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Folder ID Number: 62082-007

Folder Title:
Environmental Policy Review Group (EPRG) [2 of 2] [1991]

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THE WHITE HOUSE
WASHINGTON

ENVIRONMENTAL POLICY REVIEW GROUP

11:00 - 12:00
June 28, 1991
The Roosevelt Room

AGENDA

- 1) Extraterritorial Application of NEPA
- 2) FOET v. Watkins
- 3) Follow-up Discussion on Arctic and Antarctica

EPRG

Patricia Bliss-Guest - cost data on CEQ roundtables

- ① Extraterritorial Jurisdiction ^{DOD?} State, Justice, CEQ
July 11 hearing on NEPA and extra-terr juris.
E.O. may slow legislation

* suggests for July 11 hearing.

* provide anecdotal information of the ETJ

applic. of NEPA - list of arguments/examples
State/CEQ review existing E.O. - proposed by Deland
Interest in E.O. should tell Deland.

- ② rescheduled for next mtg.

- ③ Arctic & Antarctic

Another mtg will be scheduled for next week
to discuss — Tuesday, July 2

COB
Tues?

"CORRESPONDENCE TRACKING"

TYPE: INVITATION DOCUMENT NUMBER: 9121805
ORIGINATOR: 02 STATUS I DIRECTORATE STATUS

FROM: THE WHITE HOUSE

TO: DR. D.A. BROMLEY

DATE OF
CORRESPONDENCE: 06/12/91

SUBJECT: ENVIRONMENTAL POLICY REVIEW GROUP, Tuesday, June 25,
1991 at 2:00pm, in the Roosevelt Room.

DIRECTORATE STAFF
ASSIGNED: ENVIRONMENT ASSIGNED:

ACTION STAFF
REQUIRED: INVITATION TO ATTEND ACTION:

SENDER'S DUE DATE:
OSTP DUE DATE: 06/21/91 STAFF DUE DATE
DATE COMPLETED: DATE COMPLETED/DEPT:

COPIES TO: D. Allan Bromley
Ken Yale

WHITE HOUSE TRACKING #: CONTACT PERSON:
PHONE: EXT:
REMARKS:

OSTP RECEIVED: 06/19/91 FILE: ENVIRONMENT*WHITE HOUSE
DEPT RECEIVED:

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WASHINGTON

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ENVIRONMENTAL POLICY REVIEW GROUP

OFFICE OF THE
DIRECTOR

Tuesday, June 25, 1991
2 p.m.
Roosevelt Room

AGENDA

- (1) Extraterritorial Application of NEPA
- (2) FOET vs. Watkins
- (3) Follow-up Discussion on Arctic and Antarctica



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 12, 1991

MEMORANDUM

TO: Roger B. Porter
Assistant to the President
for Economic & Domestic Policy
Chair, EPRG

Robert E. Grady
Associate Director of OMB for Natural Resources,
Energy & Science
Coordinator, EPRG

THRU: C. Boyden Gray
Counsel to the President

FROM: Richard B. Stewart *DS*
Assistant Attorney General

As requested, attached are two decision documents for consideration by the EPRG. One deals with how the Administration should address the extraterritorial application of NEPA. The other deals with how federal agencies can consistently consider potential climate change in their NEPA documents.

Please let me know if further materials would be helpful.

CC: William P. Barr
Deputy Attorney General

closed EPRG
Cancelled

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Issue: What position should the Administration take regarding legislative proposals to extend the National Environmental Policy Act (NEPA) extraterritorially? What strategies should the Administration develop to effectuate this position?

Action Forcing Events: Congress is currently considering legislation (H.R. 1271) which would expressly require the preparation of Environmental Impact Statements under NEPA for major federal actions or impacts occurring outside the borders of the United States. A similar bill passed the House last session; a 10/10/89 Statement of Administration Policy on that bill noted "serious concerns". The Administration threatened a veto of the Senate version on constitutional and policy grounds (10/9/90 DOJ letter). It is not known if a veto could be sustained.

Background: The statute. NEPA is a procedural statute which requires that before any major federal action is taken that could significantly affect the environment, the action agency must assess the environmental impacts of the proposed action and alternatives to it. NEPA imposes no substantive environmental goals; however, persons harmed by the agency action may challenge the agency's failure to follow NEPA's procedural requirements. While NEPA can usefully direct an agency to consider environmental consequences, NEPA is also often used by interested persons as a vehicle for stopping or delaying federal projects which they oppose.

The Executive Order. NEPA applies to "major federal actions significantly affecting the quality of the human environment". Intra-administration debate about NEPA's extraterritorial reach culminated in 1979 in the signing of Executive Order 12114. That E.O. requires agencies to assess the extraterritorial consequences of activities which significantly affect the environment outside the U.S., except where a participating country's environment is affected (where impact assessment would be the responsibility of the host country). E.O. 12114 states that it does not give rise to a cause of action in the courts. Agency compliance with the E.O. has varied widely.

Litigation. Suits challenging agency failure to follow NEPA with respect to federal activities outside the U.S. have thus far not been successful. In NRDC v. NRC, the D.C. Circuit in 1981 declined to require a NEPA analysis of the impacts in the Philippines of nuclear materials export. Last year in Greenpeace v. Stone, the Hawaii Federal District Court refused to

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require a NEPA analysis of the possible effects on Germany and the oceans of the transport of chemical munitions for destruction from Germany to Johnson Atoll in the South Pacific. (The Army had complied with E.O. 12114.) Both decisions rested on (1) the absence in NEPA of any clear indication that it applies abroad; (2) the foreign relations implications of such application; and (3) the sufficiency of the environmental documentation that the agencies in question had prepared.

A case now pending challenges NSF's proposal to build an incinerator in Antarctica to burn food wastes. Suits are also likely challenging (1) Navy activities in Japan, (2) a radio transmitting station in Israel, and (3) a medfly eradication program in Guatemala. Litigation is also possible over the effects in Mexico of the North American Free Trade Agreement (NAFTA). Pending climate litigation seeks NEPA analysis of domestic activities (see other memo); litigants might also seek to use NEPA as a vehicle for challenging the global impacts of from U.S. programs at home and abroad.¹

Current legal position. Since 1979, the Administration's position has been that as a matter of law, NEPA does not extend extraterritorially, because, under the relevant legal test, Congress did not clearly indicate its intent that NEPA so extend. In addition, such extension could raise serious constitutional and policy questions. In a March, 1991 decision, EEOC v. Aramco, the Supreme Court reaffirmed the doctrine that laws do not apply extraterritorially unless the intent of Congress to do so is clear; thus, it appears likely that the Court will make the determination of congressional intent regarding extraterritoriality on a statute-by-statute basis. In the fall of 1991, the Court will hear argument on the government's appeal from the 8th Circuit's decision in Lujan v. Defenders of Wildlife, which held that the Endangered Species Act (ESA) applies to U.S. activities in foreign countries.

¹ A related issue concerns the applicability of NEPA to the negotiation of treaties. It could be argued that the CEQ and State Department NEPA regulations treat international agreements as "major federal actions" triggering NEPA requirements, even though NEPA itself may not cover negotiations; moreover, any attempt to apply NEPA to the negotiation, signature, or transmittal of international instruments, or to use NEPA litigation as a vehicle for challenging their domestic and/or extraterritorial impact, would likely raise constitutional and foreign policy concerns.

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Since 1979 it has also been the Administration's position that E.O. 12114 governs extraterritorial environmental impact assessment, and that the E.O.'s express provision that it does not give rise to a cause of action precludes private parties from enforcing the E.O. in court.

Current policy position: The Administration has opposed judicial and legislative extraterritorial extension of NEPA for the following reasons:

(1) Such extension would thrust the courts into the foreign policy sphere, and subject foreign policy decisions to cumbersome, slow, and unpredictable NEPA litigation. This process is incompatible with the flexibility, dispatch, and executive discretion necessary for the conduct of foreign policy.

(2) NEPA challenges to foreign activities might force courts to deal repeatedly with non-justiciable political questions. Such questions, for example, would arise if American courts were to determine the NEPA propriety of U.S. activities that are being conducted on foreign soil at the request of the host government. Similarly, it would be inappropriate for the judiciary to review the foreign policy factors that the Executive had weighed in determining to undertake an activity abroad.

(3) While it would be constitutionally permissible for Congress to impose NEPA obligations on executive actions which are delegated to the President by Congress, it is unconstitutional to interfere with the President's inherent power as Commander in Chief or his exclusive authority to conduct foreign affairs. Drafting legislation which distinguished between inherent and delegated powers would be difficult. Any foreign policy action could be subject to challenges arguing that a NEPA statement should first be done, and that the action should be enjoined until the court can decide if the power being exercised is inherent or delegated. The conduct of U.S. foreign policy should not be haunted by such judicial intrusions.

(4) If the action involves a foreign government, that government might arguably be a "party necessary for just adjudication" of the suit. Failure to join it (e.g., in the event it declined to waive its sovereign immunity) might result in dismissal of the suit; on the other hand, if it were joined, foreign officials and citizens might be called as witnesses. The foreign sovereign might try to use the lawsuit as foreign

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policy "leverage" to extract concessions from the U.S. government.

(5) If the foreign government had its own NEPA-type statute, and a court in that country found that the statute had or had not been complied with, an American court would be put in the position of determining what weight to give to that judgment. Such pronouncements could embarrass both the foreign sovereign and the U.S.

(6) If NEPA were applied to the effects abroad of activities at home (as H.R. 1271 proposes), would anyone in the world have standing to challenge U.S. domestic actions? For example, could a resident of a low-lying country have standing to seek to enjoin a federal action (e.g., setting CAFE standards) by alleging that the agency had not adequately considered the potential global climate change effects of the project on that person? Such litigation could greatly complicate our bilateral relationships and our negotiation of international environmental agreements.

Policy decision: From one viewpoint, if the U.S. undertakes activities that have impacts outside its borders, should it not, as a global citizen, be required to consider the environmental consequences of those activities before undertaking them? From this viewpoint, the global environment is at stake, and all the U.S. is being asked to do is to behave in accordance with its own laws. The fact is, the U.S. can and does require extraterritorial assessments under E.O. 12114; however, that E.O. has often been honored only intermittently, and there is no legal mechanism by which citizens can hold U.S. agencies accountable for their non-compliance with the E.O.

From another vantage point, providing a legal right to challenge U.S. actions abroad would drive a stake through the heart of the President's foreign policy power. From this perspective, allowing such litigation would also undermine the sovereignty of other nations, and disrupt consensus-based international agreements governing areas beyond the jurisdiction of any nation. In this view, citizens should bring such complaints to their governments, who should in turn resolve them through bilateral and multilateral dispute resolution; private litigation should not be allowed to press domestic courts into making an end run around diplomatic processes.

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Extraterritorial NEPA Proposals: Options for Action

1. Support or allow passage of the legislation as proposed

We do not consider this option to be viable. DOJ will strongly recommend a veto on constitutional and policy grounds.

2. Oppose any legislative effort to impose formal NEPA requirements on activities outside U.S. jurisdiction, and retain current Executive Order as is.

Advantages: Preserves executive prerogatives; consistent with prior Administration statements.

Disadvantages: Legislation might pass anyway and be veto-proof; this option also does not address concerns about spotty compliance with E.O. 12114.

3. Oppose the current bill and recommend revisions to the Executive Order

Advantages: Consistent with our position that an E.O. is the right way to address this issue; protects activities from judicial interference; provides a vehicle for dealing with the ESA questions at the same time.

Disadvantages: It is not clear what revisions to the E.O. would as a practical matter be acceptable to agencies, Congress, and environmental groups; litigation pressures could persist.

4. Oppose the current bill but suggest a legislative alternative

Advantages: It is possible to craft legislation which addresses extraterritorial effects of U.S. activities without raising constitutional issues. This approach gets us into the debate, and a veto threat might provide sufficient leverage to obtain acceptable legislation.

Disadvantages: Once we make a proposal, we may have to bargain. There is a fine line between what is and is not constitutionally acceptable. If we do it for NEPA, would we have to for other statutes (e.g., ESA)?

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Issue: How shall federal agencies address issues of potential global climate change under the National Environmental Policy Act (NEPA)?

Action Forcing Events: In a pending lawsuit, Foundation on Economic Trends (FOET) v. Watkins, et al. (D.D.C.), plaintiffs have sued the Departments of Agriculture, Energy and Interior claiming that these agencies have violated NEPA by failing to address climate change in their NEPA documents. Similar claims have been made in other lawsuits, and potential climate change issues are increasingly being raised in the intra-agency administrative processes through which NEPA documents are prepared. In preparing materials addressing potential climate change in their environmental impact statements (EISs) and other NEPA documents, agencies are struggling to maintain both internal consistency and consistency among all federal agencies.

In the FOET suit and similar cases, the government must respond to charges that the EIS evaluations of potential climate change were absent or inadequate. The response to each suit depends on the facts of each federal action and what was said in each EIS. But inconsistency in whether and how agencies consider potential climate change as part of their particular NEPA analyses could prove quite troublesome: arguments in one case that consideration of climate change was unnecessary or impossible could be undercut by the fact that potential climate change was indeed considered in another case, or even ruled to be a required topic of consideration by an administrative decisionmaker.

Meanwhile, legislation is pending on the Hill (H.R. 1271) that would expressly make climate change (along with a laundry list of other global environmental issues) an issue to be considered under NEPA. Although this legislation would not direct assessment of climate change in any specific case, it would probably invalidate the argument that climate change is, as a general matter, so unforeseeable that it need not be considered under NEPA. (A bill similar to H.R. 1271 passed the House last session; the Administration threatened a veto of that bill because it would have applied NEPA extraterritorially (see DOJ letter of Oct. 9, 1990).)

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Background

The statute. NEPA is a procedural statute which requires that before any major federal action is taken which could significantly affect the environment, the action agency must assess the environmental impacts of the proposed action and alternatives to it. NEPA § 102, 42 U.S.C. 4332(2)(C).

Regulations. The treatment of potential climate change under NEPA may turn on the guidance given by CEQ in its NEPA regulations. Agencies proposing major federal actions are directed to consider the both "direct effects" and "indirect effects" of the proposed action, 40 C.F.R. 1502.16. These effects include "both beneficial and detrimental effects," 40 C.F.R. 1508.8, 1508.27.

For ongoing actions, the agency is required to prepare a supplemental NEPA document where "significant new circumstances or information relevant to environmental concerns" have arisen. 40 C.F.R. 1502.9(c).

In 1986 CEQ issued a regulation covering situations where the effects of a proposed action are "reasonably foreseeable" but full information about these effects is "incomplete" or "unavailable." In these cases the agency must summarize "existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts" and evaluate such impacts "based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. 1502.22. "Reasonably foreseeable" impacts are defined to include "impacts which have catastrophic consequences, even if their probability is low." 40 C.F.R. 1502.22. (Agencies are not currently required to assess "worst-case scenarios.")

Litigation. Courts have been asked to decide whether agency discussion of climate change is required under NEPA, but no court has yet spoken authoritatively. The question is posed in FOET v. Watkins, an action initially challenging all the programs of USDA, DOE, and DOI. Plaintiffs have recently narrowed their complaint to challenge approximately 50 specific programs of these three agencies, including Forest Service planning regulations, regional forest guides, individual Forest plans, the Forest Service's Renewable Resources Planning Act Assessment and Program, the USDA National Conservation Program, DOE energy conservation standards, energy technology R&D (such as Clean Coal Technology and Photovoltaics), BLM coal leasing, and cattle grazing on BLM lands. The litigation does not challenge

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extraterritorial activities of the defendant agencies. A motion to dismiss the case on procedural grounds was denied in early 1990. The case has completed initial discovery and is scheduled for briefing at the end of July 1991 on "summary judgment" sought by the United States on jurisdictional and related grounds.

Although three agencies have been named as defendants in FOET, a government-wide perspective is warranted. Other agencies could conceivably be similarly challenged, since the several greenhouse gases are emitted or sequestered by a great variety of processes in virtually every sector of human activity. Meanwhile, the government's expertise on the foreseeability of climate change and its relation to different human activities resides in agencies such as NASA, NOAA and EPA as well as in the three defendant agencies. Further, the foreseeability of climate change is a question that has received attention throughout the government, in connection with international negotiations on a framework convention on climate change and proposed Congressional legislation.

An early issue has been "standing" -- whether plaintiffs are sufficiently affected by the alleged environmental impacts of the challenged government actions to have the right to be heard in court on this issue. Our motion to dismiss FOET for lack of standing was denied by the district court on the ground that plaintiffs have "informational standing," an interest in receiving the information that the NEPA analyses would produce. Other D.C. Circuit cases have occasionally endorsed the doctrine of "informational standing," limiting the likelihood of success were we to seek an interlocutory appeal on that question. Meanwhile, in City of Los Angeles v. NHTSA (D.C. Cir. Aug. 24, 1990), the D.C. Circuit issued a complex opinion dealing with plaintiffs' standing to raise potential climate change in challenges to NEPA documents triggered by NHTSA's CAFE rulemakings. One judge argued that the potential impact of climate change is so great that an environmental group with members in California, where sea level might rise due to global warming, is sufficiently affected to have standing; another argued that a plaintiff must show that the federal action is causally related to the ultimate alleged adverse impacts of climate change on the plaintiff, or that a court decision could redress this adverse impact by enjoining the federal action. The case was decided on other grounds, leaving this question uncertain.

We will renew our standing arguments in the summary judgment motion scheduled for late July, particularly in light of the Supreme Court's 1990 decision in Lujan v. National Wildlife Federation, strengthening the standing requirements for

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environmental plaintiffs seeking to oppose motions for summary judgment.

It is quite possible that our summary judgment motion will not succeed in defeating all elements of the plaintiffs' claims. The court will then be tempted to proceed to the merits of those claims. The question on the merits could ultimately be framed as whether climate change is a "reasonably foreseeable adverse environmental effect" of federal actions. 40 C.F.R. 1502.22. Framing the question in this posture could offer the court the opportunity to hear expert witnesses debate whether climate change is generically foreseeable as a result of all human activities, and the opportunity for the judge to "decide" that question, as he indicated a year ago he might. Such an open-court proceeding could be seen as a test of government policy on climate change, and could be reminiscent of other highly-charged lawsuits on science such as the Scopes trial on teaching evolution. We would of course remind the court that the question under NEPA is whether an impact would be a reasonably foreseeable result of a particular proposed federal action, not of all human activities or even all federal programs as a group, and that the foreseeability of climate change is a highly technical question usually handled by experts, not judges. It remains unclear whether the judge would agree to remand the case to each agency for expert case-by-case consideration or reach the merits himself.

The climate change issue has also been raised occasionally in other NEPA litigation. As indicated above, the question was posed in City of Los Angeles v. NHTSA, an action brought by NRDC, who can be expected to raise the issue again. Other environmental groups have suggested raising the issue in connection with DOT highway funding decisions. U.S. DOE has raised the issue in an effort to forestall the shutdown of the Shoreham nuclear power plant; DOE has argued in this state court litigation that under the New York state version of NEPA, the state must consider the effects on climate change of replacing Shoreham with a fossil-fuel-fired plant.

The issue of climate change as an impact of federal actions under NEPA is thus likely to reappear in the future, irrespective of the resolution of the FOET case.

Administrative processes. NEPA documents are prepared through a public review and appeal process handled by the administrative structure of each federal agency. During this process the public has an opportunity to comment on drafts of the document. Interested parties must appeal disputes about the final document to administrative officials such as administrative

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law judges (ALJs), and to higher levels of the agency, before going to court to challenge the document. This process occurs for numerous federal actions in numerous agencies and sub-agencies, every day, all around the country.

The question of climate change has already been raised in several NEPA administrative processes, and will no doubt continue to be raised. It is being raised in energy development projects, CAFE rulemakings, OCS leasing decisions, National Forest Plans, and even in occasional individual timber sales. Both private parties and other government agencies (in their consultative role under NEPA) have raised the issue in comments on draft NEPA documents.

Without guidance, these administrative decisions are likely to produce varying results from far-flung ALJs and project managers, even within one agency. Such discrepancies can cause intra-agency and inter-agency complications, as well as set precedent for treatment of the issue in future administrative actions.

Agency EIS preparations. Each agency is attempting to deal with this question in its continuing preparation of EISs required under NEPA. NHTSA and DOE are now routinely calculating the effects of proposed actions on net greenhouse gas emissions (but are not addressing the effects of those emissions on potential climate change). In its upcoming OCS Program draft EIS, DOI will provide a discussion of the uncertainties in forecasting climate change, the effect of the OCS program on net emissions of two greenhouse gases (CO₂ and methane), and the conclusion that the impact due to the OCS Program is not reasonably foreseeable. USDA is drafting a Federal Register notice to describe the state of scientific knowledge about potential climate change, relying principally on the IPCC Scientific Assessment (1990), in an effort to give generic guidance that sub-agencies can reference each time the question is raised. Other agencies, such as DOD, NASA, NSF, or HUD, could also conceivably become concerned with the potential effects of their programs on climate change.

Options for Decision:

1. In a directive or guidance from an appropriate executive authority, instruct all federal agencies to calculate the effects of their actions on net greenhouse gas emissions, following a consistent methodology.

Such a directive/guidance could be issued as:

- (a) an OMB circular,
- (b) an executive order,
- (c) CEQ guidance,
- (d) OSTP guidance,
- (e) an interagency task group, perhaps under the EPRG or the DPC Working Group on Global Change, or
- (f) some similar structure or combination of the above.

Pros:

- o would provide interagency and intra-agency consistency to evaluations that are now being conducted somewhat haphazardly
- o could help defeat or defuse FOET and related litigation
- o would assist in process of generating "Action Agenda" scorecard of U.S. policy actions affecting net greenhouse gas emissions
- o would not entail consideration of ultimate effect of emissions on potential climate change (the directive could contain an explanation of why such effects are too uncertain -- in both magnitude and direction -- to be "reasonably foreseeable adverse effects" under NEPA)
- o assessments of net greenhouse gas emissions, but not of ultimate effects on climate, would leave open the option to maintain in litigation that NEPA does not legally oblige consideration of potential climate change impacts, and that such assessments, pursuant to directive/guidance, implement a voluntary executive branch policy decision and not a NEPA obligation

Cons:

- o would require agencies to expend resources on estimating emissions (though agencies may do so anyhow under threat of litigation)
- o could call additional public attention to the issue, and to entity issuing directive/guidance

2. Let each agency develop generic guidance and methodologies for addressing climate change impacts of their programs, with case-by-case review by an expert executive body. The expert review body could be, e.g., OSTP, the Committee on Earth & Environmental Sciences (CEES), or another interagency group.

Pros:

- o would provide intra-agency consistency; central review would aid interagency consistency
- o would afford agencies greater flexibility to tailor their approaches
- o could help defeat or defuse FOET and related litigation
- o might not entail consideration of ultimate effect of emissions on potential climate change (such a choice could be left to each agency or to the central reviewing body); leaves open question of any obligation under NEPA
- o might assist in generating "Action Agenda" scorecard, but agencies might choose not to calculate effects

Cons:

- o agency approaches might be inconsistent with each other
- o process of agency development followed by central review could be time-consuming
- o some agencies may not develop generic guidance and methodology, leaving them with no consistent intra-agency position

3. Convene an informal interagency group to fashion a consistent approach to handling climate change in NEPA documents.

Pros:

- o could promote consistency
- o informal group, without supervisory review, may raise less public attention

Cons:

- o a large group may not reach consensus without a central referee
- o might not produce most useful approach to assessing climate issues under NEPA
- o may not go far enough to defeat or defuse litigation

4. Let agencies continue on their own, developing approaches as they see fit without guidance or review.

Pros:

- o avoids central review and attendant public attention
- o reduces agency expenditure of resources

Cons:

- o raises likelihood of further litigation
- o would not achieve interagency consistency
- o omits needed expertise from NOAA, NASA
- o may not produce most useful approach to assessing climate issues under NEPA

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Options as to content of any guidance or review:

A. -- pursuant to executive branch policy. Instruct agencies that NEPA requires no analyses of potential climate change, because a causal linkage between potential climate change and specific agency actions is categorically not "reasonably foreseeable." This instruction would make clear that the option to instruct agencies to assess the effects of their actions on net greenhouse gas emissions is a matter of executive branch policy and not a NEPA obligation.

B. -- pursuant to NEPA. Instruct agencies that NEPA (and the CEQ regulation on "incomplete information" (1502.22)) requires agencies, in appropriate cases, to describe the effects of programs on net greenhouse gas emissions, and/or the state of science on forecasting potential climate change (including the uncertainties in such efforts), but that NEPA does not require agencies to forecast the ultimate potential climate change effects of their actions because such a specific causal linkage is not "reasonably foreseeable."

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THE WHITE HOUSE
WASHINGTON

ENVIRONMENTAL POLICY REVIEW GROUP

11:00 - 12:00
June 28, 1991
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EPRG

Patricia Bliss-Guest - cost data on CEQ roundtables

- ① Extraterritorial Jurisdiction ^{DOD?} State, Justice, CEQ
July 11 hearing on NEPA and extra-terr juris.
E.O. may slow legislation
* suggests for July 11 hearing.
* provide anecdotal information of the ETJ
applic. of NEPA - list of arguments/examples
State/CEQ review existing E.O. - proposed by Deland
Interest in E.O. should tell Deland.
- ② rescheduled for next mtg.

③ Arctic & Antarctic

Another mtg will be scheduled for next week
to discuss — Tuesday, July 2

Antarctica

Background

- Antarctic Treaty Consultative Parties met in Madrid June 17-21 to negotiate the Protocol to the Antarctic Treaty on Environmental Protection.
- Parties agreed on important improvements in the operation of the Treaty mechanism and on extensive environmental protection measures related to waste disposal, protection of native species of flora and fauna, environmental impact assessments, and marine pollution.
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- The Chairman's proposal appears to meet the general USG objectives as set out in the Circular 175 but includes a different adoption procedure:
 1. Allows a country to return to the pre-Protocol status quo if one country or a small group of countries blocks entry into force of an amendment to Article 7.
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 3. Builds on and strengthens the Antarctic Treaty.

Specific Provisions

There are three difference between the U.S. and the Chairman's proposal: 1. Withdrawal provisions; 2. Amendment adoption procedures; and, 3. reference to Article IV of the Antarctic Treaty.

1. Withdrawal (Article 25 para.6)

- Includes our withdrawal proposal:
 - If an amendment has not entered into force within three years after it is adopted, a Party may give notice of its withdrawal which shall take effect two years after notification.
- Differs from our proposal by extending withdrawal to the entire Protocol.

Pros:

- Would be procedurally easier to mine, as a country would not be required to meet the stringent environmental protection obligations of the Protocol and Annexes.
- Party withdrawing has greater protection, as it would not be bound by the Protocol's binding arbitration provisions.

-3-

Cons:

- Higher political threshold for deciding to withdraw.
- Threat of withdrawal may be less credible, potentially diminishing leverage with others.

Counter:

- The domestic political battle will be over the implication of withdrawing (i.e., the decision to allow minerals activities).
- Withdrawing state could announce it would voluntarily continue to comply with the other provisions of the Protocol.

Discussion:

- The Chair's proposal improves the U.S. proposal as it affords greater legal protection if we decide to engage in minerals activities.

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- The right to withdraw is contingent on adoption of an amendment.
 - This is the same as the U.S. proposal, however, the actual adoption procedures are different.
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 - Differs from our proposal, which required a simple majority of Parties, including simple majority of all Consultative Parties at the time the amendment is adopted.

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- Implicitly requires that at least one claimant state supports an amendment (there are seven: UK, France, Norway, Australia, New Zealand, Argentina and Chile).
- This is essential quid pro quo for claimant states to accept our withdrawal proposal.

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- This paragraph preserves important USG objectives:
 1. A legal regime must be in place when the mineral ban ends.
 2. A legal regime cannot be imposed on us.
- Adds to U.S. proposal the requirement that the regime "shall fully safeguard the interests of all States referred to in Article IV of the Antarctic Treaty and apply the principles thereof."

Discussion

- The reference to Article IV does not affect the U.S. objectives: ensuring that a regime cannot be imposed on the U.S., and preserving the right to withdraw.

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- The provision emphasizes the importance of Article IV, which freezes the positions of claimant, non-claimant and potential claimant states vis-a-vis sovereignty over Antarctica to the status quo at the time of the entry into force of the Antarctic Treaty (1961).
- Article IV is the heart of the political balance of the Antarctic Treaty: the interests it identifies and principles it contains must be reflected in any new minerals regime, as they were in CRAMRA.
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- This provision is vague: It is best read as hortatory, without prejudice to the entry into force of any amendment pursuant to the procedures of Article 25(4).
- A strong argument could be made that it creates an objective standard that must be met, and that could be subject to binding arbitration, before an alternative regime could enter into force.

Counter:

- A Tribunal would not have clear jurisdiction to interpret it:
 - Jurisdiction only extends to Article 7, not to Article 25.
 - Questions related to Article IV are expressly made outside the Tribunal's competence.
- Our right to withdraw is not prejudiced by this provision.

"CORRESPONDENCE TRACKING"

TYPE: INVITATION DOCUMENT NUMBER: 9121805
ORIGINATOR: 02 STATUS I DIRECTORATE STATUS

FROM: THE WHITE HOUSE

TO: DR. D.A. BROMLEY

DATE OF
CORRESPONDENCE: 06/12/91

SUBJECT: ENVIRONMENTAL POLICY REVIEW GROUP, Tuesday, June 25,
1991 at 2:00pm, in the Roosevelt Room.

DIRECTORATE STAFF
ASSIGNED: ENVIRONMENT ASSIGNED:

ACTION STAFF
REQUIRED: INVITATION TO ATTEND ACTION:

SENDER'S DUE DATE:
OSTP DUE DATE: 06/21/91 STAFF DUE DATE
DATE COMPLETED: DATE COMPLETED/DEPT:

COPIES TO: D. Allan Bromley
Ken Yale

WHITE HOUSE TRACKING #: CONTACT PERSON:
PHONE: EXT:

REMARKS:

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WASHINGTON

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ENVIRONMENTAL POLICY REVIEW GROUP

OFFICE OF THE
DIRECTOR

Tuesday, June 25, 1991
2 p.m.
Roosevelt Room

AGENDA

- (1) Extraterritorial Application of NEPA
- (2) FOET vs. Watkins
- (3) Follow-up Discussion on Arctic and Antarctica



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 12, 1991

MEMORANDUM

TO: Roger B. Porter
Assistant to the President
for Economic & Domestic Policy
Chair, EPRG

Robert E. Grady
Associate Director of OMB for Natural Resources,
Energy & Science
Coordinator, EPRG

THRU: C. Boyden Gray
Counsel to the President

FROM: Richard B. Stewart *DS*
Assistant Attorney General

As requested, attached are two decision documents for consideration by the EPRG. One deals with how the Administration should address the extraterritorial application of NEPA. The other deals with how federal agencies can consistently consider potential climate change in their NEPA documents.

Please let me know if further materials would be helpful.

CC: William P. Barr
Deputy Attorney General

* PRIVILEGED MATERIAL--LITIGATION-SENSITIVE *
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Issue: What position should the Administration take regarding legislative proposals to extend the National Environmental Policy Act (NEPA) extraterritorially? What strategies should the Administration develop to effectuate this position?

Action Forcing Events: Congress is currently considering legislation (H.R. 1271) which would expressly require the preparation of Environmental Impact Statements under NEPA for major federal actions or impacts occurring outside the borders of the United States. A similar bill passed the House last session; a 10/10/89 Statement of Administration Policy on that bill noted "serious concerns". The Administration threatened a veto of the Senate version on constitutional and policy grounds (10/9/90 DOJ letter). It is not known if a veto could be sustained.

Background: The statute. NEPA is a procedural statute which requires that before any major federal action is taken that could significantly affect the environment, the action agency must assess the environmental impacts of the proposed action and alternatives to it. NEPA imposes no substantive environmental goals; however, persons harmed by the agency action may challenge the agency's failure to follow NEPA's procedural requirements. While NEPA can usefully direct an agency to consider environmental consequences, NEPA is also often used by interested persons as a vehicle for stopping or delaying federal projects which they oppose.

The Executive Order. NEPA applies to "major federal actions significantly affecting the quality of the human environment". Intra-administration debate about NEPA's extraterritorial reach culminated in 1979 in the signing of Executive Order 12114. That E.O. requires agencies to assess the extraterritorial consequences of activities which significantly affect the environment outside the U.S., except where a participating country's environment is affected (where impact assessment would be the responsibility of the host country). E.O. 12114 states that it does not give rise to a cause of action in the courts. Agency compliance with the E.O. has varied widely.

Litigation. Suits challenging agency failure to follow NEPA with respect to federal activities outside the U.S. have thus far not been successful. In NRDC v. NRC, the D.C. Circuit in 1981 declined to require a NEPA analysis of the impacts in the Philippines of nuclear materials export. Last year in Greenpeace v. Stone, the Hawaii Federal District Court refused to

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require a NEPA analysis of the possible effects on Germany and the oceans of the transport of chemical munitions for destruction from Germany to Johnson Atoll in the South Pacific. (The Army had complied with E.O. 12114.) Both decisions rested on (1) the absence in NEPA of any clear indication that it applies abroad; (2) the foreign relations implications of such application; and (3) the sufficiency of the environmental documentation that the agencies in question had prepared.

A case now pending challenges NSF's proposal to build an incinerator in Antarctica to burn food wastes. Suits are also likely challenging (1) Navy activities in Japan, (2) a radio transmitting station in Israel, and (3) a medfly eradication program in Guatemala. Litigation is also possible over the effects in Mexico of the North American Free Trade Agreement (NAFTA). Pending climate litigation seeks NEPA analysis of domestic activities (see other memo); litigants might also seek to use NEPA as a vehicle for challenging the global impacts of from U.S. programs at home and abroad.¹

Current legal position. Since 1979, the Administration's position has been that as a matter of law, NEPA does not extend extraterritorially, because, under the relevant legal test, Congress did not clearly indicate its intent that NEPA so extend. In addition, such extension could raise serious constitutional and policy questions. In a March, 1991 decision, EEOC v. Aramco, the Supreme Court reaffirmed the doctrine that laws do not apply extraterritorially unless the intent of Congress to do so is clear; thus, it appears likely that the Court will make the determination of congressional intent regarding extraterritoriality on a statute-by-statute basis. In the fall of 1991, the Court will hear argument on the government's appeal from the 8th Circuit's decision in Lujan v. Defenders of Wildlife, which held that the Endangered Species Act (ESA) applies to U.S. activities in foreign countries.

¹ A related issue concerns the applicability of NEPA to the negotiation of treaties. It could be argued that the CEQ and State Department NEPA regulations treat international agreements as "major federal actions" triggering NEPA requirements, even though NEPA itself may not cover negotiations; moreover, any attempt to apply NEPA to the negotiation, signature, or transmittal of international instruments, or to use NEPA litigation as a vehicle for challenging their domestic and/or extraterritorial impact, would likely raise constitutional and foreign policy concerns.

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Since 1979 it has also been the Administration's position that E.O. 12114 governs extraterritorial environmental impact assessment, and that the E.O.'s express provision that it does not give rise to a cause of action precludes private parties from enforcing the E.O. in court.

Current policy position: The Administration has opposed judicial and legislative extraterritorial extension of NEPA for the following reasons:

(1) Such extension would thrust the courts into the foreign policy sphere, and subject foreign policy decisions to cumbersome, slow, and unpredictable NEPA litigation. This process is incompatible with the flexibility, dispatch, and executive discretion necessary for the conduct of foreign policy.

(2) NEPA challenges to foreign activities might force courts to deal repeatedly with non-justiciable political questions. Such questions, for example, would arise if American courts were to determine the NEPA propriety of U.S. activities that are being conducted on foreign soil at the request of the host government. Similarly, it would be inappropriate for the judiciary to review the foreign policy factors that the Executive had weighed in determining to undertake an activity abroad.

(3) While it would be constitutionally permissible for Congress to impose NEPA obligations on executive actions which are delegated to the President by Congress, it is unconstitutional to interfere with the President's inherent power as Commander in Chief or his exclusive authority to conduct foreign affairs. Drafting legislation which distinguished between inherent and delegated powers would be difficult. Any foreign policy action could be subject to challenges arguing that a NEPA statement should first be done, and that the action should be enjoined until the court can decide if the power being exercised is inherent or delegated. The conduct of U.S. foreign policy should not be haunted by such judicial intrusions.

(4) If the action involves a foreign government, that government might arguably be a "party necessary for just adjudication" of the suit. Failure to join it (e.g., in the event it declined to waive its sovereign immunity) might result in dismissal of the suit; on the other hand, if it were joined, foreign officials and citizens might be called as witnesses. The foreign sovereign might try to use the lawsuit as foreign

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policy "leverage" to extract concessions from the U.S. government.

(5) If the foreign government had its own NEPA-type statute, and a court in that country found that the statute had or had not been complied with, an American court would be put in the position of determining what weight to give to that judgment. Such pronouncements could embarrass both the foreign sovereign and the U.S.

(6) If NEPA were applied to the effects abroad of activities at home (as H.R. 1271 proposes), would anyone in the world have standing to challenge U.S. domestic actions? For example, could a resident of a low-lying country have standing to seek to enjoin a federal action (e.g., setting CAFE standards) by alleging that the agency had not adequately considered the potential global climate change effects of the project on that person? Such litigation could greatly complicate our bilateral relationships and our negotiation of international environmental agreements.

Policy decision: From one viewpoint, if the U.S. undertakes activities that have impacts outside its borders, should it not, as a global citizen, be required to consider the environmental consequences of those activities before undertaking them? From this viewpoint, the global environment is at stake, and all the U.S. is being asked to do is to behave in accordance with its own laws. The fact is, the U.S. can and does require extraterritorial assessments under E.O. 12114; however, that E.O. has often been honored only intermittently, and there is no legal mechanism by which citizens can hold U.S. agencies accountable for their non-compliance with the E.O.

From another vantage point, providing a legal right to challenge U.S. actions abroad would drive a stake through the heart of the President's foreign policy power. From this perspective, allowing such litigation would also undermine the sovereignty of other nations, and disrupt consensus-based international agreements governing areas beyond the jurisdiction of any nation. In this view, citizens should bring such complaints to their governments, who should in turn resolve them through bilateral and multilateral dispute resolution; private litigation should not be allowed to press domestic courts into making an end run around diplomatic processes.

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Extraterritorial NEPA Proposals: Options for Action

1. Support or allow passage of the legislation as proposed

We do not consider this option to be viable. DOJ will strongly recommend a veto on constitutional and policy grounds.

2. Oppose any legislative effort to impose formal NEPA requirements on activities outside U.S. jurisdiction, and retain current Executive Order as is.

Advantages: Preserves executive prerogatives; consistent with prior Administration statements.

Disadvantages: Legislation might pass anyway and be veto-proof; this option also does not address concerns about spotty compliance with E.O. 12114.

3. Oppose the current bill and recommend revisions to the Executive Order

Advantages: Consistent with our position that an E.O. is the right way to address this issue; protects activities from judicial interference; provides a vehicle for dealing with the ESA questions at the same time.

Disadvantages: It is not clear what revisions to the E.O. would as a practical matter be acceptable to agencies, Congress, and environmental groups; litigation pressures could persist.

4. Oppose the current bill but suggest a legislative alternative

Advantages: It is possible to craft legislation which addresses extraterritorial effects of U.S. activities without raising constitutional issues. This approach gets us into the debate, and a veto threat might provide sufficient leverage to obtain acceptable legislation.

Disadvantages: Once we make a proposal, we may have to bargain. There is a fine line between what is and is not constitutionally acceptable. If we do it for NEPA, would we have to for other statutes (e.g., ESA)?

EPRG 7/2/91 FOET vs Watkins

- global basis vs, reg'l basis
- record of achievement

- lawyers discuss legal ~~issues~~; whether global climate at all.

- OSTP/Justice to come up with NEPA guidance re: global climate certainty.

* - talk to Dick Stewart re: Letter from OSTP, - determined at EPRG.

JULY 2, 1991

MEMORANDUM FOR D. ALLAN BROMLEY

FROM: VICKIE V. SUTTON

SUBJECT: NEPA AND CONSIDERATION OF CLIMATE CHANGE

The last EPRG meeting considered materials provided from the Department of Justice, concerning current litigation on the issue of failure to consider climate change impacts as the result of major federal actions under the National Environmental Protection Act (NEPA).

Four options are discussed in the EPRG paper to address the judicial pressure and legislative pressure on the Administration to include climate change impacts/effects under NEPA.

The first option appears to be the most viable, which recommends the development of guidance on a consistent methodology to use by agencies in calculating the effects of their actions on net greenhouse gas emissions. There is an important distinction made between the calculation of "greenhouse gas emissions" and the assessment of "climate change effects" as two parts of the issue.

In Option 1, the issuance of guidance is proposed to come from one or combination of a list which includes: (1) OMB guidance; (2) CEQ guidance; (3) an executive order; (4) DPC Working Group on Global Climate; or (5) similar structure or combination of the above. OSTP and the DPC Working Group on Global Climate are the most logical choices. The DPC Working Group, as you have indicated would be the best choice.

There are two options based on the selection of Option 1, which you might consider:

Option 1. The appointment of a task force, such as the economics task force or comprehensive approach task force would be probably best chaired by the Department of Justice representative (Dick Stewart replacement).

Option 2. No new permanent task force groups. Instead two options papers could be produced with the DPC GCWG: one the legal issues to be considered in the construction of guidance from the Department of Justice; and one from U.S. EPA and Department of Energy, jointly, on the development of a consistent methodology. The

options could be considered by the DPC GCWG and construction of guidance could then be done by an ad hoc task force.

LEGAL ISSUES

Legal issues to be considered in the construction of guidance could include defining some of the problematic guidance as it applies to global climate:

- (1) "reasonably foreseeable"
- (2) "causation"
- (3) consider current CEQ guidance 40 CFR 1502.22

METHODOLOGY ISSUES

Some of the issues to be considered by this group in developing guidance and the development of a consistent methodology could be:

(1) Focusing on net greenhouse gas emissions would be more quantitative than "effects/impacts" of climate change, and considerably less contentious in the interagency forum. Agreement in the DPC WGCC has already been reached in part with the approval of the comprehensive approach outlined in the Action Agenda. Methodology used in determining the U.S. scorecard on greenhouse gas emissions would be the first methodology to consider.

(2) The Global Environment Facility of the World Bank is currently using a formula to determine the impact of greenhouse gases as part of their criteria for the selection of projects. Discounting greenhouse gas emissions has brought some criticism to the Bank's process, nevertheless it seems to be a reasonable approach. This methodology could also be considered because it considers both benefits and costs over the life of the project.

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United States Department of State

Washington, D.C. 20520

POLICY PLANNING STAFF

FACSIMILE COVER SHEET

Date Sent: 6/27/91Number of Pages: 5
(Excluding Cover Sheet)Time Sent: 5:45 pmS/P FAX #: 202-647-0753Verification #: 202-647-1965

TO:	NAME	AGENCY	PHONE #	FAX #
	<u>Bob Grady</u>	<u>OMB</u>	<u>395-4844</u>	<u>395-5730</u>

FROM: Chris Dawson PHONE #: 647-3638SUBJECT: Antarctica Discussion PAPER

COMMENTS:

Antarctica

Background

- Antarctic Treaty Consultative Parties met in Madrid June 17-21 to negotiate the Protocol to the Antarctic Treaty on Environmental Protection.
- Parties agreed on important improvements in the operation of the Treaty mechanism and on extensive environmental protection measures related to waste disposal, protection of native species of flora and fauna, environmental impact assessments, and marine pollution.
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- Differs from our proposal by extending withdrawal to the entire Protocol.

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- Withdrawing state could announce it would voluntarily continue to comply with the other provisions of the Protocol.

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- Protects against potential "runaway majority" in the future (e.g. effort by G-77 to "break into Antarctic Treaty Club").

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- This is essential quid pro quo for claimant states to accept our withdrawal proposal.

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- The reference to Article IV does not affect the U.S. objectives: ensuring that a regime cannot be imposed on the U.S., and preserving the right to withdraw.

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- The provision emphasizes the importance of Article IV, which freezes the positions of claimant, non-claimant and potential claimant states vis-a-vis sovereignty over Antarctica to the status quo at the time of the entry into force of the Antarctic Treaty (1961).
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 - Questions related to Article IV are expressly made outside the Tribunal's competence.
 - Our right to withdraw is not prejudiced by this provision.

* PRIVILEGED MATERIAL -- LITIGATION SENSITIVE *
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Issue: How shall federal agencies address issues of potential global climate change under the National Environmental Policy Act (NEPA)?

Action Forcing Events: In a pending lawsuit, Foundation on Economic Trends (FOET) v. Watkins, et al. (D.D.C.), plaintiffs have sued the Departments of Agriculture, Energy and Interior claiming that these agencies have violated NEPA by failing to address climate change in their NEPA documents. Similar claims have been made in other lawsuits, and potential climate change issues are increasingly being raised in the intra-agency administrative processes through which NEPA documents are prepared. In preparing materials addressing potential climate change in their environmental impact statements (EISs) and other NEPA documents, agencies are struggling to maintain both internal consistency and consistency among all federal agencies.

✓ In the FOET suit and similar cases, the government must respond to charges that the EIS evaluations of potential climate change were absent or inadequate. The response to each suit depends on the facts of each federal action and what was said in each EIS. But inconsistency in whether and how agencies consider potential climate change as part of their particular NEPA analyses could prove quite troublesome: arguments in one case that consideration of climate change was unnecessary or impossible could be undercut by the fact that potential climate change was indeed considered in another case, or even ruled to be a required topic of consideration by an administrative decisionmaker.

Meanwhile, legislation is pending on the Hill (H.R. 1271) that would expressly make climate change (along with a laundry list of other global environmental issues) an issue to be considered under NEPA. Although this legislation would not direct assessment of climate change in any specific case, it would probably invalidate the argument that climate change is, as a general matter, so unforeseeable that it need not be considered under NEPA. (A bill similar to H.R. 1271 passed the House last session; the Administration threatened a veto of that bill because it would have applied NEPA extraterritorially (see DOJ letter of Oct. 9, 1990).)

Background

The statute. NEPA is a procedural statute which requires that before any major federal action is taken which could significantly affect the environment, the action agency must assess the environmental impacts of the proposed action and alternatives to it. NEPA § 102, 42 U.S.C. 4332(2)(C).

Regulations. The treatment of potential climate change under NEPA may turn on the guidance given by CEQ in its NEPA regulations. Agencies proposing major federal actions are directed to consider the both "direct effects" and "indirect effects" of the proposed action, 40 C.F.R. 1502.16. These effects include "both beneficial and detrimental effects," 40 C.F.R. 1508.8, 1508.27.

For ongoing actions, the agency is required to prepare a supplemental NEPA document where "significant new circumstances or information relevant to environmental concerns" have arisen. 40 C.F.R. 1502.9(c).

In 1986 CEQ issued a regulation covering situations where the effects of a proposed action are "reasonably foreseeable" but full information about these effects is "incomplete" or "unavailable." In these cases the agency must summarize "existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts" and evaluate such impacts "based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. 1502.22. "Reasonably foreseeable" impacts are defined to include "impacts which have catastrophic consequences, even if their probability is low." 40 C.F.R. 1502.22. (Agencies are not currently required to assess "worst-case scenarios.")

Litigation. Courts have been asked to decide whether agency discussion of climate change is required under NEPA, but no court has yet spoken authoritatively. The question is posed in FOET v. Watkins, an action initially challenging all the programs of USDA, DOE, and DOI. Plaintiffs have recently narrowed their complaint to challenge approximately 50 specific programs of these three agencies, including Forest Service planning regulations, regional forest guides, individual Forest plans, the Forest Service's Renewable Resources Planning Act Assessment and Program, the USDA National Conservation Program, DOE energy conservation standards, energy technology R&D (such as Clean Coal Technology and Photovoltaics), BLM coal leasing, and cattle grazing on BLM lands. The litigation does not challenge

DOE's
argument

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extraterritorial activities of the defendant agencies. A motion to dismiss the case on procedural grounds was denied in early 1990. The case has completed initial discovery and is scheduled for briefing at the end of July 1991 on "summary judgment" sought by the United States on jurisdictional and related grounds.

Although three agencies have been named as defendants in FOET, a government-wide perspective is warranted. Other agencies could conceivably be similarly challenged, since the several greenhouse gases are emitted or sequestered by a great variety of processes in virtually every sector of human activity. Meanwhile, the government's expertise on the foreseeability of climate change and its relation to different human activities resides in agencies such as NASA, NOAA and EPA as well as in the three defendant agencies. Further, the foreseeability of climate change is a question that has received attention throughout the government, in connection with international negotiations on a framework convention on climate change and proposed Congressional legislation.

An early issue has been "standing" -- whether plaintiffs are sufficiently affected by the alleged environmental impacts of the challenged government actions to have the right to be heard in court on this issue. Our motion to dismiss FOET for lack of standing was denied by the district court on the ground that plaintiffs have "informational standing," an interest in receiving the information that the NEPA analyses would produce. Other D.C. Circuit cases have occasionally endorsed the doctrine of "informational standing," limiting the likelihood of success were we to seek an interlocutory appeal on that question. Meanwhile, in City of Los Angeles v. NHTSA (D.C. Cir. Aug. 24, 1990), the D.C. Circuit issued a complex opinion dealing with plaintiffs' standing to raise potential climate change in challenges to NEPA documents triggered by NHTSA's CAFE rulemakings. One judge argued that the potential impact of climate change is so great that an environmental group with members in California, where sea level might rise due to global warming, is sufficiently affected to have standing; another argued that a plaintiff must show that the federal action is causally related to the ultimate alleged adverse impacts of climate change on the plaintiff, or that a court decision could redress this adverse impact by enjoining the federal action. The case was decided on other grounds, leaving this question uncertain.

We will renew our standing arguments in the summary judgment motion scheduled for late July, particularly in light of the Supreme Court's 1990 decision in Lujan v. National Wildlife Federation, strengthening the standing requirements for

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environmental plaintiffs seeking to oppose motions for summary judgment.

It is quite possible that our summary judgment motion will not succeed in defeating all elements of the plaintiffs' claims. The court will then be tempted to proceed to the merits of those claims. The question on the merits could ultimately be framed as whether climate change is a "reasonably foreseeable adverse environmental effect" of federal actions. 40 C.F.R. 1502.22. Framing the question in this posture could offer the court the opportunity to hear expert witnesses debate whether climate change is generically foreseeable as a result of all human activities, and the opportunity for the judge to "decide" that question, as he indicated a year ago he might. Such an open-court proceeding could be seen as a test of government policy on climate change, and could be reminiscent of other highly-charged lawsuits on science such as the Scopes trial on teaching evolution. We would of course remind the court that the question under NEPA is whether an impact would be a reasonably foreseeable result of a particular proposed federal action, not of all human activities or even all federal programs as a group, and that the foreseeability of climate change is a highly technical question usually handled by experts, not judges. It remains unclear whether the judge would agree to remand the case to each agency for expert case-by-case consideration or reach the merits himself.

The climate change issue has also been raised occasionally in other NEPA litigation. As indicated above, the question was posed in City of Los Angeles v. NHTSA, an action brought by NRDC, who can be expected to raise the issue again. Other environmental groups have suggested raising the issue in connection with DOT highway funding decisions. U.S. DOE has raised the issue in an effort to forestall the shutdown of the Shoreham nuclear power plant; DOE has argued in this state court litigation that under the New York state version of NEPA, the state must consider the effects on climate change of replacing Shoreham with a fossil-fuel-fired plant.

The issue of climate change as an impact of federal actions under NEPA is thus likely to reappear in the future, irrespective of the resolution of the FOET case.

Administrative processes. NEPA documents are prepared through a public review and appeal process handled by the administrative structure of each federal agency. During this process the public has an opportunity to comment on drafts of the document. Interested parties must appeal disputes about the final document to administrative officials such as administrative

nuclear
issue
DOE used
as an argument

law judges (ALJs), and to higher levels of the agency, before going to court to challenge the document. This process occurs for numerous federal actions in numerous agencies and sub-agencies, every day, all around the country.

The question of climate change has already been raised in several NEPA administrative processes, and will no doubt continue to be raised. It is being raised in energy development projects, CAFE rulemakings, OCS leasing decisions, National Forest Plans, and even in occasional individual timber sales. Both private parties and other government agencies (in their consultative role under NEPA) have raised the issue in comments on draft NEPA documents.

Without guidance, these administrative decisions are likely to produce varying results from far-flung ALJs and project managers, even within one agency. Such discrepancies can cause intra-agency and inter-agency complications, as well as set precedent for treatment of the issue in future administrative actions.

GHG impacts calculations

Agency EIS preparations. Each agency is attempting to deal with this question in its continuing preparation of EISs required under NEPA. NHTSA and DOE are now routinely calculating the effects of proposed actions on net greenhouse gas emissions (but are not addressing the effects of those emissions on potential climate change). In its upcoming OCS Program draft EIS, DOI will provide a discussion of the uncertainties in forecasting climate change, the effect of the OCS program on net emissions of two greenhouse gases (CO₂ and methane), and the conclusion that the impact due to the OCS Program is not reasonably foreseeable. USDA is drafting a Federal Register notice to describe the state of scientific knowledge about potential climate change, relying principally on the IPCC Scientific Assessment (1990), in an effort to give generic guidance that sub-agencies can reference each time the question is raised. Other agencies, such as DOD, NASA, NSF, or HUD, could also conceivably become concerned with the potential effects of their programs on climate change.

Options for Decision:

1. In a directive or guidance from an appropriate executive authority, instruct all federal agencies to calculate the effects of their actions on net greenhouse gas emissions, following a consistent methodology.

Such a directive/guidance could be issued as:

- (a) an OMB circular,
- (b) an executive order,
- (c) CEQ guidance,
- (d) OSTP guidance,
- (e) an interagency task group, perhaps under the EPRG or the DPC Working Group on Global Change, or
- (f) some similar structure or combination of the above.

Pros:

- o would provide interagency and intra-agency consistency to evaluations that are now being conducted somewhat haphazardly
- o could help defeat or defuse FOET and related litigation
- o would assist in process of generating "Action Agenda" scorecard of U.S. policy actions affecting net greenhouse gas emissions
- o would not entail consideration of ultimate effect of emissions on potential climate change (the directive could contain an explanation of why such effects are too uncertain -- in both magnitude and direction -- to be "reasonably foreseeable adverse effects" under NEPA)
- o assessments of net greenhouse gas emissions, but not of ultimate effects on climate, would leave open the option to maintain in litigation that NEPA does not legally oblige consideration of potential climate change impacts, and that such assessments, pursuant to directive/guidance, implement a voluntary executive branch policy decision and not a NEPA obligation

Cons:

- o would require agencies to expend resources on estimating emissions (though agencies may do so anyhow under threat of litigation)
- o could call additional public attention to the issue, and to entity issuing directive/guidance

2. Let each agency develop generic guidance and methodologies for addressing climate change impacts of their programs, with case-by-case review by an expert executive body. The expert review body could be, e.g., OSTP, the Committee on Earth & Environmental Sciences (CEES), or another interagency group.

Pros:

- o would provide intra-agency consistency; central review would aid interagency consistency
- o would afford agencies greater flexibility to tailor their approaches
- o could help defeat or defuse FOET and related litigation
- o might not entail consideration of ultimate effect of emissions on potential climate change (such a choice could be left to each agency or to the central reviewing body); leaves open question of any obligation under NEPA
- o might assist in generating "Action Agenda" scorecard, but agencies might choose not to calculate effects

Cons:

- o agency approaches might be inconsistent with each other
- o process of agency development followed by central review could be time-consuming
- o some agencies may not develop generic guidance and methodology, leaving them with no consistent intra-agency position

3. Convene an informal interagency group to fashion a consistent approach to handling climate change in NEPA documents.

Pros:

- o could promote consistency
- o informal group, without supervisory review, may raise less public attention

Cons:

- o a large group may not reach consensus without a central referee
- o might not produce most useful approach to assessing climate issues under NEPA
- o may not go far enough to defeat or defuse litigation

4. Let agencies continue on their own, developing approaches as they see fit without guidance or review.

Pros:

- o avoids central review and attendant public attention
- o reduces agency expenditure of resources

Cons:

- o raises likelihood of further litigation
- o would not achieve interagency consistency
- o omits needed expertise from NOAA, NASA
- o may not produce most useful approach to assessing climate issues under NEPA

Options as to content of any guidance or review:

A. -- pursuant to executive branch policy. Instruct agencies that NEPA requires no analyses of potential climate change, because a causal linkage between potential climate change and specific agency actions is categorically not "reasonably foreseeable." This instruction would make clear that the option to instruct agencies to assess the effects of their actions on net greenhouse gas emissions is a matter of executive branch policy and not a NEPA obligation.

B. -- pursuant to NEPA. Instruct agencies that NEPA (and the CEQ regulation on "incomplete information" (1502.22)) requires agencies, in appropriate cases, to describe the effects of programs on net greenhouse gas emissions, and/or the state of science on forecasting potential climate change (including the uncertainties in such efforts), but that NEPA does not require agencies to forecast the ultimate potential climate change effects of their actions because such a specific causal linkage is not "reasonably foreseeable."

INCREMENTAL REFORM

MARKET-BASED APPROACH

Streamlining

Add new deadlines to accelerate interagency appeals and require permit to be deemed approved within 6 months if agency does not extend for good cause. Also expand use of general permits. (Options 1, 4, and 5)

Accept incremental reform options but limit interagency appeals to generic policy issues. Also require agencies to provide site-specific data when commenting on individual permits. (Options 2, 3, 4, and 5)

Categorizing Wetlands

Require the Corps to develop general criteria to use on a case-by-case basis, and test use of categories in selected states. (Option 3)

Establish wetland categories based on function, value, and scarcity. (Options 1 and 2)

Mitigation Banking

Implement pilot projects to test feasibility of market for mitigation credits. Also restrict mitigation to geographical area and phase-in use of created wetlands for mitigation. (Options 1, 2, and 3)

Create a national market for mitigation credits. Eliminate preference for on-site mitigation and presume satisfaction of mitigation if from same or higher category. (Options 4 and 5)

Sequencing and Presumptive Mitigation Requirements

Continue current exceptions from sequencing when losses are insignificant or when advanced planning has been accomplished. (Option 1)

Replace sequencing with mitigation requirements established for each category and reduce mitigation requirements if public interest is served. Establish general permits for low-value wetlands. (Options 2, 3, and 4)

Increasing State Role

Increase State grants and encourage development of State no net loss plans. Also amend the Act to allow performance based approach to State plan approval under 404 and permitting of wetlands near navigable waters. (Options 1, 2, 3, and 4)

Amend Act to allow States to develop own wetland categories and mitigation requirements based on Federal criteria. Also accept permitting of wetlands near navigable waters. (Options 3 and 5)

Modifying Coverage of Program

Expand coverage of program through administrative rule. (Option 2)

Amend the Act to expand coverage of program if significant reform is included, and exempt certain man-made wetlands. (Options 1 and 3)

Use of EPA Veto

Maintain veto as is. (Option 1)

Eliminate the veto or narrow its use. (Options 2, 3, and 4)

WETLAND INITIATIVES

- **Fully funding the Wetlands Reserve Program in the 1990 Farm Bill.** The 1990 Farm bill authorized the purchase of up to 1 million acres of wetlands. The FY 1992 budget submitted by the President requested funding for 600,000 acres.
- **Initiating an Administration-wide wetlands restoration and creation program on federal lands.** Many agencies, including Interior, EPA, Defense, NOAA, and Energy, have restoration and creation programs. These activities could be coordinated through a standing interagency group. Such a group would develop an overall program for the most effective use of new and existing Federal resources in this area.
- **Promoting excellence in research on wetlands.** Several agencies are now conducting their own research on wetlands. This initiative would coordinate, consolidate and establish priorities for wetlands research to improve the scientific information base.
- **Continuing to make wetlands a priority in the allocation of Land and Water Conservation Funds.** Assure level funding or increases to this program. Target a portion of state LWCF funds to wetlands.
- **Continuing and expanding the existing satellite monitoring program to periodically assess national wetland trends.** Satellite imagery provides up to date information on the status and trends of wetlands, and can be effective in conducting periodic change analysis of high value wetland areas. Further accelerate and improve our national inventory of wetlands, with more geographically targeted reporting, and monitoring of the ecological health of our wetlands.
- **Focusing existing public outreach and education programs on informing the regulated community about federal wetlands regulations.**

NATIONAL ENVIRONMENTAL POLICY ACT
OF 1969
as amended¹

42 U.S.C.A. § 4321 et seq.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969".

PURPOSE

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 USC 4321

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 USC 4331

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

¹ Public Law 91-190, January 1, 1970, as amended by Public Law 94-52, July 3, 1975; Public Law 94-83, August 9, 1975; and Public Law 99-160, November 25, 1985.

ENVIRONMENTAL STATUTES

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
 - (2) assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings;
 - (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
 - (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
 - (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
 - (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.
- (c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.
- Sec. 102. 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, 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 decisionmaking 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, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking 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 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, 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: 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 resources;

(F) recognize the worldwide and long-range 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 USC 4333 Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

42 USC 4334 Sec. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

42 USC 4335 Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

42 USC 4341 Sec. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

42 USC 4342 Sec. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

SC 4343 Sec. 203. (a) The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

(b) Notwithstanding section 3679(b) of the Revised Statutes (31 U.S.C. 665(b)), the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.]*

SC 4344 Sec. 204. It shall be the duty and function of the Council—
(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205. In exercising its powers, functions, and duties under this Act, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation, organizations, State and local governments and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206. Members of the Council shall serve full time 42 USC 4346 and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV or the Executive Schedule Pay Rates (5 U.S.C. 5315).

ACCEPTANCE OF TRAVEL REIMBURSEMENT

"Sec. 207. The Council may accept reimbursements from any private 42 USC 4346a nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

EXPENDITURES FOR INTERNATIONAL TRAVEL

"Sec. 208. The Council may make expenditures in support of its 42 USC 4346b international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries."

Sec. 209. There are authorized to be appropriated to 42 USC 4347 carry out the provisions of this Act not to exceed \$300,000 for fiscal year 1970, \$700,000 for fiscal year 1971, and \$1,000,000 for each fiscal year thereafter.

COUNCIL ON ENVIRONMENTAL QUALITY AND OFFICE OF ENVIRONMENTAL QUALITY

For necessary expenses of the Council on Environmental Quality and the Office of Environmental Quality, in carrying out their functions under the National Environmental Policy Act of 1969 (Public Law 91-190), the Environmental Quality Improvement Act of 1970 (Public Law 91-224), and Reorganization Plan No. 1 of 1977, including not to exceed \$500 for official reception and representation expenses, and hire of passenger motor vehicles, \$700,000.

42 USC 4321
note.
42 USC 4371
note.
5 USC app.

as amended¹

42 U.S.C.A. § 4801 et seq.

SHORT TITLE

Section 1. This Act may be cited as the "Noise Control Act of 1972," as amended by the "Quiet Communities Act of 1978."

FINDINGS AND POLICY

42 USC

Sec. 2. (a) The Congress finds—

- (1) that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;
- (2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and
- (3) that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce, control of which requires national uniformity of treatment.

(b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this Act to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

DEFINITIONS

42 USC

Sec. 3. For purposes of this Act:

- (1) The term "Administrator" means the Administrator of the Environmental Protection Agency.
- (2) The term "person" means an individual, corporation, partnership, or association, and (except as provided in sections 11(e) and 12(a)) includes any officer, employee, department, agency, or instrumentality of the United States, a State, or any political subdivision of a State.
- (3) The term "product" means any manufactured article or goods or component thereof; except that such term does not include—
 - (A) any aircraft, aircraft engine, propeller, or appliance, as such terms are defined in section 101 of the Federal Aviation Act of 1958; or
 - (B) (i) any military weapons or equipment which are designed for combat use; (ii) any rockets or equipment which are designed for research, experimental, or developmental work to be performed by the National Aeronautics and Space Administration; or (iii) to the extent provided by regulations of the Administrator, any other machinery or equipment designed for use in experimental work done by or for the Federal Government.
- (4) The term "ultimate purchaser" means the first person who in good faith purchases a product for purposes other than resale.

¹ PL 92-574, October 27, 1972; as amended by PL 94-301, May 31, 1976, and PL 95-609 (Quiet Communities Act), November 9, 1978 (shown in italics).

Antarctica

Background

- Antarctic Treaty Consultative Parties met in Madrid June 17-21 to negotiate the Protocol to the Antarctic Treaty on Environmental Protection.
- Parties agreed on important improvements in the operation of the Treaty mechanism and on extensive environmental protection measures related to waste disposal, protection of native species of flora and fauna, environmental impact assessments, and marine pollution.
 - These new provisions are based on U.S. initiatives and protect U.S. interests.
 - The Protocol will provide immediate protection to Antarctica and has strong USG support.
- The Protocol also includes a provision to ban minerals activities (Article 7); the ban can be reviewed after 50 years.
 - The unresolved issue relates to procedures to amend or lift the ban (Article 25).
 - Article 25, as originally drafted, requires that an amendment be ratified by all 26 of the current Consultative Parties.
 - This would allow one or a small group of countries to block lifting of the ban.
 - Concerned about foreclosing future options, the U.S. proposed an alternative to allow parties to withdraw if an amendment adopted by a majority of the Parties did not enter into force within three years.
 - All other participating countries indicated they were not willing to accept the U.S. proposal as drafted.
- On June 20, the Spanish chairman offered a proposal based on the U.S. withdrawal proposal, with three modifications.
 - While many participating countries were not happy with the Chair's proposal, all countries indicated privately they were willing to accept it.
 - The U.S. indicated it needed more time to study the proposed changes.

-2-

General

- The Chairman's proposal appears to meet the general USG objectives as set out in the Circular 175 but includes a different adoption procedure:
- 1. Allows a country to return to the pre-Protocol status quo if one country or a small group of countries blocks entry into force of an amendment to Article 7.
- 2. Provides us some leverage to achieve a collective resolution, protecting us against having our interest in positive action blocked by the few and against actions being taken without our consent.
- 3. Builds on and strengthens the Antarctic Treaty.

Specific Provisions

There are three difference between the U.S. and the Chairman's proposal: 1. Withdrawal provisions; 2. Amendment adoption procedures; and, 3. reference to Article IV of the Antarctic Treaty.

1. Withdrawal (Article 25 para.6).

- Includes our withdrawal proposal:
 - If an amendment has not entered into force within three years after it is adopted, a Party may give notice of its withdrawal which shall take effect two years after notification.
- Differs from our proposal by extending withdrawal to the entire Protocol.

Pros:

- Would be procedurally easier to mine, as a country would not be required to meet the stringent environmental protection obligations of the Protocol and Annexes.
- Party withdrawing has greater protection, as it would not be bound by the Protocol's binding arbitration provisions.

-3-

Cons:

- Higher political threshold for deciding to withdraw.
- Threat of withdrawal may be less credible, potentially diminishing leverage with others.

Counter:

- The domestic political battle will be over the implication of withdrawing (i.e., the decision to allow minerals activities).
- Withdrawing state could announce it would voluntarily continue to comply with the other provisions of the Protocol.

Discussion:

- The Chair's proposal improves the U.S. proposal as it affords greater legal protection if we decide to engage in minerals activities.

2. Adoption (Article 25 para.3)

- The right to withdraw is contingent on adoption of an amendment.
 - This is the same as the U.S. proposal, however, the actual adoption procedures are different.
- A simple majority of the Parties, including 3/4 of the existing Consultative Parties (20 out of 26), is required to adopt an amendment.
 - Differs from our proposal, which required a simple majority of Parties, including simple majority of all Consultative Parties at the time the amendment is adopted.

Pros:

- Caps number of Consultative Parties required to adopt at 20.
- Gives states with greater stakes in Antarctica a stronger role (including the U.S.).
- Protects against potential "runaway majority" in the future (e.g. effort by G-77 to "break into Antarctic Treaty Club").

-4-

Cons:

- Implicitly requires that at least one claimant state supports an amendment (there are seven: UK, France, Norway, Australia, New Zealand, Argentina and Chile).
- This is essential quid pro quo for claimant states to accept our withdrawal proposal.

Discussion:

- A political reality of the Antarctic Treaty system is the need to protect the interests of claimant and non-claimant states.
- It would be difficult for claimant states to act en bloc: they have very different economic and political interests and different levels of concern about their claims to sovereignty in Antarctica (e.g. Argentina vs. the U.K).
- Given current trends in the number of Consultative Parties (number has doubled since 1977), it is likely that after 50 years, the 3/4 requirement of existing Consultative Parties will represent a smaller number than a simple majority of Consultative Parties.
- Only 14 new Consultative Parties would have to join to make a simple majority requirement greater than the 20 required for 3/4.

3. Legal Regime for Minerals Activities (Article 25 para.5)

- This paragraph preserves important USG objectives:
 1. A legal regime must be in place when the mineral ban ends.
 2. A legal regime cannot be imposed on us.
- Adds to U.S. proposal the requirement that the regime "shall fully safeguard the interests of all States referred to in Article IV of the Antarctic Treaty and apply the principles thereof."

Discussion

- The reference to Article IV does not affect the U.S. objectives: ensuring that a regime cannot be imposed on the U.S., and preserving the right to withdraw.

-5-

- The provision emphasizes the importance of Article IV, which freezes the positions of claimant, non-claimant and potential claimant states vis-a-vis sovereignty over Antarctica to the status quo at the time of the entry into force of the Antarctic Treaty (1961).
 - Article IV is the heart of the political balance of the Antarctic Treaty: the interests it identifies and principles it contains must be reflected in any new minerals regime, as they were in CRAMRA.
 - The reference to Article IV serves as a political marker or placeholder.
 - This provision is vague: It is best read as hortatory, without prejudice to the entry into force of any amendment pursuant to the procedures of Article 25(4).
 - A strong argument could be made that it creates an objective standard that must be met, and that could be subject to binding arbitration, before an alternative regime could enter into force.
- