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Mr. James L. Connaughton
Chairman, Council on Environmental Quality
Executive Office of the President
17th and G Streets, NW
Washington, DC 20503

Subject: Energy Task Force Suggestions to Improve the NEPA Review Process on Energy and Other Projects

Dear Mr. Connaughton:

This letter is in response to the Council on Environmental Quality (CEQ's) August 20, 2001 *Federal Register* Notice and Request for Comments requesting comments and/or recommendations to improve (but not weaken) the NEPA Review Process.

As a former USEPA Region 2 employee and an active Environmental Professional in the private sector (with over 27 years of direct experience), I offer the following comments and/or recommendations for your consideration:

1. Affects of Federal "Delegation Programs" on the NEPA Review Process

In the 1980s, the Federal Government took some positive steps to shift or delegate environmental program reviews to the state level. Although the impetus for such delegations was a reduction in federal staffing, the program has had many positive results by promoting reviews by public agencies that are closer to the ground/problem.

However, many of the delegation agreements were written as stand alone actions and programs with very specific and somewhat restrictive procedures for conducting delegated state level reviews. Typical programs delegated to the states include wetlands, coastal zone management, NPDES discharge permits, water obstruction and encroachment permits, erosion and sedimentation controls, cultural resources and categorical exclusions for funding/grant programs. Some agreements cross multiple federal agencies/departments and/or state programs (i.e., erosion and sedimentation controls are controlled by the Department of Agriculture through the funding and regulation of County Conservation Districts and are also controlled by the USEPA through the funding and regulation of NPDES permit program). Sometimes these cross-over programs have conflicting goals and objectives.

Written as stand alone documents with specified procedures, many of these delegation agreements neglected to consider their affects on multi-agency level projects and NEPA level review activities. NEPA EIS reviews are typically performed by funding agencies, like the Federal Highway Administration, while NEPA delegated-level reviews are done for one specific permit/approval action. On a recent NJDOT/FHWA project, undergoing a full NEPA EIS review, the state-delegated permitting agency stated that, "they could not comment on the EIS or the potential impacts of the project because there was no pending (Permit Action) allowing them to provide comments outside of the prescribed delegation agreement steps." Since they did not have an actual Permit Application in hand to review, they felt they were prohibited from providing "Technical Review" comments on the potential impacts of the project. I have heard this type of comment on almost every project I have worked on. The delegation agreements often contain prescriptive clauses and the local level reviewers feel they are obligated to follow and enforce the specific language in their delegation agreements.

Recommendations

NEPA delegated review procedures should be rewritten to emphasize the goal of consolidating the NEPA review process where multiple level NEPA reviews are required. Flexibility to expedite the review process should be encouraged by the local reviewers.

One objection to this proposal, with respect to permit actions, may be the argument that NEPA EIS level reviews may lack specific project design details (since that is primarily a planning function). Specific information from such reviews may include, for example, details on the exact number of piles or the exact size of structures required to support a bridge. However, in reply to this argument, there is usually adequate information from which to access the overall potential impacts of the project using preliminary data or a worst case scenario. In addition, the final NEPA delegated permit/approval actions can be used to amend or modify the original findings of the NEPA EIS process reviews but the former should not be used to re-access or re-evaluate the intent or alternatives to the project.

2. Multiple NEPA Reviews and Duplications of Notices/Hearings/Public Participation

Complicating the delegation agreement issue is the fact that major projects need multiple NEPA actions. One NEPA review for funding, another NEPA delegated review for wetland and water obstruction issues, another NEPA delegated review for NPDES Stormwater Discharge Permit for Construction Activities, another NEPA delegated review of erosion and sedimentation controls, and yet another NEPA review for Section 106 Cultural Resources reviews. There may also be a federal Army Corps of Engineers permit action that will require yet another NEPA review. During each of these reviews the delegated state agency, via the operating language in the respective Delegations Agreements, requires a public notice, public hearing and final permit actions.

Despite extensive environmental reviews, various local/state/federal approvals, and public participation during the funding program level review (NEPA EIS federal action), the same project must then undergo individual delegated NEPA reviews to obtain wetland, water obstruction, soil erosion, NPDES permit and Section 106 approvals. Each delegated agency conducts its own isolated review, issues its own isolated public notice of pending federal action,

and holds its own separate Public Hearing. All of this is done on a project that has already undergone the NEPA EIS funding review. In each case, project alternatives must be presented, evaluated and impacts determined. Major projects, such as energy generating facilities, must undergo five or six levels of NEPA reviews or potential federal actions creating a tremendous duplication of effort by the entity seeking approvals. Not to mention, the increased level of staffing required at reviewing agencies and the time demands imposed on scarce agency resources.

A secondary result of the duplicative NEPA review process is that when a funding agency completes its NEPA EIS review and decides to fund a controversial project, that same project will then encounter multiple level legal objections at each step of the five to six subsequent permitting/approval processes as the project moves from one program level review to another. The same objections raised during the funding program NEPA EIS review are raised again to prevent wetland permit approval, NPDES Permit approval, Section 106 approval and Army Corps approval.

