ROM
Bill Garner
Scottsboro, Ala

6161

DATE OF DOCUMENT
8/30/73

AC[illegible] CO[illegible]TION DEADLINE
9/13/73

O

Chairman

ACTION PROCESSING DATES
Acknowledged
Interim Reply
Final

PREPARE FOR SIGNATURE OF:
_____ Chairman
_____ Director of Regulation
_____

DESCRIPTION Ltr ☒ Original ☐ Copy ☐ Other

REMARKS

Omit signature block

Return original ltr to the Chairman

Requests that AEC do detailed environmental statements of its own on Brown's Ferry, Sequoyah & Watts Bar. Also alleges delay in answering his letters, evasive answers or no answers at all, & refusal to provide info under the FOI Act.

Encl:Article

REFERRED TO	DATE
Giambusso f/action	

IS NOTIFICATION TO THE JCAE RECOMMENDED? _____ _____

Cys: Muntzing
Gossick
O'Leary
Felton
Docket Files) 50-259 50-327
PDR 50-260 50-328
LPDR 50-296 50-390
50-391

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DIRECTOR OF REGULATION
COMMUNICATIONS CONTROL

Form HQ-32 (1-73)
USAEC

Logging date: _____

OFFICE OF THE CHAIRMAN
Atomic Energy Commission

September 7, 1973

TO : Director of Regulation

INCOMING FROM : Bill Garner
Scottsboro, Alabama

8/30/73
(Date)

SUBJECT: TVA's atomic plants and environmental impact statements.

__x__ Prepare reply for signature of:
_____ Chairman
_____ Commissioner
_____ GM, DR, GC, PA, IS
__x__ Signature Block Omitted
_____
__x__ Please return original with response

_____ For Direct Reply
_____ Send Copy of Reply to:
_____ Chairman
_____ Commissioners
_____ Secretary
_____ _____
_____ _____

_____ For Appropriate Action
_____ For Information
_____ For Recommendation

REMARKS: _____

_____

_____

For the Chairman: Minnie Earle Hargett

When separated from enclosures, handle this document as _____.

ACTION SLIP

DE-6161

JB

Copy sent PDR

August 30, 1973

Miss Dixie Lee Ray, Chairwoman
United States Atomic Energy Commission
Washington, D. C. 20545

Dear Miss Ray:

I am enclosing an article from the Natural Resources Lawyer which I believe will be of interest to you. You may be aware of the fact that the Atomic Energy Commission is now doing its own environmental impact statements on the Tennessee Valley Authority's atomic plants. In view of the very sloppy job that the Tennessee Valley Authority has been doing on its statements, I now formally request that the Atomic Energy Commission do detailed environmental impact statements of its own on the Browns Ferry, Sequoyah, and Watts Bar Nuclear Plants of the Tennessee Valley Authority.

I am writing to you directly because Mr. A. Giambusso of the Atomic Energy Commission has a policy of waiting at least 30 days to answer letters from me. Also, when he does answer my letters he frequently gives evasive answers or refuses to give answers at all. Furthermore, he has recently refused to provide me with information which I am entitled under the Freedom of Information Act, as last amended.

Respectfully,

Bill Garner

Bill Garner
Route 4, Box 354
Scottsboro, Alabama 35768

DR-6161

NATURAL RESOURCES LAWYER
VOLUME VI, NUMBER 2
SPRING 1973

DONALD L. HUMPHREYS*

NEPA and Multi-Agency Actions— Is the "Lead Agency" Concept Valid?

INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)[1] "makes environmental protection a part of the mandate of every Federal agency and department."[2] In the words of Judge J. Skelly Wright, "perhaps the greatest importance of NEPA is to require . . . agencies to *consider* environmental issues just as they consider other matters within their mandates."[3] (emphasis the court's) Further to the broad NEPA mandate, Section 102(2)(C)[4] of NEPA requires that

> all agencies of the Federal government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment,[5] a

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[1] 42 U.S.C. § 4321 *et. seq.* (Supp. 1972) (hereinafter "NEPA").

[2] Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971).

[3] *Id.* at 1112, 2 ERC at 1781.

[4] 42 U.S.C. § 4332(2)(C)(Supp. 1972).

