



NATIONAL WILDLIFE FEDERATION®

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Submitted via Whitehouse.gov

Horst Greczmiel
Associate Director for NEPA Oversight
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, DC 20503

Re: Comments on *Effective Use of Programmatic NEPA Reviews*, 79 Fed. Reg. 50579 (Aug. 25, 2014)

Dear Mr. Greczmiel:

The National Wildlife Federation (NWF) appreciates the opportunity to provide comments on the proposed guidance on “Effective Use of Programmatic NEPA Reviews” published in the August 25, 2014 Federal Register (79 Fed. Reg. 50579).

NWF is the nation’s largest conservation education and advocacy organization. NWF has more than four million members and supporters and conservation affiliate organizations in forty-nine states and territories. NWF has a long history of working to protect the nation’s rivers, coasts, and wetlands and the fish and wildlife that depend on those vital resources. As part of these efforts NWF has worked to defend and effectively implement the full suite of federal environmental laws, including the National Environmental Policy Act (NEPA).

NWF believes that development of this guidance is an important component of the Council on Environmental Quality’s efforts to ensure that all federal agencies are effectively implementing NEPA. As set forth in more detail below, NWF urges CEQ to provide additional clarification and direction in the final programmatic NEPA guidance to help ensure that programmatic reviews add meaningful value to the decision making process.

General Comments

The careful use of legally sufficient programmatic NEPA reviews can improve decision making at the broad program or policy level and can set the stage for more effective project level and site-specific decisions. However, as the draft guidance notes, historically there have been instances where programmatic reviews have fallen far short of their intended value and sometimes have resulted in a “shell game” whereby agencies continually defer the consideration of specific impacts to the point of excluding the review of such impacts all together.

Decision making is also compromised where programmatic NEPA reviews narrow or limit alternatives based on only a superficial or general review of potential impacts, and where programmatic reviews are relied upon without subsequent site-specific/project-specific NEPA reviews. Under these situations, decision will be made without a meaningful understanding of the likely environmental impacts in direct violation of NEPA's fundamental purpose.

NWF urges CEQ to include additional clarification and examples in the final guidance to better ensure that programmatic NEPA reviews will be used appropriately and uniformly across the different federal agencies. Improvements in the quality of programmatic reviews and a more uniform approach to their use across all agencies would both improve decisions that can have profound effects on people and wildlife, and increase the public's confidence in the use of programmatic NEPA reviews.

To address these fundamental issues, NWF urges CEQ to adopt the recommendations provided in these comments and to ensure that the final guidance:

- (1) Includes numerous additional specific examples that will allow the federal agencies and the public to understand when programmatic reviews are appropriate and when they are not appropriate.
- (2) Clarifies that programmatic NEPA reviews are not to be utilized to narrow future alternatives for multi-faceted actions and operating plans, as alternatives should not be narrowed for such actions and plans until detailed and site specific impact analyses have been carried out.
- (3) Clarifies that large-scale programmatic NEPA reviews without subsequent site-specific reviews will be insufficient in the vast majority of cases.

In light of the aggressive Congressional push to roll back many NEPA protections, NWF also recommends that CEQ use this guidance, and its ultimate release, to highlight the many significant benefits and protections that NEPA has provided to people, wildlife, and taxpayers since its enactment. Environmental reviews of water resources projects, for example, have produced better and far less damaging projects and saved taxpayers hundreds of millions of dollars.

For example, environmental review protected 200,000 acres of wetlands – an area the size of all 5 boroughs of New York City – and saved taxpayers more than \$220 million when the review led the George W. Bush Administration to stop the Yazoo Backwater Pumping Plant project in Mississippi.¹ Environmental review protected a pristine tidal lagoon and saved taxpayers more than \$133 million and when the review led to the end of an unnecessary and destructive plan to dredge Bolinas Lagoon in California. Environmental review protected a vital tidal inlet and saved taxpayers \$458 million when the review led the George W. Bush administration to stop the Oregon Inlet Jetty Project in North Carolina. Environmental review saved more than 4,300 acres of wetlands that would have been destroyed under the original plan for raising levees along the Mississippi River.

