United States Department of the Interior

OFFICE OF THE SECRETARY
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PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-11

To: Heads of Bureaus and Offices

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

Subject: NEPA Compliance in Emergency Situations

The purpose of this memorandum is to supplement 43 CFR 46.150. An additional purpose is to provide Council on Environmental Quality (CEQ) guidance which has been made available under 40 CFR 1506.11. CEQ regulations allow agencies to take emergency actions with significant environmental impact without National Environmental Policy Act (NEPA) compliance so long as the agency consults with CEQ about alternative arrangements and completes NEPA compliance for related actions after the emergency has passed.

43 CFR 46.150 further requires that the Responsible Official (RO) immediately take any necessary actions to mitigate harm to life, property, or important natural, cultural, or historic resources. If no follow-up action is necessary after an emergency action has been taken by the RO, consultation with the Office of Environmental Policy and Compliance (OEPC) is not required. Further, other than documenting in writing a determination that an emergency existed and the type of response action taken, no further NEPA documentation is necessary. For follow-up actions requiring NEPA documentation, the RO shall then expeditiously consult with the Office of the Solicitor, OEPC, and the appropriate Assistant Secretary. Then OEPC and the bureau or office will consult with CEQ as appropriate.

43 CFR 46.150 intends for the bureau or office to take its action, particularly if there is a possibility of imminent loss of life, property, or important natural, cultural or historic resources, prior to Departmental or CEQ approval. Obviously, if time permits, that approval can and should be obtained. Some emergencies have several days lead time in which to complete the consultation and gain approval but do not have enough lead time to complete NEPA compliance.

The attached CEQ guidance is clear on the point that agencies are not required to consult or obtain approval prior to taking an emergency action. The attached guidance is part of the CEQ/309 Reference Manual revised in August 1996 by the NEPA Compliance Division of the Office of Federal Activities, Environmental Protection Agency. Bureaus have been provided

ATTACHMENT

February 17, 1992

Compliance with 40 CFR 1506.11
"Emergencies"

The CEQ regulations provide that:

"Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review."

This regulation was first published for review and comment in 1978. In its proposed form, the section required the Federal agency "proposing to take the action" to consult with the Council about alternative arrangements.

As noted in the Preamble to the final regulations:

> "several commentators expressed concern that use of the phrase 'proposing to take the action' would be interpreted to mean that agencies consult with the Council before emergency action was taken. In the view of these commentators, such a requirement might be impractical in emergency circumstances and could defeat the purpose of the section. The Council concurs and substituted the phrase 'taking the action' for 'proposing to take the action.' Similarly, the Council amended the section to provide for consultation 'as soon as feasible' and not necessarily before emergency action."

Thus, it is clear that agencies are not <u>required</u> to consult with or obtain approval from CEQ prior to taking actions to meet an emergency; however, they should do so if it is at all possible and, if it is not possible, they should contact us as soon as feasible. An example of when it is not feasible to give CEQ any prior notice is the need to take immediate actions to prevent a dam from breaking at 3 a.m. on Saturday night. We expect the agency to go ahead and take immediate action and notify CEQ the following Monday morning. However, many emergency situations actually involve more lead time - often 3 - 7 days, for example.

CEQ's response to a request for consultation under the emergency circumstances regulation must, of necessity, be one which is appropriate in scope and timing to the particular situation at hand. The General Counsel or Deputy General Counsel should be notified as soon as we receive an emergency request. The General Counsel/Deputy General Counsel will then

determine who should handle the request and suggest a probable course of action. However, given the nature of the regulation itself, everyone on the NEPA team should be prepared to start working with the agency immediately. Whatever steps are taken should consider the following points:

1. The nature of the "emergency". Is this a true threat to some important value such as life (either human or another species) or to an important resource (which , in certain cases, may be reflective of economic, social or cultural values). The extremes are easy - the collapsing dam or the species which is almost extinct is clearly an emergency; conversely, the fact that someone has not completed an action within a particular fiscal year after making a commitment to do so is not, in and of itself, an emergency. There are many gray areas in between, and ultimately, a judgment call must be made.

2. The potential adverse effects of the proposed action (ultimately, to be weighed against the harm which the action attempts to avoid.)

