

**Defenders of Wildlife * Earthjustice
Epic – Environmental Protection Information Center
Klamath Forest Alliance * Natural Resources Defense Council
Oceana * Sierra Club * Southern Environmental Law Center
Western Environmental Law Center**

October 9, 2014

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”

Dear Mr. Greczmiel:

The undersigned organizations write to offer comments on the proposed guidance on “Effective Use of Programmatic NEPA Reviews” that the Council on Environmental Quality (“CEQ”) published for review and comment in the Federal Register on August 25, 2014. We commend CEQ for affording the public the opportunity to comment on this draft guidance document. We are pleased that CEQ is continuing with their efforts to ensure agencies are appropriately implementing this landmark statute, and urge the Council to add clarification and direction in the final guidance making it clear that large-scale programmatic reviews without additional site-specific reviews are insufficient in the vast majority of cases.

I. Introduction

We understand and appreciate the role of programmatic NEPA reviews in facilitating decisions at both the broad program or policy level as well as at the project or site-specific level. We also recognize that, done correctly, programmatic reviews can help better assess cumulative impacts, further the Administration’s efforts to implement landscape-scale mitigation policies, and meaningfully engage the public at all stages of decisionmaking. We are particularly pleased that the current draft rightly and repeatedly emphasizes the importance of agencies to engage the public at all stages of programmatic review and makes clear that agencies are required to explicitly articulate how a programmatic review will be used and when, and what will trigger site-specific, tiered reviews.

However, as the draft guidance notes, there have been instances historically where programmatic reviews have fallen far short of their intended value and sometimes have resulted in a “shell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 certain impacts altogether. The current draft provides some useful direction to assist agencies in avoiding this situation, but we recommend that CEQ provide more detailed examples and greater specificity on how this shell game should be avoided. *See* Draft Guidance 23. Moreover, the Guidance should more explicitly set out the default presumption that programmatic reviews alone are often inappropriate and, as a result, agencies must complete site-specific reviews in order to provide sufficient detail to satisfy NEPA requirements, provide meaningful public participation, and assess new information that is often revealed subsequent to the preparation of programmatic documents.

Similarly, it may well be that different federal agencies (e.g., Corps of Engineers, Department of Transportation, and land management agencies) may have very different practices when it comes to environmental analysis, thereby influencing the public's experience with programmatic review.¹ For example, when the public experiences the Corps' approach to programmatic analysis, which may differ significantly from the Forest Service's approach, it serves to confuse and frustrate the public's overall experience with NEPA. We hope that CEQ's guidance will help create uniform approaches to programmatic environmental review, which will assist the public in better understanding the purpose and desired outcomes of that programmatic review. If more specific approaches need to be outlined, then we certainly recommend that CEQ—the agency entrusted with NEPA compliance and implementation—oversee the development of any additional guidance.²

II. Recommendations

a. Application of Guidance to Environmental Assessments

The draft guidance states that “CEQ interprets its regulations as allowing for the use of a programmatic approach in developing an EA as well as an EIS.” Draft Guidance 9. The CEQ regulations state, “Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions” of NEPA, and that “these regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2) [requiring the preparation of reports documenting the environmental consequences of a proposed action].” 40 C.F.R. § 1500.3.

While we agree that the CEQ regulations are plainly applicable to the preparation of environmental assessments (programmatic or otherwise), some federal agencies—including the federal land management agencies (e.g., Forest Service, Bureau of Land Management)—do not agree. Given that CEQ's position is that the regulations are applicable to EAs as well as EISs, we recommend that CEQ further clarify and expressly describe how and why the Programmatic Guidance is applicable to EAs as well as EISs.

¹ For example, when the public has a particular experience with the Corps' approach to programmatic analysis, which may be a very different approach than the public's experience with another agency, such as the Forest Service, it serves to confuse and frustrate the public's overall experience with NEPA.

² For example, see the Water Resources Development Act, 33 U.S.C. 2348(f), which requires the Secretary to issue guidance regarding the use of programmatic approaches to carry out the environmental review process.

b. Programmatic Reviews Without Subsequent Analysis

The primary challenge of developing programmatic reviews without subsequent tiered analysis is providing sufficient detail to support informed public involvement and decisionmaking at both the program and project levels. As several courts have noted, the critical inquiry in considering the adequacy of programmatic review documents is not whether they review site-specific project impact, but when.³ When programmatic NEPA reviews are designed to avoid subsequent project-specific reviews, close scrutiny is warranted and clear guidance is needed. In our experience, programmatic reviews without subsequent site-specific analysis are insufficient in the vast majority of cases.

The guidance discusses these situations where an agency may prepare a programmatic NEPA review without any further project-specific analysis. For example, the guidance states:

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. They should be developed and their adequacy judged as a stand-alone final NEPA review. This guidance addresses both programmatic NEPA reviews that make decisions applicable to subsequent tiered NEPA reviews and programmatic NEPA reviews without any subsequent NEPA review.

Draft Guidance 4. Although a comprehensive PEIS covering site-specific actions may be possible conceptually, we are hard-pressed to find examples where a programmatic review covered all future actions and adequately addressed site-specific impacts.

We appreciate the possibility of programmatic review documents sufficiently detailed to preclude the necessity of future tiered review; however, we do believe it is a unique situation, and the default presumption should be that programmatic reviews will be followed by site-specific analysis. Consequently, we believe the guidance would benefit from further discussion of this circumstance as well as the inclusion of specific prior examples where a programmatic review was sufficiently detailed to support informed decision-making and informed public involvement at the program and site-specific level.⁴

³ 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 1083, 1095–97 (9th Cir. 2006) (“While there is nothing per se 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.”).

⁴ The history of programmatic reviews is interspersed with examples that were found to be inadequate by design and function. Tiering decisions based primarily on potentially flawed programmatic reviews will only exacerbate the inadequacy of such outcomes. The BP Deepwater Horizon disaster is an example where inappropriate drilling was allowed to continue based on information predicated upon a PEIS for the Outer Continental Shelf Oil and Gas Leasing Program: 2012–2017. Recent examples of flawed programmatic reviews that were successfully challenged by stakeholders based on the grounds that these analyses were fundamentally flawed include:

c. When to Conduct a Programmatic Review

We suggest that CEQ strengthen its language in Section III, discussing when agencies should use programmatic review. CEQ's proposed guidance describes areas where a programmatic review is "appropriate." These include where an agency is (1) adopting official policy, (2) adopting formal plans, (3) adopting agency programs, and (4) approving multiple actions. Guidance 9–11. However, there are situations where it may be "appropriate" for an agency to conduct programmatic review, but the agency foregoes this review, instead conducting multiple project-level reviews. For example, under CEQ's guidance, an agency such as the National Marine Fisheries Services could release multiple different NEPA documents reflecting multiple different fishery rules and regulations affecting a common geographic region and common species that likely have cumulative impacts without properly analyzing the cumulative impacts of this de facto program. This situation exists, for example, with respect to actions affecting sea turtles and marine mammals in the Atlantic. In these types of instances, CEQ should clarify that a programmatic NEPA document is strongly recommended, not simply "appropriate," in order to prevent the failure to account for cumulative impacts, consider alternatives to mitigate them, and to ensure that programmatic review does occur.

d. Alternatives Analysis & Public Involvement

Because the consideration of alternatives is "the heart of the environmental impact statement," the discussion of alternatives in the guidance should be expanded to emphasize the critical importance of alternatives analysis in programmatic review. We recommend that CEQ place particular emphasis on the importance of soliciting and considering alternatives developed outside of the lead agency.⁵ Similarly, since public input is a cornerstone of the NEPA process, the importance of publicly developed alternatives should also be emphasized in this section as well as in Section IV(B) on collaboration and public engagement.

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- *2009 West-wide Energy Corridor PEIS*: In the process of proposing 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 even consider the impacts to endangered and threatened wildlife and plant species in accordance with Endangered Species Act, and did not incorporate requisite mitigation practices as required for such development.
 - *2008 Oil Shale and Tar Sands Leasing PEIS*: Bureau of Land Management's analysis 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, "Because there is no commercial oil shale industry in the United States, there is no data available on what, if any, extraction process will be commercially viable, and thus there is uncertainty about the precise impacts from commercial oil shale development." 73 Fed. Reg. 69,414. Despite the near absence of data, the PEIS codified a framework for leasing.

⁵ For example, on page 18, the first sentence in the second paragraph could be amended to read, "When preparing the programmatic NEPA review for a policy, plan, program, or project, alternatives, *including non-agency alternatives*, can be considered at the programmatic level to support focusing future decisions and eliminating certain alternatives from detailed study in subsequent NEPA reviews." Similarly, on page 20, the last sentence of the second paragraph, could be changed to read, "Outreach to potentially interested stakeholders should begin as early as possible—even in advance of formal scoping periods—to afford the public a meaningful opportunity to comment on and shape the NEPA review *and/or develop alternatives to be considered*."

e. Tiering and Availability of Prior NEPA Documents

In discussing tiering and incorporation by reference, we recommend that CEQ remind agencies of their responsibility to make prior documents “reasonably available,” 40 CFR § 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 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 be made available in reasonably accessible agency reading rooms, filed in key regional and local libraries, or be made available by mailing CD or DVD copies to interested stakeholders.

We do have some concern about CEQ’s guidance regarding tiering EISs to EAs. Draft Guidance 36. In our experience, we have yet to see a successful analysis in an EA that would permit the tiering of an EIS to that document. Indeed, this guidance may encourage federal agencies to skirt their NEPA obligations, particularly related to the analysis of cumulative effects, and prepare EAs when in fact an EIS is the appropriate document. We urge CEQ to reconsider this guidance and provide examples where the Council believes successful tiering of an EIS to an EA has occurred.

f. Tiering and the Proper Time to Raise Concerns

CEQ should resolve the uncertainty surrounding the appropriate time and place to raise concerns with a programmatic review. Where an agency issues a programmatic NEPA document and a party is interested in challenging its validity, the agency often responds that the party should wait to raise concerns at the site-specific level because the agency will address these concerns at that level. For example, development under the Outer Continental Shelf Lands Act occurs in four stages, and BOEM generally releases a programmatic NEPA document at stage one, tiered with NEPA documents at the subsequent stages. When challenging the programmatic review at step one, the agency often responds that it will address the concerns raised at the subsequent stages. However, if a party waits to raise a concern at the site-specific level, then the agency may issue a less detailed EA and claim that at the site-specific level it is too narrow to raise a broad concern. This shell game essentially shields the agency from review of its NEPA analysis.

Because of this “shell game” we suggest that CEQ require the agency to clarify in its programmatic NEPA document which concerns are addressed in which document, such that an agency binds itself to a review of certain issues in certain places. We suggest that it is appropriate to raise issues at the programmatic level where the issues affect the program as a whole and the issues are not present at each site-specific level, or where the cumulative impact of the issues is plain at the programmatic level but is relatively insignificant at the level of the site.

g. Tiering and New Information

CEQ should clarify that there are situations where new information makes it more appropriate to supplement a PEIS than to address the information at the site-specific level. CEQ's proposed guidance suggests that when new information arises, an agency may address this information by either supplementing their programmatic review or analyzing the issue at the site-specific level. Draft Guidance 37–39. However, new information may affect the whole program, such as where critical habitat is identified within large geographic sections of a proposed program. In these situations, the new information must be addressed at the programmatic level because looking at the impacts of this new information at the site-specific level may segment the analysis and underplay the impacts. We suggest that CEQ strongly recommend agencies supplement their programmatic reviews, rather than address the information at the site-specific level, in situations where new information could affect the impacts of the program as a whole.

h. Monitoring

We support CEQ's guidance on monitoring, and the role that it can and should play in programmatic analysis. Draft Guidance, 29-31. However, it is our experience that federal agencies often fail to follow through with monitoring, including in the context of adaptive management. The reasons may be capacity (funding, personnel) or institutional inertia, but the outcome is the same: programmatic analysis often fails because of inadequate monitoring. We therefore encourage CEQ to provide strong direction regarding the utility and necessity of monitoring and adaptive management in the context of programmatic environmental review.

i. Additional Clarifying Examples

The current draft guidance includes extremely helpful examples and appendices, but would benefit from a few more clarifying practical examples. Specifically, examples in the following areas would be helpful:

- The discussion of the purpose of the guidance in Section I, specifically footnote three, includes reference to “infrastructure with a multijurisdictional footprint” and “multiple similar recovery projects following a major disaster.” These could be confused with site-specific construction, so an illustrative example would be useful.
- The discussion of tiering in Section IV(B) would benefit from examples where an EA and finding of no significant impact were and were not appropriately tiered to a PEIS. The significance of site-specific project impacts, and documenting those impacts in the appropriate environmental review document, in light of a broad PEIS has historically been a source of confusion for both the public and agencies, so concrete examples of best practices would add useful clarity.
- In the description of areas where programmatic review is “appropriate” in Section III, category four on “approving multiple actions” would benefit from a specific example to explain what CEQ means by “approving multiple actions,” “spatially connected,” or common geography.”

III. Conclusion

Thank you for this opportunity to comment on the draft 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. The need for clarity on the intersection between programmatic NEPA analysis and site-specific impact assessment is paramount, so again, we appreciate this opportunity. We look forward to the completion of the "Effective Use of Programmatic NEPA Reviews" as well as the Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts—both of which are a critical component of modernizing and reinvigorating NEPA for the 21st century. We would be pleased to discuss these issues further if that would be useful, so please feel free to contact us with additional questions or concerns.

Sincerely,

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