On the other hand, when resource agency concerns are ignored and necessary studies are not done, the results can be devastating. Prior to construction of the Mississippi River Gulf Outlet (MRGO)² in Louisiana, the U.S. Fish and Wildlife Service raised serious concerns and called on the U.S. Army Corps of

¹ NWF can provide a significant amount of additional information on the projects and environmental reviews referred to in this paragraph if that would be useful. There are also, of course, many more examples of positive NEPA outcomes (*see, e.g.*, <http://www.nrdc.org/legislation/nepa-success-stories.asp>).

² This project was constructed before passage of NEPA.

Engineers (Corps) to conduct additional environmental and hydrologic modeling, but the Corps ignored this advice. The Corps also ignored repeated calls to alter its management of the MRGO after construction. During Hurricane Katrina, the MRGO funneled Katrina's storm surge into New Orleans, resulting in devastating flooding in St. Bernard Parish and the lower Ninth Ward. The MRGO has destroyed more than 27,000 acres of coastal wetlands and damaged more than 600,000 acres of coastal ecosystems surrounding the Greater New Orleans area.

As aptly stated by eight past chairs of the Council on Environmental Quality:

[C]onsideration of the impacts of proposed government actions on the quality of the human environment is essential to responsible government decision-making. Government projects and programs have effects on the environment with important consequences for every American, and those impacts should be carefully weighed by public officials before taking action. **Environmental impact analysis is thus not an impediment to responsible government action; it is a prerequisite for it.**³

Specific Comments

NWF recommends the following additions and changes to the draft programmatic NEPA guidance.

A. Appropriate Use of Programmatic Reviews

The final programmatic guidance should more clearly define when, and for what types of activities, a programmatic NEPA review is appropriate and useful and when a programmatic review should not be utilized. As part of this clarification, CEQ should add numerous additional specific examples to provide guidance to the federal agencies and the public. The specific examples provided in the draft guidance are extremely useful, but additional examples are needed.

NWF also urges CEQ to amend the draft guidance to prohibit the use of programmatic NEPA reviews to narrow or otherwise restrict future alternatives for multi-faceted actions and operating plans. Alternatives should not be narrowed for such actions and plans until detailed and site specific impact analyses have been carried out. To do otherwise could radically limit the ability of decision makers to identify alternatives that would better protect the environment and public safety.

Operating plans, such as those developed and carried out by the U.S. Army Corps of Engineers (Corps), can often involve significant, multiple and diverse activities carried out over many decades. As discussed in more detail in the examples below, such operating plans can result in extensive ecosystem-wide environmental harm and can put the public at significant risk. The environmental impacts of operating large-scale projects can often dwarf the impacts of the original construction.

³ September 19, 2005 Letter to the Honorable Cathy McMorris, Chair of the Task Force on Improving the National Environmental Policy Act from Russell E. Train (CEQ Chair 1970-1973), Russell W. Peterson (CEQ Chair 1973-1976), John Busterud (CEQ Chair 1976-1977), Charles W. Warren (CEQ Chair 1977-1979), J. Gustave Speth (CEQ Chair 1979-1981), Michael R. Deland (CEQ Chair 1989-1993), Kathleen A. McGinty (CEQ Chair 1995-1998), George T. Frampton Jr. (CEQ Chair 1998-2001), Gary Widman (CEQ General Counsel 1974-1976), Nick Yost (CEQ General Counsel 1977-1981) (emphasis added).

The adverse environmental impacts are often amplified and prolonged by the Corps' failure to regularly update its operating plans as required by internal Corps guidance and its failure to supplement decades-old NEPA reviews when the Corps is clearly required to do so as a matter of law.

While a programmatic NEPA review could assist in improving planning for these types of operating activities, it is essential that alternative management strategies and activities are **not** eliminated until a detailed, site-specific impact analysis is carried out since detailed analysis is required to determine the true extent of harm caused by different management approaches. Similarly, a large-scale programmatic NEPA review without additional site-specific reviews will not be sufficient for these operating plans.

