May 1, 1979

UNITED STATES
NUCLEAR REGULATORY COMMISSION

SECY-79-305

POLICY SESSION ITEM

For: The Commissioners

From: Howard K. Shapar
Executive Legal Director

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General Counsel

Subject: NRC COMPLIANCE WITH CEQ NEPA REGULATIONS[1/]

Purpose: To inform the Commission of actions required to implement final CEQ NEPA regulations, to identify significant problems from the standpoint of implementation, to obtain Commission guidance on the extent to which NRC, as an independent regulatory agency, should be bound by the mandate to comply with CEQ's NEPA regulations, and to obtain Commission approval of a proposed letter (Enclosure F) from Chairman Hendrie to The Honorable Charles H. Warren, Chairman, Council on Environmental Quality, which expresses the Commission's concern over NRC's continuing ability to carry out its NEPA responsibilities in a manner which is consistent with its decisionmaking responsibilities as an independent regulatory agency, and indicates how the Commission plans to implement CEQ's final NEPA regulations to achieve this objective.

Issues: 1. Is NRC required, as a matter of law, to comply with CEQ's NEPA regulations?

2. If NRC compliance with CEQ's NEPA regulations is not mandated by law, should NRC voluntarily comply with those regulations as a matter of policy?

Discussion: Background

On May 24, 1977, the President issued Executive Order 11991 directing the Council on Environmental Quality (CEQ) to issue regulations to the Federal agencies to implement all the procedural provisions

1/ 43 FR Part VI, pgs. 55978-56007, November 29, 1978. On December 20, 1978 in response to Commissioner Ahearne's request, the Executive Legal Director transmitted a summary of CEQ's NEPA regulations to each Commissioner.

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of NEPA. In this same Executive Order, the President also directed Federal agencies to comply with regulations issued by CEQ "except where such compliance would be inconsistent with statutory requirements."

Current CEQ Guidelines,[2/] which remain in effect until July 30, 1979, the date on which CEQ's new NEPA regulations become effective, only provide guidance on the preparation of environmental impact statements.

In December 1977, after public hearings and consultation among a wide spectrum of public officials, organizations and private citizens, CEQ circulated draft regulations to all the Federal agencies for comment. On June 9, 1978, after further study, discussion and evaluation of comments, CEQ published proposed draft regulations in the Federal Register (43 FR 25230-25247) and provided a two-month period for public review and comment. Upon expiration of the comment period, August 11, 1978, CEQ reevaluated and revised the regulations in the light of the comments received. The regulations were published in final form on November 29, 1978 to become effective July 30, 1979.

On several occasions during the development of CEQ's NEPA regulations, individual Commissioners and NRC staff submitted written comments to CEQ.[3/] The effect of the

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2/ These Guidelines were originally issued in 1970 pursuant to Executive Order 11514 and were revised in 1973. (38 FR 20550-20562 August 1, 1973)

3/ *Staff comments on the first draft of the proposed regulations, forwarded by letter to CEQ Chairman Charles Warren from NRC General Counsel Jerome Nelson, dated February 7, 1978.

*Letter to Chairman Warren from Commissioner Kennedy, dated February 7, 1978.

Letter to Chairman Warren from Chairman Hendrie, dated February 10, 1978.

*Letter to Chairman Warren from Commissioner Bradford, dated February 27, 1978.

*Letter to Chairman Warren from Chairman Hendrie, dated August 11, 1978, providing Commission comments on the revised draft of the regulations.

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* Identifies documents in which the issue of the applicability of CEQ regulations to independent regulatory agencies is addressed.

proposed regulations was also discussed in comments, submitted to CEQ and to White House Counsel Robert Lipshutz, on proposals relating to the application of NEPA to agency activities affecting the environment in foreign nations and the global commons.[4/] In six of these submittals, the possible inapplicability of the CEQ regulations to independent regulatory agencies was raised as a major problem.

On February 14, 1979, NRC staff met with CEQ staff to discuss NRC implementation of CEQ's NEPA regulations. The meeting focused on specific items in the CEQ regulations which NRC staff had either identified as unclear or as likely to have a substantial impact on various aspects of NRC's regulatory program. At the conclusion of the meeting, the question of the applicability of CEQ's NEPA regulations to independent regulatory agencies was briefly discussed. CEQ staff stated that the regulations, which are procedural in nature, are intended to apply to the independent regulatory agencies and that the CEQ staff would view their adoption by the Commission as a positive step forward in improving the effectiveness and efficiency of the NEPA process. At the same time, CEQ staff recognized that the independent regulatory agencies might experience some difficulty in carrying out their responsibilities within the framework of CEQ's NEPA process. CEQ staff indicated that it would use a rule of reason in evaluating the way in which independent regulatory agencies implement CEQ's NEPA regulations.

4/ *Letter to Chairman Warren from Commissioner Kennedy, dated March 2, 1978.

*Letter to Mr. Robert Lipshutz from Chairman Hendrie stating the Commission's views, dated July 31, 1978.

Letter to Mr. Lipshutz from Commissioner Bradford, dated August 14, 1978.

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* Identifies documents in which the issue of the applicability of CEQ regulations to independent regulatory agencies is addressed.

Actions Required to Implement
CEQ NEPA Regulations

On January 19, 1979, CEQ General Counsel Nicholas C. Yost issued a Memorandum For NEPA Liaisons in Federal agencies[5/] providing guidance on how agencies should develop procedures to implement CEQ's NEPA regulations. The regulations do not require, nor does CEQ consider it desirable, that agency implementing procedures address every section of the CEQ regulations. As envisaged by CEQ, agency implementing procedures should be brief and need only contain new material not included in the CEQ regulations. Relevant provisions of the CEQ regulations may be cross-referenced but may not be restated or paraphrased. Quotations from CEQ NEPA regulations must be verbatim.

Agencies adopting implementing procedures or regulations were directed to follow a four-step process and adhere to the following timetable:

1. Consult with CEQ during the development of proposed implementing procedures.

2. On or before April 1, 1979, publish proposed procedures in the Federal Register for public review and comment. (This date is flexible. The effective date of the CEQ regulations, July 30, 1979, is firm.)

3. On or before June 1, 1979, submit final version of agency procedures to CEQ for review for conformity with NEPA and CEQ NEPA regulations.

4. Following adoption, file a copy of effective procedures with CEQ.

The CEQ Memorandum stated that CEQ's NEPA regulations would go into effect and be binding throughout the

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5/ See Enclosure A. for text of CEQ Memorandum For NEPA Liaisons.

government on July 30, 1979,[6] regardless of whether individual agencies have adopted implementing procedures.

The CEQ Memorandum recognizes that agency implementing procedures are not limited to rules and regulations, but may take the form of operating manuals, administrative directives, explanatory bulletins and other publications. The Memorandum states that this kind of agency guidance must also be reviewed by the Council and made available to the public. The CEQ Memorandum also refers to the requirement in § 1507.3(a) of the CEQ regulations that agencies continuously review their policies and procedures and in consultation with the Council revise them as necessary to ensure full compliance with the purposes and provisions of NEPA.

The principal task imposed on the Commission by the new CEQ NEPA regulations is the preparation, publication for comment and adoption, within the time frame specified above, of regulations which provide procedures implementing particular sections[7] of the CEQ regulations. This will require extensive revision of 10 CFR Part 51, which now sets forth NRC policy and procedures for the preparation and processing of environmental impact statements. In connection with this task, it will also be necessary to identify and revise other portions of the Commission's regulations which relate or refer to 10 CFR Part 51.

In connection with this revision, the staff also plans to restructure 10 CFR Part 51 so as to incorporate therein any additional regulations which may be needed to accommodate specific requirements of particular environmental laws, such as, for example, the Wild and Scenic Rivers Act (16 U.S.C. § 1271 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C.

6/ Although no completed environmental documents need be redone by reason of the new regulations and although the new regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of the regulations, the regulations do apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. (40 CFR § 1506.12.)

7/ §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e) and 1508.4. These sections are described in Enclosure B.

§ 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. § 1531 et seq.), and the Coastal Zone Management Act of 1972, as amended (16 U.S.C. § 1451 et seq.) In this way, all requirements respecting environmental matters will be brought together in one place in the Commission's regulations. This approach is consistent with the directives in the CEQ regulations that agencies integrate their NEPA reviews with other environmental review and consultation requirements.[8/]

Subject to Commission instruction, the NRC staff plans to send CEQ a draft of NRC's proposed implementing regulations at the same time the proposed regulations are circulated to NRC staff offices for final concurrence review. After Commission approval of the proposed regulations (May 21, 1979 is the currently projected date for transmittal of NRC's proposed regulations to the Commission) publication of the proposed regulations in the Federal Register, expiration of the public comment period and completion of the analysis of public comments, the NRC staff will prepare a Federal Register notice containing the text of the effective rule. This text will be submitted to the Commission and to the CEQ staff simultaneously, thus enabling both reviews to proceed in parallel. This procedure should eliminate any unnecessary delay in Commission issuance and publication of the final rule.

Review and analysis of specific environmental laws are now underway. Proposals for specific additions or amendments to 10 CFR Part 51 to reflect the provisions of these statutes will be submitted to the Commission from time to time as they are developed.