Recommendations

Delegation Agreements should be amended to reflect the goal of simplifying the NEPA review process where multiple level federal and/or state actions/approvals/permits are required. All reviews should be coordinated at the funding agency NEPA EIS level and there should be only one set of public hearings and reviews on a project. For non-EIS projects requiring multiple level reviews, an agreement should be made on which agency will act as the "lead reviewer". In some cases this may be the Corps of Engineers and other times a state delegated agency/ department.

Objections to this proposal may be expressed by the funding agencies because it will force them to coordinate projects better. These objections are off set by the savings resulting from removal of duplicative efforts and elimination of project delays. Scare agency resources could thus be much better and more efficiently employed.

3. Cumulative and Secondary Impact Assessments, and Home Rule Authority

Back in the 1970s, when I was with the USEPA, we began to review projects for potential secondary impacts. We wanted to avoid funding a sewage plant at Site "A" if it would result in the filling of wetlands at Site "B" for the construction of new homes. If we did not build the sewage plant then development at Site "B" probably would not occur.

From basic issues, like the above, cumulative and secondary impact evaluations are key issues facing us in the 21st Century. Many FHWA projects are in limbo facing challenges regarding the validity of cumulative impact assessments.

The issue here is where does federal authority and jurisdiction end and local home rule authority begin. In the Northeast, most of our states and local governments have enacted municipal planning and zoning ordinances. Under such programs, the local government evaluates its own communities and decides what type and how much development it wants. This is reflected in a local zoning map with specific development criteria. Such local ordinances are presented to the

public and approved by referendum and/or at the election booth. Developers building projects in specific communities must follow the local planning and zoning ordinances or challenge them in court. Each and every development project must go through the zoning review process before it can be built. That is how the local government controls and regulates things at the local level.

Recommendations:

So long as NEPA projects are planned and designed to conform with the local planning and zoning ordinances, there is no need for projects to undergo a review for secondary or cumulative impacts. The Federal Government should have no jurisdiction regarding local zoning. There should be a waiver of NEPA cumulative and secondary impact review requirements when a project conforms to the local planning and zoning of a municipality. This waiver should apply to NEPA funding and any NEPA permit/approvals required for the project.

Objections to such a waiver may be made by anti-development groups simply because they feel many local zoning ordinances do not reflect sound environmental planning. But if the local community has followed a NEPA-like process and has environmentally sound community planning and zoning elements in their local ordinances, then there should be no federal NEPA objections. Isn't this what home rule is all about? This same type of program is already in affect for local procurement actions that meet the federal criteria.

Some groups may also object to this proposal because they question or challenge the quality of the local planning and zoning process, and sometimes local zoning does not take into consideration the benefits of protecting wildlife habitat and open space. However, planning and zoning are purely the responsibility of local government and not the federal sector.

4. NEPA Coordination with Resource Agencies and Follow-ups during Federal Action Approvals/Permit

During project development, one of the early tasks is to send resource agencies a project data sheet informing them of what is planned and what the potential impacts may be. We then wait to receive comments and then incorporate those comments into our final designs. Despite this proactive effort, at the beginning of the project, once we submit actual applications for NEPA delegated approvals/permits, the federal agency/delegated agency then sends out a second series of notices to the same resource agencies asking for a second round of comments. Why? If I did a good job at up-front coordination and have included review comment from these agencies (or documentation of my efforts to get their comments) in the application packages, why should there be a second round of coordination? This is duplicative of our original efforts to expedite the project and of a sound project management strategy.

Recommendations

If, during the NEPA review process or the application preparation process, there has been adequate coordination with resource agencies and this can be documented, then the requirements for subsequent coordination should be waived at all subsequent review and approval levels. I very much like the August 9, 2001 Corps of Engineers *Federal Register* proposal, regarding Nationwide Permits, General Permit Condition Number 13 (e) Agency Coordination, that

Resource Agencies be given 10 calendar days to provide comments or to request additional review time. I would like to see this expanded to include up-front applicant coordination efforts and waive the requirements at the tail end. The NEPA and other federal actions/approvals/ permits should encourage up-front coordination instead of being reactive at the tail end of projects.

Resource Agencies may object to this proposal because they lack sufficient staff to do up-front evaluations on projects that may or may not ever get built. But this attitude keeps them in a reactive mode of operation instead of forcing them to become pro-active in their project reviews. There may also be a question as to whether all of the Resource Agencies were contacted and/or whether they were given accurate up-front information.

In response to the objection, good project management calls for the identification of potential issues early in the project planning and design process. With 30% plans, all of the potential impacts can be identified and there is still adequate time to modify the designs without a significant effect on the overall project schedule and/or budget. Delaying resource agency coordination to the end stages of the design process risks project delays. It also creates a potential need to totally redesign the project, something that is not in the economic interests of anyone. This approach is wasteful of both developers' and agencies' resources.

Conclusion

There are many ways of improving the NEPA Review Process without decreasing the importance and value of sound environmental planning. Implementing the above recommendations would not reduce environmental compliance, but may help to expedite and simplify NEPA reviews. The important thing for you to remember is that NEPA reviews are not limited to Federal or Federal EIS projects. NEPA affects almost every level and degree of development taking place in America and it extends all the way down to local level NEPA-delegated permits and approvals.

If you have any questions on the above or would like additional information on NEPA review problems, please feel free to contact me at 1-215-922-8080 x 1266.

Sincerely,

URBAN ENGINEERS, INC.

Joseph F. Musil Jr., PE, PP
Environmental Project Manager