This also raises the question of how much analysis does exist about the impacts of the proposed action - is it well documented and understood or a new, unprecedented type of action (the latter may sometimes be inevitable in a true emergency situation) .

3. The extent to which NEPA analysis would be required for the proposed action under normal circumstances, and the extent to which the NEPA process can be followed in the emergency circumstances. NOTE - however much the normal NEPA process is truncated, there is often time for at least telephone notification of interested parties and preparation of a short EA. Our emphasis during this period should be, not surprisingly, on analysis of major adverse environmental impacts; public and environmental agency comment; and mitigation.

4. The duration of the emergency and the extent to which the NEPA process can and should be undertaken for a continuing part of the action after the immediate emergency has ceased.

5. Possible mitigation measures which can be used during the emergency period.

Steps in handling emergency requests:

1. Emergency requests virtually always begin by a phone call to the General Counsel's office. Many times, CEQ staff will advise that a request does not fall in the ballpark of our definition of an "emergency" and suggest that the agency pursue a different route. Sometimes, the call will be from someone in a field office, and we will suggest they coordinate with their NEPA liaison in Washington and determine alternative approaches. Usually, that is the end of that line of inquiry.

2. If the situation does appear to be of an emergency nature, CEQ staff will arrange f or an informational type of exchange as soon as possible. This may involve a meeting at CEQ or a conference call - whatever fits the situation. We will ask the agency to be prepared to discuss the five points mentioned above, as well as any other pertinent facts.

3. Once we have gotten further information from the agency, we will advise them on our probable response, including suggested interim NEPA compliance and followup NEPA compliance. Depending upon the circumstances, this could mean instant approval with follow-up work; preparation of an EA and notification to the public; a series of contacts between the agency, CEQ and interested agencies and members of the public, or whatever else seems to make sense. Obviously, each situation must be treated differently to adapt to the facts.

4. CEQ should assure itself that the agency had made appropriate efforts to communicate with interested parties, including EPA, the Fish and Wildlife Service, state agencies, and interested organizations. If it has not, CEQ may request the agency to do so and in many circumstances, we may wish to consult with such parties ourselves. We should also consult with CEQ's Congressional Liaison about probable interest in Congress.

5. If there is no time available to document the exchange between CEQ and the agency, we may give oral approval, followed up by a written letter. For example, we had once had a situation where two groups.of people were shooting at each other (bullets, not words) over the use of a natural resource; we did not ask the agency to wait until they received a letter from us before they took action to stop the conflict. Similarly, in our recent work regarding capturing the last of the Sockeye salmon on the Snake River, the CEQ General Counsel gave oral approval to the Bonneville Power Administration, followed by a letter (both of which were preceded by preparation of an EA and extensive consultation with numerous outside parties). Obviously, it is preferable for CEQ to issue the letter prior to or simultaneously with the action when at all possible. Neither a letter nor a verbal approval should proceed without approval from the General Counsel, Deputy General Counsel, or in their absence, the Chief of staff.

6. The CEQ letter should carefully spell out the considerations on which the alternative arrangements were based. Our alternative arrangements have been upheld in three particular instances (capture of California condors, HUD loan to City of Detroit, Westover flight pattern) by Federal courts, thus validating the regulation and our use of it. However, the loss of a single court case could be damaging to necessary regulatory flexibility.

7. All parties who have expressed an interest in the outcome of the situation should be informed of the final disposition and receive a copy of CEQ's letter.

One final note: sometimes, agencies contact us simply because the situation is indeed an emergency, without stopping to consider whether the action they need to take to meet the

emergency is truly a major federal action with significant environmental impacts. In other words, they tend to focus on the word emergency and think they need some special dispensation from CEQ just because it is an emergency, as opposed to an action which they proposed to take to address an emergency which would normally require an EIS. In some of those situations, the agency has prepared an EA and consulted with the public, but still thinks they need a CEQ blessing because it is an emergency. The emergency regulation only applies to actions with significant environmental impacts. For actions with less than significant environmental impacts, agencies do not need (nor, in my view, should we generally give) approval under 1506.11. The agency should be advised that they are free to proceed upon signing of the FONSI, just as in a normal situation. If the agency doesn't know whether the impacts will be significant, CEQ will have to make a judgment on what kind of advice to give - generally, the nature of the emergency versus the possibility of the impacts will suggest a course of action.