Although an important first step, revision of 10 CFR Part 51 is not the only task that must be undertaken to implement CEQ's NEPA regulations. Regulatory guides, environmental standard review plans and office procedures will need review and revision. NRC resources and personnel will have to be reevaluated to determine the availability of needed environmental expertise. Consideration will have to be given to the appropriate NRC response to the directive in 40 CFR § 1507.2(a) that agencies "shall designate a person to be responsible for overall review of agency NEPA compliance." This matter will be addressed in the paper submitting the proposed revision of 10 CFR Part 51 to the Commission.

8/ §§ 1502.25.

CEQ NEPA regulations specifically require each Federal agency to have the capability, in terms of personnel and other resources, of fulfilling the requirements of sections 102(2)(A), (B), (C), (E), (F), (G), (H) and (I) of NEPA and section 2 of Executive Order No. 11514, Protection and Enhancement of Environmental Quality, as amended, (40 CFR § 1507.2).[9/] Under the regulations, a Federal agency may provide this capability by arranging to use the resources of others. However, the regulations also require any Federal agency making such an arrangement to have sufficient capability in-house to evaluate work which the agency has requested others to perform.

Impact of CEQ NEPA Regulations on NRC's Regulatory Process

CEQ's NEPA regulations contain several features which could improve NRC's present NEPA process. These include provisions:

1. Containing guidance on the use of significance, importance and cost criteria in limiting the depth of information and analysis in NRC environmental impact statements (40 CFR §§ 1501.7, 1502.2 and 1502.23);

2. Requiring early scoping of issues in proposed actions to limit the selection of alternatives for analysis to a reasonable number, emphasizing real alternatives of importance for consideration by the ultimate agency decisionmaker. (40 CFR §§ 1500.4(g), 1501.7, 1502.1, 1502.2 and 1502.14);

3. Shortening environmental impact statements by reducing the volume of descriptive material and by eliminating repetition through "tiering" (40 CFR §§ 1500.4 and 1502.20);

4. Focusing on actual issues ripe for decision at each level of environmental review (40 CFR §§ 1500.4 and 1502.20);

9/ See Enclosure C. for text of Section 102(2) of NEPA and texts of Executive Order No. 11514, March 5, 1970, and Executive Order No. 11991, May 24, 1977.

5. Authorizing joint preparation of environmental impact statements by Federal, State and local governments and establishing procedures for coordination of analyses (40 CFR §§ 1500.4(n), 1501.5, 1501.6 and 1506.2);

6. Permitting one Federal agency to adopt an environmental impact statement prepared by another Federal agency (40 CFR §§ 1500.4(n) and 1506.3);

7. Requiring agencies to make diligent efforts and to follow prescribed procedures to involve the public in preparing and implementing agency NEPA procedures (40 CFR § 1506.6);

8. Improving the clarity of environmental impact statements through use of a revised format focusing on decisions (40 CFR §§ 1500.4(e) and (f), 1502.10, 1502.14, 1502.15 and 1502.16).

Other provisions of the CEQ NEPA regulations may create problems from the standpoint of implementation in the NRC regulatory process. These provisions include:

1. Section 1502.14(b) which provides that the environmental impact statement "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits."

   Although this section represents a revision of an earlier version which would have required "substantially equal treatment" to be given to each alternative, we believe that present NRC practice may be at variance with this provision of the regulations. In the typical nuclear power reactor licensing case under present NRC procedures, detailed safety-related information is only provided for the applicant's proposed site. This kind of information is not provided for possible alternative sites. Similarly, detailed environmental information is only developed for the proposed site. Reconnaissance level information is normally considered adequate for evaluating alternative sites. If § 1502.14(b)

is to be interpreted as mandating a change in this procedure, the information-gathering burden placed on NRC and on the applicant could become expensive and time-consuming. According to informal advice from CEQ, this provision does not require that each alternative receive equal treatment; application of the provision in a given instance would be subject to a rule of reason.

2. Section 1502.22(a) which requires an agency to obtain information relevant to adverse impacts which is not known and which is essential to a reasoned choice among alternatives if the overall costs are not exorbitant.

   This provision could have a significant impact in those circumstances where extensive information has been developed with respect to one alternative and information regarding other alternatives has not yet been developed. This provision could impact any agency decision in this circumstance where the costs (in terms of both information-gathering costs and project delay costs) of obtaining the information needed for a reasoned choice among alternatives are large but fall short of being exorbitant. (For example, development of information necessary to evaluate viable alternatives for waste management is proceeding on different timetables.)

3. Section 1502.22(b) which requires an agency to perform a "worst case analysis" and indicate the probability or improbability of its occurrence whenever the agency is unable to obtain information relevant to adverse impacts important in making a reasoned choice among alternatives and the agency has decided, despite this uncertainty, to proceed with the action.

   The requirement to conduct a worst case analysis in any situation in which information about adverse impacts is unobtainable could have a substantial impact on NRC resources and on the length of time required to complete NRC licensing reviews. This provision would make it necessary to perform worst case analyses for both radiological and non-radiological impacts in situations

where such analyses are not normally conducted. Examples could include situations involving the evaluation of reactor aquatic impacts where a case can be made for extensive long-term time-dependent studies, and repository license actions where waste-form performance cannot be accurately predicted without in situ testing.

Section 1502.22(b) could also have a substantial impact on NRC resources if interpreted to require in-depth analysis of the consequences of a "worst case" accident in addition to an analysis of the likelihood that such an accident would occur. Under NRC's current risk analysis practices, the consequences of accidents whose likelihood of occurrence is remote and highly speculative are not given detailed consideration, except in unusual cases, even though those consequences, should they occur, would be extremely severe.

In 1971, Russell E. Train, then Chairman of the Council on Environmental Quality, informed Hon. Chet Holifield, Member of the Joint Committee on Atomic Energy, that CEQ felt that "...the approach taken by the Commission regarding consideration of accidents, [in environmental statements] [i.e., that accidents that pose severe consequences with an extremely low probability of occurrence would not require further consideration] ...appears to be a reasonable one..." and that CEQ also felt "...the AEC is acting reasonably when it does not require an analysis of those accidents that pose an insignificant threat to the environment... because of the extreme unlikelihood of their occurrence...."10/ This approach towards "worst case" analysis has also been upheld by the U.S. Court of Appeals for the District of Columbia Circuit in Carolina Environmental Study Group v. United States, 510 F.2d 796 (1975). NRC staff has discussed this matter informally with CEQ staff and has requested further clarification of § 1502.22(b).

10/ See correspondence between Hon. Chet Holifield, Member, Joint Committee on Atomic Energy, U.S. Congress, and Hon. Russell E. Train, Chairman, Council on Environmental Quality, October 8, 1971 and November 4, 1971, as printed in "Selected Materials on the Calvert Cliffs Decision, Its Origin and Aftermath," Joint Committee Print, 92d Congress, 1st Session, February 1972 at pp. 293-295.

According to preliminary telephone advice from CEQ staff, § 1502.22(b) contemplates consideration of the consequences as well as the probabilities of an occurrence. However, the degree of detail which must be furnished concerning remote consequences is subject to a rule of reason. This is not to say that NRC's past approach to Class 9 accidents should not be changed - indeed the matter is currently the subject of a staff study. However, given the pendency of the staff study and the uncertainty as to the impact of the CEQ regulations on this point, it seems unwise to adopt or implement this provision of the CEQ regulations without further study.

4. Section 1508.18 which includes within the definition of major Federal action, "the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action."

It is unclear whether this provision would necessitate a change in present NRC practice by requiring NRC staff to prepare environmental assessments or environmental impact statements for such actions as denials of petitions[11] which claim significant on-going environmental harm. According to informal telephone advice from CEQ staff, preparation of an environmental impact statement would not be necessary when the denial of such a petition is based on a finding that there are no significant on-going adverse environmental effects. Under CEQ's NEPA regulations, this finding could require an environmental assessment (§ 1501.4(b), see also §§ 1508.9 and 1508.13.) Under present NRC practice, it is not customary to prepare environmental assessments in connection with denials of petitions.

11/ These petitions could include petitions for rulemaking (10 CFR § 2.802) and petitions to initiate enforcement actions (10 CFR § 2.206).

Several provisions of the CEQ NEPA regulations contain procedures which, when applied, could seriously interfere with the manner in which the Commission performs its functions as an independent regulatory agency. These provisions include:

1. Section 1501.5 which enumerates the responsibilities of lead agencies for the preparation of environmental impact statements and authorizes CEQ to designate a lead agency when Federal agencies are unable to agree on which agency should undertake the lead agency role;

2. Part 1504 which prescribes procedures for predecision referral to CEQ of Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects.

In addition to the provisions just discussed, there are other provisions of the CEQ NEPA regulations (identified in Enclosure D) which could present problems if NRC were not allowed flexibility in implementing them. However, based on informal advice received from CEQ, implementation of these provisions may not be difficult.

NRC Compliance with CEQ NEPA Regulations as a Matter of Law

The issue of whether NRC, as an independent regulatory agency, can be bound by CEQ's NEPA regulations as a matter of law was raised by the Commission and by individual Commissioners on several occasions in comments to CEQ. 3, supra/ Despite NRC's expressed concern, CEQ declined to address this question when it promulgated its final NEPA regulations on November 29, 1978 and declared them to be applicable to and binding on all Federal agencies. CEQ has characterized its NEPA regulations as procedural rather than substantive. This is consistent with Executive Order 11991, which authorized CEQ to develop regulations implementing NEPA's procedural provisions. Earlier, CEQ had failed to secure Presidential approval of an Executive Order authorizing it to issue regulations implementing NEPA's substantive requirements.

The Office of Legal Counsel of the Department of Justice has addressed this issue in three memoranda.[12/] In a memorandum dated April 4, 1977, prepared for Charles H. Warren, Chairman of the Council on Environmental Quality, in response to CEQ's request, the Office of the Legal Counsel provided the following advice on the question whether the President may authorize or direct CEQ to issue regulations governing the preparation of environmental impact statements in place of guidelines.

> "...it is our conclusion that the President may properly delegate to CEQ the authority to issue regulations instructing Executive departments and agencies regarding the form and content of environmental impact statements, but we seriously question whether independent regulatory agencies can be bound by the regulations."

Briefly, the April 4, 1977 memorandum states that NEPA does not authorize CEQ to issue regulations or make substantive decisions binding on other Government agencies, and that a number of court cases have held that CEQ guidelines do not have the force of law. The memorandum takes the position that although NEPA makes the preparation of impact statements the responsibility of each agency, Government-wide coordination to bring cohesion and uniformity to the NEPA process would not be inconsistent with the purposes

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12/ The memoranda are:

Memorandum for Charles H. Warren, Chairman, Council on Environmental Quality, Re: CEQ's issuance of regulations, April 4, 1977.

Memorandum for Simon Lazarus, Associate Director, Domestic Council, Re: President's Authority to impose procedural reforms on the Independent Regulatory Agencies, July 22, 1977.

Memorandum for Wayne Granquist from Si Lazarus, Subject: Applicability of Executive Order to Independent Agencies, December 9, 1977, transmitting excerpt of pertinent portion of Department of Justice memorandum dated June 9, 1977.

Copies of these memoranda were furnished by the General Counsel to Commissioner Bradford, with copies to other Commissioners, on February 2, 1978.

of the Act. The preparation of impact statements is not an activity so peculiarly and specifically committed to agency discretion as to remove it from the general rule that the President may control the operations of Executive Branch agencies. The memorandum states:

> "...we believe that a persuasive argument can be made that the President has the constitutional authority to direct Federal agencies under his control in their implementation of NEPA. If the President himself possesses this power, it may properly be delegated to the Council on Environmental Quality. See U.S.C. § 301.
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> "Additionally, we note that an agency is bound by its own regulations even though the content of the regulations is not mandated by statute. See, e.g., United States v. Nixon, 418 U.S. 683, 694-97 (1974). The contemplated CEQ regulations will not be the regulations of any particular agency; they will only be the President's instructions to individual agencies. But the new procedures currently under consideration could presumably be brought within the scope of the rule binding agencies to their own regulations if the President or CEQ further instructed each agency to adopt procedural and substantive requirements that conform to the CEQ regulations...."

With respect to the application of CEQ regulations to independent regulatory agencies, the April 4, 1977 memorandum expresses

> "...serious reservations about the ability of the President to authorize the issuance of regulations that would be binding on independent regulatory agencies. NEPA directs agencies to prepare the environmental impact statements in connection with the substantive acts and policies they administer. See 40 CFR 1500.4. The President cannot remove members of independent bodies from their position for failing to follow his instructions regarding

> the administration of their agencies' substantive acts where Congress has mandated a statutory term, Humphrey's Executor v. United States, 295 U.S. 602 (1935), and we doubt that he could do so for failure to follow the President's directions in connection with NEPA requirements engrafted upon those statutes. The absence of the power to remove in such cases suggests the absence of a power to direct the actions of the agencies. See also Kendall v. United States, 12 Pet. (37 U.S.) 524, 610 (1838); Corwin, supra, at 85....It may therefore be advisable simply to request independent agencies to comply with whatever regulations are promulgated."

The memorandum notes that although the regulations promulgated by CEQ might be persuasive to a court because of CEQ's expertise in the environmental area,

> "...it can be expected that some independent agencies will not abide by CEQ regulations in certain circumstances, and we believed that they would have a fairly strong basis for refusing to do so...."

The second memorandum, dated July 22, 1977, on the "President's Authority to impose procedural reforms on the Independent Regulatory Agencies," replies to a request from Simon Lazarus of the Domestic Council for the views of the Office of Legal Counsel on whether the President may by Executive Order direct independent regulatory agencies to adopt certain proposals designed "to improve procedure, set up work sch ules and plans for the more efficient discharg .. the agencies' duties, and improve the proficiency of personnel by appropriate training programs directed to the drafting of regulations."

The July 22, 1977 memorandum cites an earlier memorandum, dated June 9, 1977, in which the Office of Legal Counsel had advised the White House as to the legality, as applied to independent regulatory agencies, of a proposed Executive Order on the logging of outside contacts. The June 9, 1977 memorandum

took the position that the President's duty to see that the laws are faithfully executed "would appear to enable him to establish policies concerning the efficiency and fairness of agency procedures and determinations"--including the logging of outside contacts. This memorandum cited previous Executive Orders on similar matters (ethical standards and standards of conduct) which had been made applicable to independent regulatory agencies.

The July 22, 1977 memorandum notes that while there are no pertinent judicial decisions, the question of the President's authority over independent regulatory agencies has been the subject of scholarly discussion. The consensus is that the agencies, "although independent with respect to their quasi-legislative and judicial functions," can be bound by Presidential directives designed to assure that they "perform those functions efficiently and without undue delay." Similarly, the President has the legal authority to guide the fiscal and personnel policies of the independent regulatory agencies. The memorandum concludes that the White House proposals for improving agency procedures appear consistent with the Presidential authority.

The July 22, 1977 memorandum considers whether the President could by Executive Order require "general or periodic reviews of existing regulations." It states that the President would probably have this power if the regulations were "procedural or internal." However, the memorandum concludes:

> "But the legal situation is somewhat different where regulations of a substantive (i.e., of a truly quasi-legislative) nature are involved. It could be said that regulations of this type may be modified or reviewed only to the extent that the governing statute requires or permits. A Presidential requirement that the independent regulatory agencies engage in a general review of their substantive rules therefore could well be considered to constitute an invasion of the agencies' quasi-legislative autonomy, a matter that does not come within the purview of the President's constitutional authority to take care that the laws be faithfully executed."

The import of the April 4, 1977 memorandum of the Office of Legal Counsel is that regulations governing the "form and content of environmental impact statements" are of a substantive and quasi-legislative nature, not merely procedural or internal. We see no basis for assuming that the July 22, 1977 memorandum represents a change of position by the Office of Legal Counsel.

The gist of the Office of Legal Counsel analyses, with which we have no disagreement, is that the President or his delegee has the power to prescribe purely procedural, ministerial matters to independent regulatory agencies. As illustrated in the earlier discussion of the impact of CEQ NEPA regulations on NRC's regulatory process (supra, pp. 8-12) difficulties arise when the Executive Branch attempts to dictate matters that go to the substance of the way the agency performs its functions. The April 4, 1977 memorandum of the Office of Legal Counsel observes correctly that agencies' impact statements are prepared in connection with the "substantive acts and policies they administer."

CEQ has taken the position that regulations specifying the content of a written document are per se procedural. In reply to a question from an OGC lawyer, CEQ General Counsel Nicholas C. Yost expressed the view that a regulation requiring agencies to select the least environmentally harmful alternative would be substantive, and beyond CEQ's power to require. However, according to Yost, a regulation requiring agencies to certify in their "record of decision" that the least environmentally harmful alternative had been selected would be procedural and within the scope of CEQ's authority. We do not regard this argument as persuasive.

The answer to the question whether NRC, as an independent regulatory agency, can be bound by CEQ's NEPA regulations as a matter of law is two-fold. NRC can be bound by CEQ's NEPA regulations as a matter of law insofar as those regulations are solely procedural or ministerial in nature. NRC cannot be bound as a matter of law by those portions of CEQ's NEPA regulations which have a substantive impact on the way in

which the Commission performs its regulatory functions. Application of these legal principles to regulations which involve both substance and procedure presents certain practical difficulties.

Given CEQ's NEPA regulations, how does the law apply? Some provisions of CEQ's NEPA regulations, for example, § 1502.7, prescribing recommended page limits for final environmental impact statements, § 1502.8, requiring environmental impact statements to be written in plain language, § 1502.11, specifying information to be included on environmental impact statement cover sheets, and § 1506.9, containing requirements for filing environmental impact statements with EPA, appear to be solely procedural and to have no substantive impact on the Commission's regulatory responsibilities. It is our view that the Commission can be held to comply with these provisions and with others like them.

Other provisions of CEQ's NEPA regulations, such as § 1502.24, containing requirements relating to methodology and scientific accuracy, and § 1506.6, requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures, although arguably procedural, have a definite though limited substantive impact. Since provisions of this type appear to have a minimal effect on the way in which the Commission conducts its business and therefore would not jeopardize the Commission's independence, there is little reason in our view why the Commission should not voluntarily comply.

Finally, there are those provisions of CEQ's regulations which are clearly substantive despite CEQ's claim that they are merely procedural. These provisions, which are discussed in greater detail elsewhere in this paper, include § 1502.14, relating to the analysis of alternatives in environmental impact statements, § 1502.22(b) relating to the obligation to obtain information and prepare worst-case analyses, § 1501.5, relating to lead agencies, and Part 1504, relating to predecision referrals to CEQ. It is our view that the Commission is not required, as a matter of law, to comply with these portions of CEQ's NEPA regulations because they have a significant impact on the manner in which the Commission performs its substantive regulatory responsibilities.

