
ATTACHMENT B

Environmental Guidelines for Transboundary Impacts

This attachment contains federal instruction and guidelines governing the analysis of the Transboundary Impacts in Section 3.16 of the FEIS. Two documents are included – Executive Order 12114, *Environmental Effects Abroad of Major Federal Actions*, and *Council on Environmental Quality Guidance on NEPA Analysis for Transboundary Impacts*, July 1, 1997.

Executive Order 12114 - Environmental Effects Abroad of Major Federal Actions

Exec. Order No. 12114
44 Federal Register 1957
1979 WL 25866 (Pres.)

Executive Order 12114

Environmental Effects Abroad of Major Federal
Actions

January 4, 1979

By virtue of the authority vested in me by the Constitution and the laws of the United States, and as President of the United States, in order to further environmental objectives consistent with the foreign policy and national security policy of the United States, it is ordered as follows:

Section 1.

1-1. Purpose and Scope. The purpose of this Executive Order is to enable responsible officials of Federal Agencies having ultimate responsibility for authorizing and approving actions encompassed by this Order to be informed of pertinent environmental considerations and to take such considerations into account, with other pertinent considerations of national policy, in making decisions regarding such actions. While based on independent authority, this Order furthers the purpose of the National Environmental Policy Act and the Marine Protection Research and Sanctuaries Act and the Deepwater Port Act consistent with the foreign policy and national security policy of the United States, and represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.

Sec. 2.

2-1. Agency Procedures. Every Federal agency taking major Federal actions encompassed hereby and not exempted herefrom having significant effects on the environment

outside the geographical borders of the United States and its territories and possessions shall within eight months after the effective date of this Order have in effect procedures to implement this Order. Agencies shall consult with the Department of State and the Council on Environmental Quality concerning such procedures prior to placing them in effect.

2-2. Information Exchange. To assist in effectuating the foregoing purpose, the Department of State and the Council on Environmental Quality in collaboration with other interested Federal agencies and other nations shall conduct a program for exchange on a continuing basis of information concerning the environment. The objectives of this program shall be to provide information for use by decisionmakers, to heighten awareness of and interest in environmental concerns and, as appropriate, to facilitate environmental cooperation with foreign nations.

2-3. Actions Included. Agencies in their procedures under Section 2-1 shall establish procedures by which their officers having ultimate responsibility for authorizing and approving actions in one of the following categories encompassed by this Order, take into consideration in making decisions concerning such actions, a document described in Section 2-4(a):

(a) major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica);

(b) major Federal actions significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action;

(c) major Federal actions significantly affecting the environment of a foreign nation which provide to that nation:

(1) a product, or physical project producing a principal product or an emission or effluent, which is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious public health risk; or

(2) a physical project which in the United States is prohibited or strictly regulated by Federal law to protect the environment against

radioactive substances.

(d) major Federal actions outside the United States, its territories and possessions which significantly affect natural or ecological resources of global importance designated for protection under this subsection by the President, or, in the case of such a resource protected by international agreement binding on the United States, by the Secretary of State.

Recommendations to the President under this subsection shall be accompanied by the views of the Council on Environmental Quality and the Secretary of State.

2-4. Applicable Procedures. (a) There are the following types of documents to be used in connection with actions described in Section 2-3:

(i) environmental impact statements (including generic, program and specific statements);

(ii) bilateral or multilateral environmental studies, relevant or related to the proposed action, by the United States and one or more foreign nations, or by an international body or organization in which the United States is a member or participant; or

(iii) concise reviews of the environmental issues involved, including environmental assessments, summary environmental analyses or other appropriate documents.

(b) Agencies shall in their procedures provide for preparation of documents described in Section 2-4(a), with respect to actions described in Section 2-3, as follows:

(i) for effects described in Section 2-3(a), an environmental impact statement described in Section 2-4(a)(1);

(ii) for effects described in Section 2-3(b), a document described in Section 2-4(a)(ii) or (iii), as determined by the agency;

(iii) for effects described in Section 2-3(c), a document described in Section 2-4(a)(ii) or (iii), as determined by the agency;

(iv) for effects described in Section 2-3(d), a document described in Section 2-4(a)(i), (ii) or (iii), as determined by the agency.

Such procedures may provide that an agency

need not prepare a new document when a document described in Section 2-4(a) already exists.