[5] "Major federal actions" within the meaning of § 102(2)(C), according to the Senate Report accompanying S.1075, include project proposals, regulations, policy statements, or expansion or revision of ongoing programs. S. REP. No. 91–296, 91st Cong. 1st Sess. (1969) at 20. According to the Guidelines of the Council on Environmental Quality, 36 Fed. Reg. 7724–7729, April 23, 1971, "actions" include, in addition to those mentioned above, "projects and continuing activities: directly undertaken by Federal agencies; supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance; involving a Federal lease, permit, license, certification or other entitlement for use." Whether an action is "major" and "significantly" affects the quality of the human environment is for the agencies to decide, although some general guidance is afforded by the Guidelines of the Council on Environmental Quality (*e.g.*, environmental effects may be "adverse or beneficial, direct or indirect"). According to the Department of Interior, "major" action may be any action if it, together with others, constitutes a collective "major" action (Dept. Manual, Pt. 516, Ch. 2.5.B.1.). Actions which "significantly affect the quality of the human environment," according to the Department of Interior, are actions which "significantly degrade or enhance the quality of human environment, curtail or extend the range of beneficial uses of the environment, or serve short-term to the disadvantage of long-term environmental goals" (Dept. Manual, Pt. 516, Ch. 2.5.B.2.).

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.

The required "detailed statement" is commonly referred to as an environmental impact statement.[6] The apparent purpose of the Section 102

The Department of Interior's Bureau of Reclamation speaks of significant effects as including "those that degrade or enhance the quality of the environment." Reclamation Instructions, Pt. 376, Ch. 5.4.A. Thus, arguably, in the Bureau of Reclamation's view the magnitude of the effect is not important. The Federal Highway Administration indicates that a "major upgrading of an existing highway section resulting in a functional characteristic change (*e.g.*, a local road becoming an arterial highway)" is a "major" action and attempts to list the instances where highway sections are likely to "significantly" affect the quality of the human environment. App. F to Fed. Highway Admin. Policy and Proc. Memo., para's 2,3. The U.S. Geological Survey requires the preparation of an environmental impact statement for "minor" actions if they have a significant environmental impact. Geological Survey Manual, Pt. 516, Ch. 2.3.B. The Second Circuit Court of Appeals has recognized that the construction of a jail in a narrow space across two apartment houses would have a "peculiar environmental impact" which might fall within the purview of NEPA Section 102(2)(C). *Hanly v. Mitchell*, 460 F.2d 640, 4 ERC 1152 (2d. Cir. 1972) *cert. denied* 41 U.S.L.W. 3254 (U.S. Nov. 6, 1972), petition for cert. filed 41 U.S.L.W. 3488 (U.S. Mar. 5, 1973). It has been held that the action of the Army Corps of Engineers in issuing a discharge permit under the Refuse Act of 1899 requires an environmental impact statement. *Sierra Club v. Sargent*, 3 ERC 1905, (W.D. Wash. 1972). In *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 3 ERC 1580 (D.Me. 1972), the Court held that the Department of Defense did not exceed its authority in determining that a mock amphibious landing of approximately 900 Marines in a State park was not a major action significantly affecting the quality of the human environment. The expansion of a two-lane highway to a four-lane freeway over a length of approximately 12 miles may be a major action requiring an environmental impact statement. *Scherr v. Volpe*, 336 F. Supp. 882, 3 ERC 1586, (W.D. Wis. 1971), *aff'd Scherr v. Volpe*, 466 F.2d 1027, 4 ERC 1435 (7th Cir. 1972). In *SCRAP v. United States*, 4 ERC 1312 (D.D.C., 1972), appeals docketed, No. 72–535, U.S. Sup. Ct., Oct. 2, 1972, and No. 72–562, U.S. Sup. Ct. Oct. 7, 1972, *prob. juris noted*, 41 U.S.L.W. 3346 (Dec. 19, 1972), it was held that Interstate Commerce Commission action on a temporary freight rate increase would be a major action and if it arguably would have an adverse impact on the environment, an environmental impact statement is required (the potential adverse impact was a reduced level of recycling). A stay of the preliminary injunction granted in *SCRAP* by the District Court was denied by Chief Justice Burger sitting as Circuit Justice for the District of Columbia Circuit in *Aberdeen Railroad v. SCRAP*, 4 ERC 1369 (D.C. Cir. 1972). It would seem that *any* action which enables a major undertaking with a significant impact on the environment would be a "major" action "significantly" affecting the quality of the human environment.

[6] The environmental impact statement is also sometimes referred to as a Section 102 statement after § 102(2)(C) of NEPA which prescribes it.

(2)(C) environmental impact statement "is to aid the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned Federal action."[7] The purpose of this article is to explore the extent to which one agency can rely on the environmental impact statement of another agency in the case of a project requiring multi-agency actions.[8]

THE "LEAD AGENCY" CONCEPT

NEPA requires an environmental impact statement of "all agencies."[9] There is no mention in the Act of a so-called "lead agency." The "lead agency" concept was first espoused by the Council on Environmental Quality in its guidelines for the preparation of environmental impact statements.[10] The Council on Environmental Quality recognized that incremental action by several agencies, each of which enables a major project, although perhaps by itself minor, can be deemed "major" given the cumulative effect of all of such incremental actions. In such a case, the Council on Environmental Quality advises that the "lead agency" should prepare an environmental impact statement. In the language of the Council

> The lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. "Lead agency" refers to the Federal agency which has primary authority for committing the Federal government to a course of action of significant environmental impact.[11]

According to the Council, in instances where several agencies' actions are involved in a project or activity, while each agency may prepare its own environmental impact statement, it is permissible and usually more effective for the agencies to designate a "lead agency" to prepare the environmental impact statement.[12]

It has been held that the Council on Environmental Quality guidelines are merely advisory and that the Council has no authority to promulgate regulations.[13] Accordingly, the Council guidelines do not afford a sound

[7] Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114, 2 ERC 1779, 1782 (D.C. Cir. 1971).

[8] For example, development of a coal-fired power plant and related facilities might involve Bureau of Reclamation approval of the use of water under the Bureau's jurisdiction, a U.S. Geological Survey approval of a mining plan pursuant to which the power plant fuel would be mined and Bureau of Land Management rights-of-way across Federal lands for transmission lines.

[9] 42 U.S.C. § 4332(2)(C) (Supp. 1972).

[10] 36 Fed. Reg. 7724–29 (April 23, 1971).

[11] *Id.* at para. 5(b).

[12] Council on Environmental Quality, Third Annual Report of the Council on Environmental Quality (1972), 234–36.

[13] Greene County Planning Bd. v. FPC, 445 F.2d 412, 3 ERC 1595 (2d Cir. 1972), *cert. denied*, 41 U.S.L.W. 3184 (U.S. Oct. 10, 1972).

legal basis for the "lead agency" concept. Moreover, while an administrative interpretation of a law cannot be ignored, particularly where the interpretation is a construction of a statute by the men designated by the statute to put it into effect,[14] it would seem that such an interpretation must relate to some provision in the law. The "lead agency" concept appears to have no clear basis in NEPA but is rather the creation of the Council on Environmental Quality.

According to the Council on Environmental Quality "the courts have recognized that the lead agency device can be a proper way to satisfy NEPA's procedural demands in a multi-agency context."[15] For that proposition the Council cites *Natural Resources Defense Council, Inc. v. Morton*,[16] and *Upper Pecos Association v. Stans*.[17]

Upper Pecos involved a challenge to a project involving the construction of a new road through a national forest. The action challenged was that of the Economic Development Administration of the Department of Commerce in making an offer to grant funds which would enable the construction of the road without having first prepared and circulated an environmental impact statement. The Department of Commerce argued that an environmental impact statement was prepared by the Forest Service and that the Forest Service was properly the "lead agency." The Court in *Upper Pecos* found that the Forest Service had planned to construct the road for some time and that because of its significant involvement with the project was the "lead agency." The Court, alluding to the concept of "lead agency" as expressed in the Guidelines of the Council on Environmental Quality,[18] concluded that the environmental statement prepared by the Forest Service would suffice (notwithstanding the fact that the statement was not prepared in time to be considered by the Department of Commerce before making its offer of funds). The Court thereby implicitly approved the "lead agency" concept.

In *Natural Resources Defense Council Inc. v. Morton*[19] the Court also implicitly approved the "lead agency" concept by holding that the impact statement function under review could have been assigned to an agency with broader responsibility (*i.e.*, to decide between alternative programs) than the agency which, prior to implementing a specific program, had in fact

[14] Environmental Defense Fund v. TVA, 339 F.Supp. 806, 3 ERC 1553 (E.D. Tenn. 1972).

[15] *Supra* note 12.

[16] 458 F.2d 827, 3 ERC 1558 (D.C. Cir. 1972).

[17] 328 F.Supp. 332, 2 ERC 1614 (D.N.M. 1971), *aff'd* 452 F.2d 1233, 3 ERC 1418 (10th Cir. 1971), judgement vacated and case remanded for determination as to mootness, 41 U.S.L.W. 3287 (U.S. Nov. 20, 1972).

[18] *Supra* note 10.

[19] 458 F.2d 827, 3 ERC 1558 (D.C. Cir. 1972).

prepared the impact statement. The implication is that the environmental impact statement prepared by the agency with broad responsibility (presumably the "lead agency") would have served for the action of the agency with a more limited role. Nonetheless, while the environmental statement could have been prepared at an earlier stage by the agency with broad responsibility, the Court in *Natural Resources* concluded that the preparation of the statement could also be deferred until the first agency action implementing a specific program.

GREENE COUNTY PLANNING BOARD v. FPC AND THE "LEAD AGENCY" CONCEPT

The notion that a "lead agency" may prepare an environmental impact statement which will serve the needs of other agencies arguably violates the mandate of NEPA Section 102(2)(C) that "all agencies" prepare an environmental impact statement. The importance of requiring that each Federal agency prepare an environmental impact statement was underlined in the case of *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*.[20] According to the Court in *Calvert Cliffs*, Section 102 of NEPA mandates "a particular sort of careful and informed decision making process" involving "individualized consideration and balancing of environmental factors."[21] Indeed, in light of the mandate to each federal agency to give "individualized consideration" to environmental factors, one might well question the propriety of permitting one Federal agency to prepare an environmental impact statement which will serve for another agency. That such an approach is not to be permitted under NEPA is suggested by the holding in *Greene County Planning Board v. FPC*.[22]

In *Greene County*, the Court, in disapproving the procedure whereby the Federal Power Commission circulated an environmental statement prepared by an applicant, the Court observed that "the Commission appears to be content to collate the comments of other Federal agencies, its own staff and . . . intervenors and . . . act as an umpire."[23] According to the Court, "the Commission was in violation of NEPA by conducting hearings prior to the preparation by *its staff* of its own impact statement. . . ." (emphasis the Court's).[24]

Whether or not NEPA, as interpreted by *Greene County* and *Calvert Cliffs* requires that each agency in a multi-agency situation prepare its own

[20] Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971).

[21] *Id.* at 1115, 2 ERC at 1783.

[22] Greene County Planning Bd. v. FPC, 455 F.2d 412, 3 ERC 1595 (2d Cir. 1972) *cert. denied*, 41 U.S.L.W. 3184 (U.S. Oct. 10, 1972).

[23] *Id.* at 420, 3 ERC at 1599.

[24] *Id.* at 422, 3 ERC at 1601.

environmental impact statement, certainly agency decision-making would be more "careful and informed"[25] given such a requirement than were one or more agencies to rely on the environmental impact statement prepared by another. Much of the benefit to be derived from the impact statement procedure is in the gathering and analysis of data, and to a significant extent this benefit is lost to the agency which merely reviews another agency's environmental statement. Indeed, one may advance the argument that the language of Section 102(2)(C) of NEPA requiring compliance with the impact statement procedure "to the fullest extent possible" requires that each agency in a multi-agency situation prepare its own environmental impact statement.

The principal argument against the proposition that each agency in a multi-agency situation should prepare its own impact statement would appear to be a practical one, namely, that were each agency to prepare its own environmental statement, there would be considerable duplication of effort. Certainly that would be true if each agency were obliged to collect its own data. The argument is not as valid, however, as regards the analysis of the data collected (*i.e.* the discussion of the environmental impact of a proposed action) since many environmental values are unquantifiable and much of such analysis must be subjective. Independent multi-agency analysis of data in such circumstances cannot readily be considered duplicative. Clearly when only one agency performs the environmental analysis without significant collaboration with other involved agencies, the benefit of the possibly divergent thinking of the other agencies is lost. It is questionable whether the pre-impact statement consultation mandated by Section 102(2)(C)[26] of NEPA results in any substantial contribution by the agencies that are not involved in the preparation of the environmental statement regarding the full scope of the potential environmental impact.

One way to insure that each agency in a multi-agency context gives the environmental aspects of its proposed action the careful, informed consideration it is required to give while minimizing the possibility of a duplication of effort is to require a joint statement. In a joint statement approach it is contemplated that each agency in a multi-agency situation would be involved in all aspects of the preparation of the environmental statement, from data gathering to analysis. Each agency would be obliged to supply input at all stages, and the net result would reflect the variety of points of view and expertise brought to the matter by each agency. No agency would

[25] Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115, 2 ERC 1779, 1783 (D.C. Cir. 1971).

[26] "[P]rior 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."

be required to duplicate the efforts of another, but all would participate co-equally.

It has been recognized that joint statements may be appropriate in some circumstances. According to the Council on Environmental Quality the description of "lead agency" in the April 23, 1971 Guidelines[27] was not intended to foreclose the possibility of a statement prepared jointly by all agencies involved in a project.[28] In fact, the Council on Environmental Quality recognizes that in cases involving multi-agency action, "preparation of an overview statement by an interagency group can make use of each agency's special knowledge while avoiding the duplication inherent in separate statements."[29]

CONCLUSION

While *Natural Resources Defense Council, Inc. v. Morton* and *Upper Pecos Association v. Stans*[31] both recognize, at least implicitly, the validity of the "lead agency" concept, both cases were decided before *Greene County Planning Board v. FPC*.[32] While *Greene County* concerned a situation where the Federal agency relied on an applicant's environmental statement, many of the same problems noted in *Greene County* would be associated with an agency's reliance on the environmental statement prepared by another agency. Another difficulty with the "lead agency" concept is that the selection of the wrong "lead agency" affords objecting persons a basis for overturning agency action.[33]

While the Council on Environmental Quality's Guidelines[34] and Recommendations[35] permit the selection of a "lead agency" to prepare the Section 102(2)(C) statement, in light of the policy of NEPA as interpreted by

[27] *Supra* note 11.

[28] Council on Environmental Quality Recommendations for Improving Agency NEPA Procedures, Para 4, accompanying "Memorandum for Agency and General Counsel Liaison on National Environmental Policy Act (NEPA) Matters" (May 16, 1972), reprinted in 3 Env. Rep. 82 (1972).

[29] *Supra* note 12 at 235.

[30] 458 F.2d 827, 3 ERC 1558 (D.C. Cir. 1972).

[31] 328 F.Supp. 332, 2 ERC 1614 (D.N.M. 1971), *aff'd* 452 F.2d 1233, 3 ERC 1418 (10th Cir. 1971), *judgement vacated and case remanded for determination as to mootness*, 41 U.S.L.W. 3287 (U.S. Nov. 20, 1972).

[32] Greene County Planning Bd. v. F.P.C., 455 F.2d 412, 3 ERC 1595 (2d Cir. 1972), *cert. denied*, 41 U.S.L.W. 3184 (U.S. Oct. 10, 1972).

[33] *See e.g.*, Upper Pecos Assn. v. Stans, 328 F. Supp. 332, 2 ERC 1614 (D.N.M. 1971), *aff'd* 452 F.2d 1233, 3 ERC 1418 (10th Cir. 1971), *judgement vacated and case remanded for determination as to mootness*, 41 U.S.L.W. 3287 (U.S. Nov. 20, 1972).

[34] *Supra* note 10.

[35] *Supra* note 28.

Calvert Cliffs' Coordinating Committee, Inc. v. AEC[36] and *Greene County*, the legality of the "lead agency" concept is open to serious question. Adoption of the joint statement approach would not only obviate any argument that an agency unlawfully delegated its NEPA responsibility to another agency, but it would also avoid the problem associated with the selection of the appropriate "lead agency."[37] Moreover, the joint statement approach would tend to insure that each agency involved would have input into the analysis of the environmental values affected by proposed action and the alternatives available, and in the making of the necessary important trade-offs between competing values—all furtherance of the NEPA objective of protecting and enhancing the quality of the human environment.

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[36] Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971).

[37] Upper Pecos Assn. v. Stans, 328 F. Supp. 332, 2 ERC 1614 (D.N.M. 1971), *aff'd* 452 F.2d 1233, 3 ERC 1418 (10th Cir. 1971), *judgement vacated and case remanded for determination as to mootness*, 41 U.S.L.W. 3287 (U.S. Nov. 20, 1972).