(1) Operation of the Mississippi River Navigation System

The Corps carries out a large scale, multi-faceted actions to operate and maintain the Upper Mississippi River navigation system, which includes the Mississippi River from Cairo, Illinois north and parts of the Illinois and other rivers in that region. The Corps continues to rely on a series of 35 year old environmental impact statements to justify ongoing operation of this project.⁴

The Corps' current operation and maintenance actions include: water level regulation, dredging and dredged spoil disposal, construction of large scale river training structures, construction and placement of revetment and other bank hardening activities, and operation and maintenance of the systems' extensive number of locks and dams. Reports released by the U.S. Geological Survey in 1999 and 2008 document the role of these activities in destroying critical habitats including the rivers' backwaters, side channels and wetlands; altering water depth; destroying bathymetric diversity; causing nonnative species to proliferate; and severely impacting native species. Extensive peer-reviewed science shows that construction of river training structures as part of these activities have increased flood levels by 10 to 15 feet in broad stretches of the river during large floods.

While a programmatic NEPA review could provide useful information with respect to the impacts of these ongoing operations activities, alternative approaches to managing the river system should **not** be eliminated or narrowed without a detailed and site-specific analysis of impacts, and the ultimate recommendation of an alternative management regime should be based on a project and site specific NEPA review.

(2) Operation of the Apalachicola-Chattahoochee Flint River System

The corps is managing the Apalachicola-Chattahoochee-Flint (ACF) system under an operating manual that was completed in 1958 and numerous interim documents. The Corps continues to rely on a more than 20 year old NEPA review to justify ongoing operation of this project.⁵

The outdated operating manual – and flawed interim operating manuals – are preventing the Apalachicola River from receiving the freshwater flows needed to maintain a healthy river, floodplain, and fishery causing significant damage to one of the most ecologically rich river systems in North America and

⁴ NWF and others are currently suing the Corps to compel completion of a single, comprehensive supplemental EIS for these activities.

⁵ The Corps is currently preparing a new water control manual and environmental impact statement for this project, but only as the result of years of pressure and litigation. This review is still years away from completion.

the vitally important Apalachicola Bay. Recreational fishing in the Apalachicola River and Bay contributes \$191 million to the local economy each year while commercial fishing contributes \$200 million annually to the regional economy and directly supports up to 85 percent of the local population. The ecosystem services provided by the Apalachicola River and Bay have been valued at \$5 billion a year.

The Deputy Secretary of Florida's Department of Environmental Protection recently told Congress that the Apalachicola "River and Bay ecosystem, and thus, the men and women of this region, are entirely dependent on timely freshwater flows to remain healthy and productive."⁶ Despite this critical importance, the Corps' outdated management has resulted in both lower flows and more frequent low flows than any time in recorded history, with particularly extreme low flows during the past 10 years. Low flows lead to a recent crash in the oyster populations in Apalachicola Bay, forcing Florida's Governor to ask for a federal declaration of a commercial fishery failure for Florida's oyster harvesting areas in the Gulf of Mexico.⁷

While a programmatic NEPA review could provide useful information with respect to the impacts of the ongoing management measures, alternative operating approaches should **not** be narrowed for operating the ACF dams and reservoirs without a detailed and site-specific analysis of impacts, and the ultimate recommendation of an alternative management regime should be based on a project and site specific NEPA review.

(3) Operation of California Flood Control Dams

Outdated Corps operating plans are harming California's rivers and threatening the safety of communities throughout central California. The region's 35 federal flood control dams are being managed under flood operating plans that are dramatically out of date, with many dating back 50 years. Clearly much has changed since then, including changes in rainfall, snowmelt patterns, land use patterns, weather forecasting, hydrology, computer modeling, and applicable laws and policies. Operating rules developed decades ago with a slide-rule, paper, and pencil cannot account for modern conditions.