(c) Nothing in this Order shall serve to invalidate any existing regulations of any agency which have been adopted pursuant to court order or pursuant to judicial settlement of any case or to prevent any agency from providing in its procedures for measures in addition to those provided for herein to further the purpose of the National Environmental Policy Act and other environmental laws, including the Marine Protection Research and Sanctuaries Act and the Deepwater Port Act, consistent with the foreign and national security policies of the United States.

(d) Except as provided in Section 2-5(b), agencies taking action encompassed by this Order shall, as soon as feasible, inform other Federal agencies with relevant expertise of the availability of environmental documents prepared under this Order.

Agencies in their procedures under Section 2-1 shall make appropriate provision for determining when an affected nation shall be informed in accordance with Section 3-2 of this Order of the availability of environmental documents prepared pursuant to those procedures.

In order to avoid duplication of resources, agencies in their procedures shall provide for appropriate utilization of the resources of other Federal agencies with relevant environmental jurisdiction or expertise.

2-5. Exemption and Considerations. (a) Notwithstanding Section 2-3, the following actions are exempt from this Order:

(i) actions not having a significant effect on the environment outside the United States as determined by the agency;

(ii) actions taken by the President;

(iii) actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict;

(iv) intelligence activities and arms transfers;

(v) export licenses or permits or export approvals, and actions relating to nuclear activities except actions providing to a foreign nation a nuclear production or utilization facility as defined in the Atomic Energy Act of 1954, as amended, or a nuclear waste management facility;

(vi) votes and other actions in international conferences and organizations;

(vii) disaster and emergency relief action.

(b) Agency procedures under Section 2-1 implementing Section 2-4 may provide for appropriate modifications in the contents, timing and availability of documents to other affected Federal agencies and affected nations, where necessary to:

(i) enable the agency to decide and act promptly as and when required;

(ii) avoid adverse impacts on foreign relations or infringement in fact or appearance of other nations' sovereign responsibilities, or

(iii) ensure appropriate reflection of:

(1) diplomatic factors;

(2) international commercial, competitive and export promotion factors;

(3) needs for governmental or commercial confidentiality;

(4) national security considerations;

(5) difficulties of obtaining information and agency ability to analyze meaningfully environmental effects of a proposed action; and

(6) the degree to which the agency is involved in or able to affect a decision to be made.

(c) Agency procedure under Section 2-1 may provide for categorical exclusions and for such exemptions in addition to those specified in subsection (a) of this Section as may be necessary to meet emergency circumstances, situations involving exceptional foreign policy and national security sensitivities and other such special circumstances. In utilizing such additional exemptions agencies shall, as soon as feasible, consult with the Department of State and the Council on Environmental Quality.

(d) The provisions of Section 2-5 do not apply to actions described in Section 2-3(a) unless permitted by law.

Sec. 3.

3-1. Rights of Action. This Order is solely for the purpose of establishing internal procedures for Federal agencies of consider the significant effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action.

3-2. Foreign Relations. The Department of State shall coordinate all communications by agencies with foreign governments concerning environmental agreements and other arrangements in implementation of this Order.

3-3. Multi-Agency Actions. Where more than one Federal agency is involved in an action or program, a lead agency, as determined by the agencies involved, shall have responsibility for implementation of this Order.

3-4. Certain Terms. For purposes of this Order, 'environment' means the natural and physical environment and excludes social, economic and other environments; and an action significantly affects the environment if it does significant harm to the environment even though on balance the agency believes the action to be beneficial to the environment. The term 'export approvals' in Section 2-5(a)(v) does not mean or include direct loans to finance exports.

3-5. Multiple Impacts. If a major Federal action having effects on the environment of the United States or the global commons requires preparation of an environmental impact statement, and if the action also has effects on the environment of a foreign nation, an environmental impact statement need not be prepared with respect to the effects on the environment of the foreign nation.

JIMMY CARTER
THE WHITE HOUSE,
January 4, 1979.

Exec. Order No. 12114
44 Federal Register 1957
1979 WL 25866 (Pres.)
END OF DOCUMENT

CEQ Guidance on NEPA Analyses
for Transboundary Impacts
July 1, 1997



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.

Recycled Paper

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 States². 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

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).

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

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,

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 process¹⁵ 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,

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 regulations¹⁹ and various judicial doctrines interpreting NEPA²⁰. 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 state²¹. This rule of

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. Catholic 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.