To state these legal conclusions does not make the Commission's task of deciding how NRC should implement CEQ's NEPA regulations any easier. The problem of determining the extent to which the NRC should voluntarily comply with CEQ's NEPA regulations also needs to be addressed from the standpoint of policy.

NRC Compliance with CEQ NEPA Regulations As a Matter of Policy

As indicated previously in this paper, some aspects of CEQ's NEPA regulations should result in improvements in NRC's current NEPA process, some provisions present difficulty from the standpoint of implementation, and some provisions, notably the lead agency concept in § 1501.5 and the procedures in Part 1504 for predecision referrals to CEQ, could present serious challenges to NRC's ability to carry out its regulatory functions in an independent manner. All these elements need to be weighed by the Commission in formulating its response.

The basic objectives of CEQ's NEPA regulations--to reduce paperwork, to reduce delay and to make sure that significant environmental issues are responsibly considered by Federal agencies in their decision-making process--are consistent with current Commission policy. Those provisions of CEQ's NEPA regulations which would improve the Federal permitting process for energy facilities[13/] are consistent with the Commission's continuing efforts to improve the process of siting and licensing nuclear power plants. The procedures provided to facilitate cooperation among Federal, State and local agencies, including joint planning, joint studies and joint public hearings, are all reminiscent of similar efforts undertaken by the Commission from time to time for similar purposes.

To these considerations can be added the weight of Commission precedent. The Commission is now complying on a voluntary basis with Executive Order 12044 on Improving Government Regulations, issued by the President on March 23, 1978. The Commission took this step despite the fact that Executive Order 12044

13/ See Enclosure E.

clearly states that it does not apply to "regulations issued by the independent regulatory agencies."

It is clear, on the other hand, that NRC ought not to commit itself now to comply voluntarily as a matter of policy with those portions of the CEQ regulations which might interfere with the effective performance of NRC's substantive responsibilities or with its independence. These provisions of the CEQ regulations, which are discussed more fully earlier in this paper, include § 1502.14(b) which prescribes how alternatives are to be presented in environmental impact statements, § 1502.22 which could either require NRC to obtain new information about adverse environmental impacts or perform a worst case analysis, § 1501.5 which authorizes CEQ to designate lead agencies, and Part 1504 which prescribes procedures for predecision referral to CEQ of Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. Accordingly, if NRC should decide to comply with CEQ's NEPA procedures as a matter of policy, care must be taken to assure that those procedures are not implemented in a manner which could have a detrimental effect on the Commission's effectiveness or its independence as a regulatory agency. It should be noted that an approach which accepts some parts of CEQ's NEPA regulations and declines at this time to accept other parts of those regulations is consistent with 40 CFR §§ 1500.3 and 1507.3(b)[14] which specifically recognize the possibility that some of the provisions of the regulations may be inconsistent with agencies' mandates.

Recommendations: - That the Commission comply with CEQ's NEPA regulations, subject to the following conditions:

1. Compliance does not bind the Commission to adopt subsequent interpretations or changes to the regulations made by CEQ. The Commission reserves the right to examine future interpretations or changes to the regulations on a case-by-case basis.

14/ 40 CFR § 1500.3 states in part that CEQ's regulations are "...applicable to and binding on all Federal agencies...except where compliance would be inconsistent with other statutory requirements...." 40 CFR § 1507.3(b) provides in part that "Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements..."

2. The effect of some specific provisions of CEQ's NEPA regulations (e.g., §§ 1502.14(b) - evaluation of alternatives, 1502.22(b) - examination of consequences of Class 9 accidents, and 1508.18 - requirements for environmental impact statements associated with failures to act) on the Commission's regulatory activities is unclear. The Commission will devote additional study to these matters before developing implementing regulations.

3. NRC reserves the right to prepare an independent environmental impact statement whenever it has jurisdiction over a particular activity even though it has not been designated as lead agency for preparation of the statement.

4. NRC reserves the right to make a final decision on all matters within its regulatory authority despite 40 CFR Part 1504--Predecision Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory.

In the opinion of the staff, these conditions identify those areas of CEQ's NEPA regulations which present significant problems from the standpoint of the Commission's independent exercise of its regulatory responsibilities. Although the staff believes that these conditions reflect major areas of NRC concern, additional problems may arise as the task of implementing CEQ's NEPA regulations proceeds. It is not yet clear, for example, how extensively NRC will have to discuss the energy requirements and conservation potential of various alternatives and mitigation measures in its environmental impact statements (40 CFR § 1502.16(e)). Nor is it clear what the discussion of direct, indirect and cumulative impacts may entail beyond what is now being done (40 CFR §§ 1508.7, 1508.8 and 1508.25). Subject to further guidance from the Commission, the staff plans to follow the approach presented in this paper in resolving future problems, should these occur.

- That the Commission approve the proposed letter to CEQ Chairman Warren (Enclosure F) for signature by Chairman Hendrie.

Cost Estimate: According to preliminary estimates, the approximate cost of actions required to initiate implementation of CEQ's NEPA regulations, including, among others, revision of 10 CFR Part 51, development of a revised format for environmental impact statements, development of procedures for early scoping of environmental issues, initiating revision of NRC's present Environmental Standard Review Plans (ESRPs), is expected to be about 12 man-years. This estimate of "start-up" costs does not include costs of routine implementation of CEQ NEPA regulations over an extended period. It would be premature to develop estimates of the latter costs at this time.

Coordination: The Offices of Standards Development, Nuclear Material Safety and Safeguards, Nuclear Reactor Regulation, Nuclear Regulatory Research, State Programs, and Policy Evaluation concur.

Scheduling:

Howard K. Shapar
Executive Legal Director

Leonard Bickwit, Jr.
General Counsel

Enclosures: See page 23

Enclosures:
A. Memorandum for NEPA Liaisons from CEQ General Counsel, Nicholas C. Yost re "Agency Implementing Procedures Under CEQ's NEPA Regulations," January 19, 1979
B. Provisions of CEQ NEPA Regulations Requiring Supplementary Agency Procedures
C. Text of Sec. 102(2) of NEPA, 42 U.S.C.S. § 4332 and texts of Executive Order No. 11514, March 5, 1970, and Executive Order No. 11991, May 24, 1977.
D. Provisions of CEQ NEPA Regulations which present problems but appear amenable to NRC implementation
E. Memorandum for Energy Coordinating Committee Members from Charles Warren, Chairman, Council on Environmental Quality on "How The NEPA Regulations Improve the Federal Permitting Process," December 21, 1978
F. Proposed letter to CEQ Chairman Warren

ENCLOSURE A

ENCLOSURE A

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N. W.
WASHINGTON, D. C. 20006

January 19, 1979

MEMORANDUM FOR NEPA LIAISONS

SUBJECT: Agency Implementing Procedures Under CEQ's NEPA Regulations

Introduction

On November 29, 1978 the Council on Environmental Quality issued regulations implementing the procedural provisions of the National Environmental Policy Act ("NEPA regulations"). The regulations are binding on all Federal agencies and were developed through interagency and public consultation, review and comment. The regulations appear at pages 55978-56007 of Volume 43 of the Federal Register.

Section 1507.3 of the NEPA regulations provides that each agency shall adopt procedures implementing the NEPA regulations by July 30, 1979 ("agency implementing procedures").* The purpose of this memorandum is to provide Federal agencies with general guidance for developing these implementing procedures.**

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* Implementing procedures for programs administered under Section 102(2)(D) of NEPA or under Section 104(h) of the Housing and Community Development Act of 1974 must also be adopted by July 30, 1979. However, Section 1506.12 provides that the procedures for these programs will not become effective until November 30, 1979 -- four months after the deadline for their adoption. This four month hiatus has been established to allow State and local agencies involved in these programs to adjust their decisionmaking to new implementing procedures.

On a separate point, Section 1506.12(a) also provides that any agency may proceed under these regulations at an earlier time. By this we mean that an agency may either adopt and place into effect implementing procedures before the July 30, 1979 deadline, if approved by the Council, or, for selected proposals, conduct its environmental reviews under the regulations before that time. Agencies administering programs under Section 102(2)(D) of NEPA or under Section 104(h) of the Housing and Community Development Act of 1974 may proceed under the regulations before November 30, 1979 with the consent of the State or local agencies involved.

** In developing this memorandum we have consulted with, circulated drafts to, and met with a number of the NEPA liaisons from agencies which prepare significant numbers of EISs. We appreciate their contribution.

Members of the Council's staff will be contacting you in the near future regarding a schedule for developing implementing procedures. We would like to become involved in your efforts early to avoid a last-minute crunch later in the year. We have attached as Appendix A a list of our staff members who will be available for consultation throughout the process.

Procedural Considerations

In developing implementing procedures under the NEPA regulations, agencies should bear in mind the following important considerations: First, the purpose of agency procedures is both to provide agency personnel with additional, more specific direction for implementing the procedural provisions of NEPA and to inform the public and State and local officials of how the NEPA regulations will be implemented in agency decisionmaking. Agency procedures should therefore provide Federal personnel with the direction they need to implement NEPA on a day-to-day basis. The procedures must also provide a clear and uncomplicated picture of what those outside the Federal government may do to become involved in the environmental review process under NEPA.

Second, the NEPA regulations provide that each agency shall as necessary adopt procedures to supplement the regulations (Section 1507.3). Major agency subunits are also encouraged (with the consent of the department) to adopt their own procedures. Departmental procedures would then address issues of general concern for all of its agencies; an individual agency's procedures would address the particulars of its own planning and decisionmaking.

Third, agency implementing procedures are not required to, nor is it desirable that they address every section of the regulations. The sections which must be addressed are identified in Section 1507.3(h). This is detailed in the "NEPA Procedures Checklist" enclosed herewith. Agencies are encouraged to address other sections where this would further implementation of the NEPA regulations.

Fourth, while the format for implementing procedures is largely a matter of agency discretion, the following points should be noted:

(1) By Executive Order 11991, the President directed the Council to establish a single and definitive set of uniform standards for implementing NEPA government-wide. Therefore, while agencies may quote the regulations in their implementing procedures, they shall not attempt to restate or otherwise paraphrase the regulations (Section 1507.3(a)). Agencies shall confine themselves to procedures which make the standards established by the NEPA regulations effective in the context of their decisionmaking.

(2) Agencies may quote from the regulations to provide a context for implementing procedures. For example, an agency may quote from Section 1508.9 on environmental assessments as a means of introducing its own environmental assessment procedures. In addition, agencies may produce a single, self-contained document containing quotations from the NEPA regulations so that agency personnel need not refer back and forth from NEPA regulations to implementing procedures in conducting environmental reviews. However, whenever the NEPA regulations are quoted they must be quoted verbatim, properly cited, and set off in some fashion (e.g., italics, boldfaced type) so that the reader can readily distinguish between the NEPA regulations and agency implementing procedures.

You will understand the competing considerations that guide us here. On the one hand we intend the agency procedures to be the minimum length possible consistent with the regulations and this memorandum. On the other hand, we do not want to place readers in the position of having constantly to refer to other documents.

(3) Implementing procedures should cross-reference relevant sections of the regulations where they are not quoted in full. It is important to link agency procedures with corresponding sections in the NEPA regulations so that agency personnel will have a complete picture of the standards which govern the environmental review process.

(4) Agency implementing procedures should where practicable follow the same sequence of procedural steps appearing in the NEPA regulations. It will be easier to work with both documents if the procedures and the regulations take a parallel approach.

Fifth, there is no need to include every detail of agency decisionmaking in the implementing procedures. The NEPA regulations contemplate the publication of further explanatory guidance with specific information that may not be appropriate for agency implementing procedures (Section 1507.3(a)). This further guidance, which may be in the form of an operating manual, administrative directives, explanatory bulletins, and other publications, must also be reviewed by the Council and made available to the public.

Sixth, agencies with similar programs should consult with each other and the Council to coordinate their implementing procedures, especially for programs requesting similar information from applicants (Section 1507.3(a)). Opportunities exist to improve the environmental review process through a consistent approach to similar Federal programs. It is important that agencies combine efforts in developing this approach and ensure that, once developed, it is uniformly adopted in agency implementing procedures. We have attached as Appendix B a list of NEPA liaisons for all agencies who should be contacted for this purpose.

Finally, in developing implementing procedures, agencies must allow time for review by the Council and the public. Section 1507.3(a) of the NEPA regulations establishes a three-step process leading to adoption of final procedures by July 30, 1979: Agencies shall consult with the Council in developing proposed implementing procedures. Agencies shall then publish their proposed procedures in the Federal Register for public review and comment. As the last step, and following changes made in response to comments received during the review period, agencies shall submit the final version of their proposed procedures for review by the Council for conformity with the Act and the NEPA regulations. The Council will complete its review within 30 days. The Council may thereafter make public the results of its reviews.

To ensure that this process is concluded by July 30, 1979, the Council recommends that agencies publish their proposed procedures in the Federal Register for comment no later than April 1, 1979 and submit by June 1, 1979 the final version of the procedures to the Council for review. Please note that the regulations go into effect and are binding throughout the government on July 30, 1979, regardless of whether an individual agency has adopted its procedures.

Once in effect, agency implementing procedures shall be filed with the Council, published in the Federal Register and made readily available to the public. Please note that Section 1507.3(a) of the regulations requires agencies continuously to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

Guidance for Developing Agency Implementing Procedures

We have enclosed with this memorandum a copy of the "NEPA Procedures Checklist" which the Council will use in evaluating agency implementing procedures. Many sections of the regulations will need no elaboration by agencies. Those sections of the regulations which must be addressed in agency procedures are marked with asterisks. Other sections described in the checklist or appearing in the regulations may be addressed, at the option of an agency, to further provide for implementation of the NEPA regulations in the agency's environmental review process.

The test for evaluating agency procedures is whether they provide the means to incorporate the standards of the regulations into agency planning and decisionmaking. The question we will ask, in other words, is whether the procedures will give practical effect to the provisions of the regulations in the agency's environmental review process.

In what follows, we elaborate several aspects of our guidance for developing agency implementing procedures.

A. CARRYING OUT NATIONAL ENVIRONMENTAL POLICY AND GOALS

Section 1500.1(a) of the NEPA regulations states that

> "The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains 'action-forcing' provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement Section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101."

In addition, Section 1500.1(c) states that

> "Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork -- even excellent paperwork -- but to foster excellent action...."

These statements of purpose place the procedural requirements of NEPA in the context of national environmental policies and goals and establish guiding principles for the development of agency implementing procedures.

B. ASSURING THAT THE NEPA PROCESS CORRESPONDS WITH MAJOR DECISION POINTS FOR PRINCIPAL AGENCY PROGRAMS

The NEPA regulations are designed to ensure that the data and analysis developed during the environmental review process is made available to agency planners and decisionmakers at the time when it will be of most value to them in formulating, reviewing and deciding upon proposals for agency action. Section 1501.2 provides, for example, that "[a]gencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values ...." Section 1501.2(b) states that "[e]nvironmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents."

In addition, Section 1502.5 provides that an "agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal" so that the statement "can serve practically as an important contribution to the decisionmaking process...." In the case of Federal projects, the EIS shall be prepared at the "feasibility analysis (go-no go) stage" (Section 1502.5(a)). For projects initiated elsewhere, the process shall commence "no later than immediately after the application is received" (Section 1502.5(b)). Agencies are encouraged in such cases to initiate their analyses even earlier.

Morever, Section 1505.1(d) directs agencies to adopt implementing procedures requiring that relevant environmental documents, comments and responses "accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions." Agency implementing procedures must also ensure that "the alternatives considered by the decisionmaker are encompassed by the range of alternatives" discussed in these environmental materials (Section 1505.1(e)).

Agency implementing procedures must serve as the vehicle for ensuring that these critical issues of timing and integration are properly established in agency planning and decisionmaking processes. It is for this reason that Section 1505.1(b) provides that agency implementing procedures shall include "[d]esignating the major decision points for the agency's principal programs likely to have a significant effect on the human environment assuring that the NEPA process corresponds with them."

In order to conform with this section, an agency's procedures should include such information as a description of when the NEPA process starts, i.e. "the earliest possible time;" a designation of major decision points; an identification of the official making the major decisions; a description of what is decided at each major decision point; and a description of the environmental data and analysis that are to be made available to the decisionmaker at each major decision point.

Charts and other graphic aids may be useful in presenting this material.

C. IDENTIFYING TYPICAL CLASSES OF ACTION FOR SIMILAR TREATMENT IN THE NEPA PROCESS

Section 1507.3(c)(2) of the NEPA regulations provides that agency implementing procedures shall include:

> "(2) Specific criteria for and identification of those typical classes of action:
>
> (i) Which normally do require environmental impact statements.
>
> (ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (Sec. 1508.4)).
>
> (iii) Which normally require environmental assessments but not necessarily environmental impact statements."

Section 1501.4 describes the way in which these categories are to be used in determining whether to prepare an environmental impact statement.

Section 1508.4 defines "categorical exclusion" to mean "a category of actions which do not individually or cumulatively have a significant

effect on the human environment..." (the category described in 1507.3(b)(2)(ii) above). Section 1508.4 also states, however, that agency implementing procedures "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." When these extraordinary circumstances occur, the action or actions would not be treated as categorically excluded from the NEPA process.

Three things should be noted about this aspect of agency implementing procedures. First, Section 1508.18 of the regulations states that

> "(b) Federal actions tend to fall within one of the following categories:
>
> "(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.
>
> "(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.
>
> "(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.
>
> "(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities."

Agencies should review this list of actions for purposes of establishing typical classes of action under Section 1507.3(b)(2).

Second, it is not sufficient simply to identify and categorize typical classes of agency actions under Section 1507.3(b)(2) of the regulations. Agency implementing procedures must also contain the "specific criteria" used for this purpose.

Third, categorical exclusions must be explicitly qualified as required by Section 1508.4. For each such exclusion, agency implementing procedures must describe at least in general terms "the extraordinary circumstances in which a normally excluded action may have a significant environmental effect" and include a description of the procedures which would be followed by the agency in recognizing such an exception.

D. INTEGRATING NEPA REQUIREMENTS WITH OTHER ENVIRONMENTAL REVIEW AND CONSULTATION REQUIREMENTS

One important purpose of the regulations is "[i]ntegrating NEPA requirements with other environmental review and consultation requirements" (Sections 1500.4(k), 1500.5(g)). Section 1502.25(a) provides, for example, that:

> "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. Sec. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. Sec. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), and other environmental review laws and executive orders."

To this end, Section 1501.7(a)(6) requires that as part of the scoping process agencies identify other environmental review and consultation requirements so that other required analyses and studies may be prepared concurrently with, and integrated with, the environmental impact statement (see Sections 1502.25(b), 1503.3(c), (d)).

We have attached as Appendix C a list of the major environmental review and consultation requirements for Federal agencies. Agency implementing procedures should identify those requirements that apply to agency actions, and the analyses, surveys and studies which they entail. The implementing procedures should also describe the process by which these requirements are met and indicate how this process will be made to run concurrently with, and integrated with, the NEPA process in terms of timing, agency personnel involved, public review and comment, publication and use of documents, research and analysis, and so forth. However, agencies should not allow the incorporation of these other more narrowly focused environmental review and consultation requirements to detract from the comprehensive approach required by NEPA.

E. FACILITATING ENVIRONMENTAL REVIEWS FOR PRIVATE APPLICANTS

Section 1501.2(d) of the NEPA regulations states that each agency shall:

> "(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:
>
> "(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

"(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable."

Section 1507.3(b)(1) states that agency implementing procedures shall include the procedures required by Section 1501.2(d).

To fulfill these requirements, agency implementing procedures should accomplish the following:

(a) Identify types of actions initiated by private parties, State and local agencies and other non-governmental entities for which agency involvement is reasonably foreseeable;

(b) Establish policies for advising potential applicants of studies or other information foreseeably required for later Federal action including the NEPA process. Such policies should provide for full public notice that agency advice on such matters is available, publications containing that advice such as a handbook for applicants, and early consultation in cases where agency involvement is reasonably foreseeable;

(c) Designate agency personnel responsible for making the identifications and implementing the policies under subsections (a) and (b), above.

F. MITIGATION AND MONITORING

Section 1505.3 of the NEPA regulations states that

"Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (Section 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

"(a) Include appropriate conditions in grants, permits or other approvals.

"(b) Condition funding of actions on mitigation.

"(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

"(d) Upon request, make available to the public the results of relevant monitoring."

Agencies are encouraged to address these requirements in their implementing procedures.

G. OTHER MATTERS

1. Making Environmental Documents a Part of the Record in Administrative Proceedings

Section 1505.1(c) provides that agencies shall adopt procedures which require "that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings." In addition, Section 1502.9(c)(3) of the NEPA regulations provides that agencies "[s]hall adopt procedures for introducing a supplement [to an enviornmental impact statement] into its formal administrative record, if such a record exists. Agency procedures must include provisions for implementing these requirements of the NEPA regulations. Section 1507.3(b)(1).

2. Informing the Public on the Status of the NEPA Process

Section 1506.6(e) of the NEPA regulations provides that agency implementing procedures shall indicate "where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process." See Section 1507.3(b)(1). Similarly, Section 1507.2(a) provides that "[a]gencies shall designate a person to be responsible for overall review of agency NEPA compliance."

3. Identifying Agencies With Special Expertise and Jurisdiction By Law

Some agencies have already made arrangements among themselves for cooperation in the environmental review process. Agency implementing procedures should describe the arrangements which exist, identify letters of agreement, memoranda of understanding and other written documents reflecting the arrangements, and indicate how these documents may be obtained by members of the public.

The Council is currently preparing a list of agencies with special expertise in prescribed resource areas and an analysis of agency jurisdiction by law under Federal statutes. When published, this information will assist lead agencies in identifying potential cooperating agencies for preparing environmental impact statements.

4. Cooperating With State and Local Agencies

Section 1506.2 of the NEPA regulations provides for cooperation with State and local agencies to reduce duplication between NEPA and State and local requirements. To this end, we have attached as Appendix D a list of State and local entities with environmental review requirements that appeared in the Council's 1977 Annual Report on Environmental Quality.

ENCLOSURE A (continued)

We recognize that developing agency implementing procedures will be a challenging job. We will be available for consultation throughout this process and are prepared to meet with you to discuss the implementing procedures at the earliest mutually convenient time.

NICHOLAS C. YOST
General Counsel

Enclosures (not attached)

APPENDIX A - CEQ Staff Contacts
APPENDIX B - NEPA Liaisons
APPENDIX C - Environmental Review and Consultation Requirements
APPENDIX D - State Environmental Impact Statement Requirements, May 1, 1977

NEPA Procedures Checklist

ENCLOSURE B

ENCLOSURE B

Provisions of CEQ NEPA Regulations Requiring Supplementary Agency Procedures

Section 1507.3(b)(1) of CEQ's NEPA Regulations requires each Federal agency to develop supplementary procedures to implement the following regulatory provisions:

(1) § 1501.2(d) - which specifies steps Federal agencies should take to ensure that environmental factors are considered at an early stage in the planning process where actions are planned by private applicants or other non-Federal entities before Federal involvement. These steps include:

- Having policies or designated staff available to advise potential applicants of studies or other information foreseeably required for later Federal action.
- Consulting early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when involvement of the Federal agency is reasonable foreseeable.
- Commencing the NEPA process at the earliest possible time.

(2) § 1502.9(c)(3) - which requires agencies to adopt procedures for introducing supplements to draft or final environmental impact statements into formal administrative records.

(3) § 1505.1 - which requires agencies to adopt implementing procedures to ensure that decisions are made in accordance with the policies and purposes of NEPA as set out in sections 101 and 102(1) of that Act. These procedures shall, among other things:

- Designate the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assure that the agency's NEPA process corresponds with those decision points.
- Require that relevant environmental documents, comments and responses (1) be part of the record in formal rule making or adjudicatory proceedings, and (2) accompany a proposal through existing agency review processes so that agency officials use these documents in making decisions.

- Require that alternatives considered by the decisionmaker be encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement.
- In addition to the preceding requirements relating to relevant environmental documents, § 1505.1(e) encourages agencies to make available to the public before a decision is made, any parts of other decision documents which relate to the comparison of alternatives.

(4) § 1506.6(e) - which requires agencies to explain in their procedures where interested persons can get information or status reports on environmental impact statements or other elements of the NEPA process.

Section 1501.7(b)(3) provides that an agency may adopt implementing procedures to combine its environmental assessment process with its scoping process.

Pursuant to 40 CFR § 1507.3(b)(2), each Federal agency is required to include in its implementing procedures specific criteria for and identification of those typical classes of action which normally (i) require an environmental impact statement, (ii) do not require an environmental impact statement or an environmental assessment, i.e.

categorical exclusion as defined in § 1508.4 [1/] and (iii) require an environmental assessment but not necessarily an environmental impact statement.

Pursuant to 40 CFR § 1507.3(c), agency procedures may include specific criteria for providing limited exceptions to CEQ's regulations for classified proposals. Time periods for taking agency action and publishing a notice of intent to prepare an environmental impact statement may be shortened or lengthened pursuant to 40 CFR §§ 1507.3(d) and (e).

1/ § 1508.4 "Categorical Exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

ENCLOSURE C

ENCLOSURE C - Section 102 of the National Environmental Policy Act of 1969, as amended; 42 USCS § 4332.

§ 4332. Cooperation of agencies—Reports—Availability of information—Recommendations—International and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code [5 USCS § 552], and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [42 USCS §§ 4321 et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resouces;

(F) recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.].

(Jan. 1, 1970, P. L. 91-190, Title I, § 102, 83 Stat. 853; Aug. 9, 1975, P. L. 94-83, 89 Stat. 424.)

Texts of Executive Orders Nos. 11514 and 11991.

Protection and enhancement of environmental quality. Ex. Or. No. 11514 of Mar. 5, 1970, 35 Fed. Reg. 4247, provided:

SECTION 1. *Policy.* The Federal Government shall provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life. Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals. The Council on Environmental Quality, through the Chairman, shall advise and assist the President in leading this national effort.

SEC. 2. *Responsibilities of Federal agencies.* Consonant with Title I of the National Environmental Policy Act of 1969 [42 USCS §§ 4331 et seq.], hereafter referred to as the "Act," the heads of Federal agencies shall:

(a) Monitor, evaluate, and control on a continuing basis their agencies' activities so as to protect and enhance the quality of the environment. Such activities shall include those directed to controlling pollution and enhancing the environment and those designed to accomplish other program objectives which may affect the quality of the environment. Agencies shall develop programs and measures to protect and enhance environmental quality and shall assess progress in meeting the specific objectives of such activities. Heads of agencies shall consult with appropriate Federal, State and local agencies in carrying out their activities as they affect the quality of the environment.

(b) Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. Federal agencies shall also encourage State and local agencies to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment.

(c) Insure that information regarding existing or potential environmental problems and control methods developed as part of research, development, demonstration, test, or evaluation activities is made available to Federal agencies, States, counties, municipalities, institutions, and other entities, as appropriate.

(d) Review their agencies' statutory authority, administrative regulations, policies, and procedures, including those relating to loans, grants, contracts, leases, licenses, or permits, in order to identify any deficiencies or inconsistencies therein which prohibit or limit full compliance with the purposes and provisions of the Act [42 USCS §§ 4321 et seq.]. A report on this review and the corrective actions taken or planned, including such measures to be proposed to the President as may be necessary to bring their authority and policies into conformance with the intent, purposes, and procedures of the Act [42 USCS §§ 4321 et seq.], shall be provided to the Council on Environmental Quality not later than September 1, 1970.

(e) Engage in exchange of data and research results, and cooperate with agencies of other governments to foster the purposes of the Act [42 USCS §§ 4321 et seq.].

(f) Proceed, in coordination with other agencies, with actions required by section 102 of the Act [42 USCS § 4332].

Refer to Section 2 of Executive Order No. 11991 for text of new subsection (g).

Text of Executive Order No. 11514 (continued)

SEC. 3. *Responsibilities of Council on Environmental Quality.* The Council on Environmental Quality shall:

(a) Evaluate existing and proposed policies and activities of the Federal Government directed to the control of pollution and the enhancement of the environment and to the accomplishment of other objectives which affect the quality of the environment. This shall include continuing review of procedures employed in the development and enforcement of Federal standards affecting environmental quality. Based upon such evaluations the Council shall, where appropriate, recommend to the President policies and programs to achieve more effective protection and enhancement of environmental quality and shall, where appropriate, seek resolution of significant environmental issues.

(b) Recommend to the President and to the agencies priorities among programs designed for the control of pollution and for enhancement of the environment.

(c) Determine the need for new policies and programs for dealing with environmental problems not being adequately addressed.

(d) Conduct, as it determines to be appropriate, public hearings or conferences on issues of environmental significance.

(e) Promote the development and use of indices and monitoring systems (1) to assess environmental conditions and trends, (2) to predict the environmental impact of proposed public and private actions, and (3) to determine the effectiveness of programs for protecting and enhancing environmental quality.

(f) Coordinate Federal programs related to environmental quality.

(g) Advise and assist the President and the agencies in achieving international cooperation for dealing with environmental problems, under the foreign policy guidance of the Secretary of State.

Refer to Section 1. of Executive Order No. 11991 for text of revised subsection (h).

~~(h) Issue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act [42 USCS § 4332(2)(C)].~~

(i) Issue such other instructions to agencies, and request such reports and other information from them, as may be required to carry out the Council's responsibilities under the Act [42 USCS §§ 4321 et seq.].

(j) Assist the President in preparing the annual Environmental Quality Report provided for in section 201 of the Act [42 USCS § 4341].

(k) Foster investigations, studies, surveys, research, and analyses relating to (i) ecological systems and environmental quality, (ii) the impact of new and changing technologies thereon, and (iii) means of preventing or reducing adverse effects from such technologies.

Text of Executive Order No. 11514 (continued)

SEC. 4. *Amendments of E.O. 11472.* Executive Order No. 11472 of May 29, 1969 [see above note to this section], including the heading thereof, is hereby amended:

(1) By substituting for the term "the Environmental Quality Council", wherever it occurs, the following: "the Cabinet Committee on the Environment".

(2) By substituting for the term "the Council", wherever it occurs, the following: "the Cabinet Committee".

(3) By inserting in subsection (f) of section 101, after "Budget,", the following: "the Director of the Office of Science and Technology,".

(4) By substituting for subsection (g) of section 101 the following:

"(g) The Chairman of the Council on Environmental Quality (established by Public Law 91-190) shall assist the President in directing the affairs of the Cabinet Committee."

(5) By deleting subsection (c) of section 102.

(6) By substituting for "the Office of Science and Technology", in section 104, the following: "the Council on Environmental Quality (established by Public Law 91-190)".

(7) By substituting for "(hereinafter referred to as the 'Committee')", in section 201, the following: "(hereinafter referred to as the 'Citizens' Committee')".

(8) By substituting for the term "the Committee", wherever it occurs, the following: "the Citizens' Committee".

Executive Order 11991 May 21, 1977

RELATING TO PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the purpose and policy of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), the Environmental Quality Improvement Act of 1970 (42 U.S.C. 4371 et seq.), and Section 309 of the Clean Air Act, as amended (42 U.S.C. 1857h-7), it is hereby ordered as follows:

Section 1. Subsection (h) of Section 3 (relating to responsibilities of the Council on Environmental Quality) of Executive Order No. 11514, as amended, is revised to read as follows:

"(h) Issue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)). Such regulations shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. They will be designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. They will require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses. The Council shall include in its regulations procedures (1) for the early preparation of environmental impact statements, and (2) for the referral to the Council of conflicts between

agencies concerning the implementation of the National Environmental Policy Act of 1969, as amended, and Section 309 of the Clean Air Act, as amended, for the Council's recommendation as to their prompt resolution.".

Sec. 2. The following new subsection is added to Section 2 (relating to responsibilities of Federal agencies) of Executive Order No. 11514, as amended:

"(g) In carrying out their responsibilities under the Act and this Order, comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.".

Jimmy Carter

THE WHITE HOUSE,
May 24, 1977

[FR Doc.77-15124 Filed 5-24-77;1:45 pm]

ENCLOSURE D

Provisions of CEQ NEPA Regulations Which Present Problems but Appear Amenable to NRC Implementation

1. Section 1502.9, which relates to draft, final and supplemental impact statements and provides in part that "[t]he agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action."

It is unclear whether this requirement, to discuss and disclose all major points of view, obligates agencies to identify and discuss all theoretically possible points of view with respect to environmental impacts or whether agencies are only obligated to discuss major points of view which are actually presented. According to informal advice from CEQ staff, the second interpretation is correct. This provision was not intended to require agencies to conduct exhaustive, completely open-ended environmental reviews.

2. Several provisions of the CEQ regulations, specifically those relating to the record of decision,[1/] establishment of time limits,[2/]

1/ 40 CFR §§ 1502.2(f), 1505.2, 1506.1 and 1506.10.
2/ 40 CFR §§ 1501.8.

and treatment of comments on final environmental impact statements[3/] could present problems unless the Commission was given latitude to determine how best to mesh these requirements with the Commission's regulatory review and hearing process. For example, the timing of the issuance of the record of decision could have a major impact on the Commission's immediate effectiveness rule (10 CFR § 2.764)[4/] by reason of the fact that § 1506.1(a) of CEQ's NEPA regulations (see also §§ 1505.2 and 1506.10) precludes agency action on a proposal which would have an adverse environmental impact or limit the choice of reasonable alternatives until the record of decision is issued.

According to informal advice from CEQ staff, regulatory agencies will be accorded sufficient latitude to enable them to incorporate these provisions in their implementing regulations in a rational manner. CEQ staff has indicated that they see no problem with staff level issuance of the record of decision.

3/ 40 CFR § 1503.1(b).

4/ The issues involved in the immediate effectiveness rule are being studied by the NRC's Advisory Committee on Nuclear Power Plant Construction During Adjudication. The Advisory Committee is expected to issue its report about November 1, 1979.

3. Further clarification of the tiering concept (§ 1502.20)[5/] was sought to determine whether tiering would preclude NRC from continuing to use generic environmental studies[6/] in its regulatory process. (These studies do not satisfy CEQ requirements for environmental impact statements.) According to informal telephone advice from CEQ staff, NRC could continue to use these studies.

4. Concerns respecting the reach of the limitations placed on agency action pending completion of a required program environmental impact statement (§ 1506.1(c)) were alleviated by informal advice from CEQ staff that the limitations which § 1506.1(c) places on agency action

5/ Tiering permits agencies to link broad environmental impact statements with specific environmental impact statements in order to eliminate repetitive discussions of the same issues and focus on issues ripe for decision at each level of environmental review.

6/ For examples of these studies, see 10 CFR Part 51, Table S-3 - Summary of environmental considerations for uranium fuel cycle, based on supporting data contained in "Environmental Survey of the Uranium Fuel Cycle," WASH-1248, April 1974, "Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle," NUREG-0116 (Supp. 1 to WASH-1248, October 1976) and "Discussion of Comments Regarding the Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle," NUREG-0216 (Supp. 2 to WASH-1248, March 1977). See also Vermont Yankee Nuclear Power Corp. v. NRDC, et al. Nos. 76-491 and 76-528, decided April 3, 1978, 435 U.S. 519, in which the U.S. Supreme Court upheld the procedures, including the use of environmental surveys, used in this rulemaking proceeding.

See also, 10 CFR Part 51, Summary Table S-4 - Environmental impact of transportation of fuel and waste to and from 1 light-water-cooled nuclear power reactor, based on supporting data contained in "Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants," WASH-1238, December 1972, and NUREG-75/038 (Supp. 1 to WASH-1238, April 1975).

when an agency is required to prepare a program environmental impact statement do not apply to instances in which an agency prepares a program environmental impact statement voluntarily.

5. The CEQ regulations contain several provisions[7/] which encourage affected agencies to the fullest extent possible to cooperate and coordinate their review processes so that needed permits and approvals are issued simultaneously instead of sequentially. According to informal advice from CEQ staff, these provisions are not intended to bar any Federal agency from taking action until after other needed permits and approvals have, in fact, been obtained. In accordance with current NRC practice, each final environmental impact statement contains a section which summarizes the status of other Federal, State or local permits which might be required in connection with the proposed action. CEQ staff indicated that this practice would continue to be acceptable under the new CEQ NEPA regulations.

6. Section 1505.3 of the CEQ regulations provides in part that "/a/gencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases...." The provisions

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7/ See §§ 1502.16(c), 1502.25, 1503.3(c) and (d) and 1506.2(b), (c) and (d). For a general discussion of "How The NEPA Regulations Improve The Federal Permitting Process" see Memorandum on this subject for Energy Coordinating Committee Members from Charles Warren, Chairman, Council on Environmental Quality, dated December 21, 1978, Enclosure E.

of the Federal Water Pollution Control Act preclude NRC from performing monitoring in connection with certain water quality matters. CEQ staff acknowledged the limitations placed by this statute on NRC's monitoring capability.

ENCLOSURE E

ENCLOSURE E

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N. W.
WASHINGTON, D. C. 20006

December 21, 1978

MEMORANDUM FOR ENERGY COORDINATING COMMITTEE MEMBERS

SUBJECT: How The NEPA Regulations Improve The Federal Permitting Process

In its newly adopted regulations under the National Environmental Policy Act, the Council adopted a series of specific measures which will greatly improve the federal permitting process for energy facilities. The new regulations go beyond environmental impact statement requirements and address broader issues in integration and coordination of all environmental review and permit requirements. Major reforms include:

- All permits identified early.
- All agencies with authority over a project required to consult early and work with the lead agency.
- All agencies to develop procedures to aid applicants.
- Avoidance of delay. Time limits on NEPA process must be set at applicant's request.
- All reviews to be prepared concurrently rather than consecutively.
- All information or mitigation that will be necessary to approve the project to be identified early.
- Eliminates duplication in EIS preparation.

This memorandum briefly discusses these and other provisions in the new NEPA regulations, which were issued on November 29, 1978.

Project sponsors often face a number of federal permit and license requirements before construction can start. There are a variety of federal statutes requiring different kinds of environmental reviews to precede the issuance of applicable federal permits or licenses. While NEPA's EIS requirement is the only comprehensive environmental review requirement, a project may require compliance with specialized environmental reviews and analyses such as those required under the Fish and Wildlife Coordination Act (in connection with the issuance of dredge and

fill permits), or those required under the Clean Air Act (in connection with permits issued directly by EPA or by a state through its State Implementation Plan requirements). Similarly, a non-federal project may require federal permission and compliance with federal environmental reviews for some components, such as a BLM easement over public lands for transmission lines for a fossil fuel generating plant that otherwise requires no federal permits.

In the past there have been cases, particularly where multiple federal permit and environmental review requirements are applicable, where compliance with various federal permit and environmental review requirements has been delayed. Reasons for delay include lack of coordination among federal agencies having approval and review authority, sequential (rather than concurrent) processing of permit and review requirements, failure to prepare environmental reviews early during the planning stages, inadequate guidance from federal agencies to permit applicants, adversary relations between agencies having differing missions, and duplication between federal and state environmental protection requirements.

The Council's final NEPA regulations address each of these problems in the federal permitting process. Applicable provisions in the NEPA regulations which will improve federal permitting are summarized below.

1. Agencies having permitting, licensing or other approval authority over a project are required to consult early in the planning of the project. During this early consultation, called the "scoping process" agencies are to identify significant environmental issues, identify all applicable permit and environmental review requirements, and organize the preparation of the EIS in a way that consolidates and integrates all environmental reviews. (Sections 1501.1, 1501.2, 1501.7).

2. Agencies with jurisdiction by law over the project (e.g., permitting or approval authority) are required to cooperate with the lead agency in preparing the EIS. An agency having permit authority over a component of the project cannot stay aloof from the EIS preparation and intervene at later stage in the project approval to conduct environmental reviews necessary for the permit. (Section 1501.6).

3. Agencies having permitting or licensing authority are required to develop procedures that facilitate application of the NEPA process at the earliest possible time in cases where projects are being planned by private applicants or other non-Federal entities before Federal involvement. Such procedures must make available to potential applicants agency policies or designated staff to advise applicants of studies or other

information foreseeably required for the later-stage Federal permit or approval. Such procedures must also indicate how the agency will consult early with appropriate State and local agencies, Indian tribes, interested private parties and organizations when the Federal agency's permitting authority is reasonably foreseeable. (Section 1501.2(d)).

4. In order to avoid delays in applying the NEPA process to permits, the regulations require environmental assessments or EISs to be started no later than immediately after the permit application is received, preferably earlier and jointly with applicable State or local agencies. (Section 1502.5(b)). In addition, the lead agency is required to set time limits for the NEPA process at the request of the permit applicant so long as the time limits are consistent with NEPA and other essential considerations of national policy (Section 1501.8).

5. In order to minimize delays caused by sequential preparation of environmental reviews and analyses for a project requiring federal permits, licenses or approvals, the regulations require that the draft EIS serve to the maximum extent as the vehicle for conducting all required environmental reviews. Thus the draft EIS is to be prepared concurrently with and integrated with environmental studies, reports and analyses required by other federal statutes, regulations and Executive Orders (Section 1502.25(a)).

6. To facilitate identification of federal permit requirements for a project, the regulations require that all applicable federal permits, license and other approval requirements be identified initially when the EIS is started (Section 1501.7) and again when the draft EIS is circulated for review and comment (Section 1502.25(b)).

7. To improve coordination among federal agencies having authority over a project and to minimize adversary relations between agencies with conflicting missions, the regulations require federal agencies with jurisdiction by law to comment on the draft EIS and to state in their comments whether they need additional information to fulfill environmental review requirements for permits, licenses or entitlements they issue, and to state what additional information is required. In particular, a cooperating agency is required to specify any additional information it needs to comment adequately on the draft EIS's analysis of site-specific effects associated with the granting or approving by that agency of necessary Federal permits, licenses or entitlements. (Section 1503.3(c)).

Reinforcing this requirement, the regulations provide that when one federal agency with jurisdiction by law objects to or expresses reservations about the project on environmental impact grounds, the agency expressing the reservation or objection must specify any mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license or related requirements or concurrences (Section 1503.3(d)).

These provisions will help insure that federal permitting agencies will work closely with the lead agency in resolving environmental impact issues, and avoid adversarial positions which cause delay in the permitting process.

8. To minimize delays in the permitting process caused by duplicate reviews, the regulations allow a federal permitting agency to adopt the EIS prepared by the lead agency without recirculating it for review (Section 1506.3(c)). In addition, the regulations provide for eliminating duplication between the Federal EIS and State/local review requirements (Section 1506.2)).

Charles Warren

CHARLES WARREN
Chairman

ENCLOSURE F

Proposed Letter to CEQ Chairman Warren

The Honorable Charles H. Warren
Chairman, Council on Environmental Quality
Executive Office of the President
722 Jackson Place, N.W.
Washington, D.C. 20006

Dear Chairman Warren:

The Commission supports the objectives of Executive Order 11991 to make the environmental impact statement process more useful to decisionmakers and the public, to reduce paperwork and delay, and to focus on real environmental issues and alternatives. Towards this end and to the extent possible and consistent with its substantive statutory responsibilities, the Commission plans to carry out its responsibilities under the National Environmental Policy Act, as amended, in accordance with the procedures promulgated by the Council.

The November 29, 1978 issue of the Federal Register in which the text of CEQ's final NEPA regulations appeared contains a detailed account of the concerns and problems which the Council considered and addressed in preparing the regulations in effective form. Although this statement is helpful in understanding some of the broad objectives and specific provisions of the Council's NEPA regulations, it does not provide guidance on how conflicts between CEQ's NEPA requirements and NRC's responsibilities as an independent regulatory agency might best be resolved.

In considering what actions may be needed to implement CEQ's NEPA regulations, the Commission has again focused its attention on this matter. After further deliberation and review of the problems involved, we have concluded that a sound accommodation can be reached between NRC's independent regulatory responsibilities and CEQ's objective of establishing uniform NEPA procedures. To achieve this goal, the Commission would undertake to comply with CEQ's NEPA regulations voluntarily, subject to the following conditions:

1. Voluntary compliance with CEQ's NEPA regulations does not bind the Commission to adopt subsequent interpretations or changes to the regulations made by CEQ. The Commission reserves the right to examine future interpretations or changes to the regulations on a case-by-case basis.

2. The effect of some specific provisions of CEQ's NEPA regulations (e.g., 1502.14(b), 1502.22(b) and 1508.18) on the Commission's regulatory activities is unclear. The Commission will devote additional study to these matters before developing implementing regulations.

3. NRC reserves the right to prepare an independent environmental impact statement whenever it has jurisdiction over a particular activity even though it has not been designated as lead agency for preparation of the statement.

4. NRC reserves the right to make a final decision on all matters within its regulatory authority despite the provisions of 10 CFR Part 1504 which provide procedures for predecision referrals to CEQ.

It is the Commission's present plan to develop implementing NEPA regulations in accordance with the above guidelines. Although these guidelines contain certain reservations, we believe the reservations are limited to matters which fall well within the exception in 40 CFR §§ 1500.3 and 1507.3(b) which relieves agencies from compliance "... where compliance would be inconsistent with other statutory requirements."

We would appreciate any comments which you may wish to make concerning this approach. The NRC staff has been instructed to consult with members of your staff throughout the drafting process. We have every confidence that this continuing dialogue will yield a set of implementing regulations which the Council and the Commission will find mutually acceptable.

Sincerely,

Joseph M. Hendrie
Chairman