California recognizes the vital importance of modernizing operation of the Corps' flood control reservoirs in the state. Recently enacted state legislation (SB X2 1) requires the California Department of Water Resources to identify potential options for reoperation of the state's flood protection and water supply systems. To implement this legislation, the department is developing a System Reoperation Program to improve water supply reliability, flood hazard reduction, and ecosystem protection and restoration. Reoperation of federal flood control reservoirs managed by the Corps, and improved coordination with federal water resources projects, are a central component of this plan.

The Corps should conduct project-specific NEPA reviews and update these operating plans to account for: current needs; current environmental conditions, including changes in rainfall, flood levels, snowmelt patterns; current land use patterns; modern scientific information; and state of the art management approaches that can both ensure effective operation of federal projects *and* protect the environment.

⁶ Testimony of Greg Munson, Deputy Secretary of Florida Department of Environmental Protection, *Oversight of Army Corps of Engineers Water Management in the Apalachicola-Chattahoochee-Flint River (ACF) and the Alabama-Coosa-Tallapoosa (ACT) River Systems* before the Senate Committee on Environment and Public Works, July 22, 2013.

⁷ *Id.*

While a programmatic NEPA review could provide useful information with respect to the impacts of the ongoing management measures, alternative operating approaches should **not** be narrowed for operating California's flood control dams without a detailed and site-specific analysis of impacts, and the ultimate recommendation of an alternative management regime should be based on a project and site specific NEPA review.

Recommendations: To address these issue, NWF recommends the following changes to Section III (When to Use a Programmatic and Tiered NEPA Review) and Section IV (Practical Considerations for Programmatic Reviews and Documents) of the draft programmatic guidance:

1. Provide numerous additional specific examples to assist federal agencies in determining when and for what types of activities, a programmatic NEPA review is appropriate and useful and when a programmatic review should not be utilized. Specific examples may well be the most useful tool in helping agencies and the public make such determinations.
2. Prohibit the use of programmatic NEPA reviews to narrow or limit future alternatives for large or multi-faceted actions and for operating plans (see, *e.g.*, Draft Guidance at 18, 23, 25-26, 33). Use of a programmatic NEPA review to narrow alternatives in such instances could radically limit the ability to implement alternative approaches that would cause far less harm to the environment.
3. Establish an explicit default presumption that programmatic reviews **alone** will be inappropriate and as a result, site-specific reviews will be required in order to provide sufficient detail to satisfy NEPA requirements and meaningful public participation and to assess new information that is often revealed subsequent to preparation of programmatic documents. This presumption should be rebuttable only if the agency can demonstrate with substantial evidence that subsequent site specific reviews are not necessary.
4. Carefully define and provide explicit examples of the terms: "existing program", "agency plan for a group of related projects", "decision to proceed with a group of concerted actions to implement a specific policy or plan", "approving multiple actions", and "multiple projects that are temporally or spatially connected" (see, *e.g.*, Draft Guidance at 10-11). As noted above, we urge that the final guidance explicitly state that programmatic NEPA reviews may not be used to narrow or limit alternatives for operating plans or for large or multi-faceted actions.
5. Provide more detail and specific examples of both appropriate and inappropriate "purpose and need" statements for a programmatic NEPA document (see Draft Guidance at 14).
6. Provide more detail and specific examples relating to determining the level of detail appropriate to a programmatic analysis (see Draft Guidance at 25-26).

B. Programmatic Reviews Without Subsequent Analysis

Programmatic reviews without subsequent tiered analysis will be insufficient in the vast majority of cases. The fundamental problem with such an approach is that the programmatic review will not provide sufficient detail to support informed public involvement and decision-making at either the program or project levels. As several courts have noted, the critical inquiry in considering the adequacy of NEPA review is not whether a project's site specific impacts must be analyzed in detail, but when that detailed analysis will take place.⁸

⁸ See *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) ("The critical inquiry in considering the adequacy of an EIS prepared for a large scale, multi-step project is not whether the project's site-specific impact should be evaluated in detail, but when such detailed evaluation should occur."). See also, *Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d

