

CEQ PROMOTES NEPA REVIEW COLLABORATION TO HELP DETER LAWSUITS

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The White House Council on Environmental Quality (CEQ) is advocating greater collaboration among federal agencies and non-governmental stakeholders during National Environmental Policy Act (NEPA) evaluations of the environmental impacts of major federal actions.

A new CEQ handbook for federal collaboration says such collaboration could reduce litigation -- which at times has plagued controversial military actions, such as training exercises deploying sonar or military expansion plans.

According to the new guidance, "The main goal of the handbook is to encourage collaboration where appropriate by showing how agencies have collaborated with parties in the past and how agencies can better collaborate with parties in the future throughout a NEPA process."

The 35-page document -- Collaboration in NEPA: A Handbook for NEPA Practitioners -- generally refers to collaboration as agency engagement with other government bodies and "a balanced set of affected and interested parties in seeking agreements at one or more stages of the NEPA process by cultivating shared vision, trust, and communication." Under NEPA, if a federal agency plans to undertake a major federal action significantly affecting the environment, it must prepare an environmental impact statement (EIS) -- an analysis of the action's environmental impacts -- and weigh alternatives.

Although the handbook is dated October 2007, CEQ announced its release in a Nov. 7 Federal Register notice.

Collaboration does not take away the agency's authority or responsibilities, the guide notes. "Collaboration does not turn the NEPA process into a process where an agency's responsibility to make sound decisions is replaced by how many votes are cast for a particular option or alternative."

A CEQ task force created the non-binding document as part of an effort to review NEPA implementing practices and procedures in a variety of areas. CEQ envisions the document -- as well as other efforts by the task force -- will aid federal agencies in updating their practices and procedures, CEQ says on its NEPA task force Web page. Military sources could not be reached for comment on the handbook.

The Air Force was the only military service to submit written comments on the draft version of the handbook, warning in its general comments that "[u]nless 'collaboration' is adopted as a policy in the iterative process, it may not be considered a viable option to

environmental engineers confronted with the NEPA process." The Air Force also argued the handbook should stress that there is no difference between the collaborative and traditional NEPA processes, "and that collaboration is an integral part of the NEPA process." The task force, however, did not modify this characterization in the final document, noting that "[a]gencies will sometimes find that there is tension between traditional NEPA practices and collaborative approaches."

To facilitate collaboration, the handbook links the various stages of the NEPA process -- such as development of a proposed action and analyzing alternatives to the action -- to measures intended to enhance collaborative engagement. The NEPA task force found that using collaborative approaches to engage the public and assess impacts stemming from federal agency actions "can improve the quality of decision-making and increase public trust and confidence in agency decisions."

The guide describes various activities for which collaboration is appropriate, such as when developing alternatives to the agency's planned action, during which a particularly contentious sticking point can drive the remaining NEPA process. To enhance collaboration during this step, agencies could hold public workshops to discuss draft alternatives, work with other agencies, advisory committees or other stakeholder groups to identify or refine alternatives, or meet with nongovernmental organizations to discuss improving draft alternatives.

"If agencies desire broader agreement in identifying the preferred alternative, engaging in effective collaboration at the alternative development stage of NEPA is absolutely essential. Selecting a preferred alternative collaboratively can be an effective way of reducing future conflicts and expediting the NEPA process."

The handbook lists several benefits to collaborating. These include making more informed decisions based on added scientific, technical and local expertise, creating a fairer process, improving fact-finding, increasing public confidence in government, easing implementation of a decision, enhancing environmental stewardship, better integrating the multiple analyses associated with various legal and permitting requirements for a project, preventing conflict and reducing litigation.

This last benefit could be significant for the military, which in recent years has seen a number of lawsuits filed -- some successful -- over alleged NEPA violations. Among these are various challenges to the Navy's use of sonar in training, including one key case in which legal scholars are warning that Navy arguments in the case would have the court create a first-time judicial exemption under NEPA for national security issues, which could in turn lead to exemptions from NEPA compliance for a slew of other military activities. In another case, progress on a landing field that the Navy wants to build in North Carolina stalled when an appeals court ordered the Navy to redo an EIS under NEPA, after environmentalists successfully argued that the original impact analysis was inadequate and did not conform to the law.

In addition, the Army is facing potentially significant NEPA challenges over its plans to increase its size by 74,000 troops by 2010. That plan will entail expanding a number of bases and ranges throughout the United States.

State and local regulators and environmental activists in Alaska, Arizona, Hawaii and Colorado recently submitted comments criticizing a key NEPA document for the plan, saying it gives insufficiently detailed or realistic analysis of environmental impacts at specific installations (Defense Environment Alert, Nov. 13, p3). But the Army is defending the document, claiming that more detailed analysis at this point is not practical and not helpful to commanders faced with difficult choices as the force becomes larger. The criticisms build on existing fights in both Hawaii and Colorado, where activists have successfully litigated or sought congressional intervention to oppose the Army's handling of the EIS process.

The handbook also notes that collaboration is not always the best path to take. In some cases, "a level of engagement providing stakeholders with opportunities for public input supplemented with outreach efforts may be more appropriate." If parties believe they can achieve their interests through unilateral action such as the courts or legislature, they may not be motivated to collaborate, the guidance says. Collaboration is also less likely to work if the parties disagree on factual information or if the lead agency has "strong internal resistance" to using the approach, it says.