "worst case analysis" at 51 Federal Register 15625, April 25, 1986, for a detailed explanation of this regulation.

[19] For example, agencies may contact CEQ for approval of alternative arrangements for compliance with NEPA in the case of emergencies. 40 CFR 1506.11.

[20] For example, courts have recognized that NEPA does not require an agency to make public information that is otherwise properly classified information for national security reasons, Weinberger v. Cathollic Action of Hawaii, 454 U.S. 139 (1981).

[21] *Trail Smelter Arbitration*, U.S. v. Canada, 3 UN Rep. Int'l Arbit. Awards 1911 (1941). The case involved a smelter in British Columbia that was causing environmental harm in the state of Washington. The decision held that "under principles of International Law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is described by clear and convincing injury." *Id.* at 1965). Also see the American Law Institute's Restatement of the Foreign Relations Law of the United States 3d, Section 601, ("State obligations with respect to environment of other States and the common environment").

customary law has been recognized as binding in Principle 21 of the Stockholm Declaration on the Human Environment and Principle 2 of the 1992 Rio Declaration on Environment and Development. This concept, along with the duty to give notice to others to avoid or avert such harm, is incorporated into numerous treaty obligations undertaken by the United States. Analysis of transboundary impacts of federal agency actions that occur in the United States is an appropriate step towards implementing those principles.

CONCLUSION

NEPA requires agencies to include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States. Such effects are best identified during the scoping stage, and should be analyzed to the best of the agency's ability using reasonably available information. Such analysis should be included in the EA or EIS prepared for the proposed action.