We appreciate the statement in the draft guidance that programmatic NEPA reviews “designed to meet NEPA responsibilities for proposed actions without a tiered review are governed by the same regulations and guidance that apply to non-programmatic NEPA reviews” and “should be developed and their adequacy judged as a stand-alone final NEPA review” (Draft Guidance at 4). However, we are unaware of any cases where a programmatic review in fact covered all future actions and adequately addressed site specific impacts.⁹

Recommendations: To ensure compliance with the requirements of NEPA, NWF recommends that the final guidance:

1. Clearly state that the use of programmatic reviews without subsequent site-specific analysis will be insufficient in the vast majority of cases, are strongly discouraged, and should be utilized only in the rarest of cases.
2. Provide additional clarification, including specific examples, on those limited circumstances where a stand-alone programmatic NEPA review may be appropriate, including specific examples.
3. Stress the importance of including detailed site specific reviews in any programmatic review that is intended to support decision making without subsequent project-specific reviews; provide additional detailed guidance on what must be addressed in such a review; and include references and links to any stand-alone programmatic reviews that have been found to be legally adequate (if they exist) to provide additional guidance to the agencies and the public.

C. Analysis of Alternatives and Public Involvement

The consideration of alternatives is “the heart of the environmental impact statement” and alternatives should not be narrowed without a detailed analysis of the impacts to ensure that less damaging alternatives are not being ignored or otherwise given short shrift. As discussed above, NWF has significant concerns regarding the narrowing of alternatives for large, multi -faceted actions and operating plans based on only a programmatic review and recommends that this be expressly prohibited.

For other types of programmatic analyses, NWF recommends that CEQ provide additional guidance and direction on the alternative evaluation process for programmatic NEPA reviews and place particular

1083, 1095 (9th Cir. 2006)(“While there is nothing improper about reaching these decisions at the programmatic stage, it is improper to do so without undertaking the analysis required by NEPA when those decisions are made.”).
⁹ To the contrary, numerous programmatic reviews have been found to be inadequate both by design and function. Tiering to a flawed programmatic review will only exacerbate the inadequacy of such outcomes. For example, the BP Deepwater Horizon disaster is an example where inappropriate drilling was allowed to continue based on information predicated upon a Programmatic EIS for the Outer Continental Shelf Oil and Gas Leasing Program: 2012-2017. Recent examples of fundamentally flawed programmatic reviews that were successfully challenged include: *2009 West-wide Energy Corridor Programmatic Environmental Impact Statement (in evaluating new siting processes to deploy energy infrastructure in accordance with Section 368 of the Energy Policy Act of 2005, the Department of Energy failed to analyze the site-specific impacts of new energy corridors while permitting development in federal areas off-limits to such development, failed to consider the impacts to endangered and threatened wildlife and plant species in accordance with Endangered Species Act, and failed to incorporate required mitigation practices); 2008 Oil Shale and Tar Sands Leasing Programmatic EIS (BLM’s programmatic EIS to amend eight resource management plans in Colorado, Wyoming, and Utah to allow for the commercial leasing of oil shale and tar sands resources failed to contemplate likely impacts).*

emphasis on the importance of soliciting and considering alternatives that are outside of the jurisdiction of the lead agency or that are developed outside of the lead agency. Similarly, since public input is a cornerstone of the NEPA process, the importance of publicly developed alternatives should also be emphasized in the final guidance.

To facilitate meaningful public involvement in site specific EIS or EAs that are tiered to a programmatic EIS, NWF recommends that the guidance both remind agencies of their responsibility to make prior documents “reasonably available” (1502.21) and urge agencies to make them *easily* available. In our experience, when working within the confines of a short comment period, the public is often faced with the time-consuming challenge of attempting to locate prior NEPA documents. Prior documents should be posted online along with current documents. However, posting online alone is not sufficient. For NEPA to continue to promote public participation, it is critical that key documents reach as wide an audience as possible. For this reason, in addition to posting documents online, documents should also be made available: in reasonably accessible reading rooms at the federal agencies; in key regional and local libraries; and by mailing CD/DVD and/or hard copies upon request to interested stakeholders.

D. Lifespan of a Programmatic NEPA Document

As discussed in Section A of these comments, it is clear that at least some agencies lack the resources, or are otherwise reluctant to update even unquestionably out of date environmental impact statements, including for large-scale, multi-faceted projects and for ongoing operating plans. NWF urges CEQ to provide more direction to the federal agencies on the useful life of both programmatic and site-specific NEPA reviews, and to work with the federal agencies to ensure that outdated analyses are in fact supplemented when they meet the legal requirements for supplementation.

NWF strongly supports the CEQ guidance requiring federal agencies to carefully reexamine an EIS that is more than 5 years old to determine whether the criteria for supplementation have been met. Unfortunately, however, there are many cases where agencies fail to update an EIS for unconstructed or ongoing activities even when the criteria for supplementing that EIS are clearly met.

While NWF appreciates concerns related to establishing a hard outside time limit for supplementing an EIS (*i.e.*, that this could deter agencies from supplementing an EIS earlier than the set time limit even when new and significant information or project changes mandate earlier supplementation), we do believe that an outside limit would be helpful in preventing egregious abuses of the supplementation standard. We urge CEQ to consider establishing some type of absolute outside time limit for supplementation, or at least to establish a strong presumption that an EIS must be updated after a certain date. We suggest that there should be no set of circumstances under which an agency can continue to rely on an EIS or Programmatic EIS that is more than 10 years old.

E. Implications of the Final Programmatic NEPA Guidance to Other Legislative Mandates Related to Developing Programmatic Approaches to NEPA Review

As CEQ is aware, there has been a strong legislative push towards the use of programmatic approaches to NEPA reviews based on the faulty assumption that the environmental review process is a root cause of project delays. Significant changes to the environmental review process for water resources projects were enacted in the Water Resources Reform and Development Act of 2014 (WRRDA 2014, P.L. 113-121). NWF and many others in the conservation and legal communities are extremely concerned that these

changes will undermine the effectiveness of reviews carried out under NEPA and other bedrock environmental laws, including the Endangered Species Act, the Clean Water Act, and the Fish and Wildlife Coordination Act. The changes implemented by WRRDA 2014 may severely limit the quality of information available to assist Corps project planning. The changes also impose limitations on the public's ability to participate in decisions that have profound impacts on public safety, the environment, and the economy.

Section 1005 (Project Acceleration) of WRRDA 2014 creates an extensive array of changes to the NEPA review process for Corps projects. Among many other things, this section directs the Secretary of the Army to "issue guidance regarding the use of programmatic approaches to carry out the environmental review process." The guidance must ensure that any reviews carried out using "programmatic approaches" will comply with NEPA and all other applicable laws. In developing this guidance, the Secretary is to consult with other agencies, Tribes, and the public; emphasize the importance of collaboration; and ensure that the programmatic reviews promote transparency and use accurate and timely information. Among other things, the Secretary is to establish "criteria for determining the general duration of the usefulness of the reviews" and a "timeline for updating any out-of-date review." The guidance is to be subject to formal public notice and comment.

NWF believes that a meaningful set of guidelines on the use of "programmatic approaches" – which appear to be different than programmatic NEPA reviews – will require a stand-alone comprehensive inter-agency process, and extensive stakeholder involvement, to ensure that any final guidelines will in fact ensure full compliance with NEPA and other environmental laws.

NWF requests that CEQ clarify the extent to which the final programmatic NEPA guidance should apply to the development of guidance regarding the use of "programmatic approaches" to environmental reviews. NWF also urges CEQ to take an active leadership role in establishing the "programmatic approaches" guidance.

Conclusion

Thank you for the opportunity to comment on the draft programmatic NEPA guidance. We appreciate CEQ's effort to enhance the clarity and utility of programmatic reviews while also ensuring the role of an informed public in providing meaningful input into government decisions. We would be pleased to discuss our comments with you in more detail.

Sincerely,



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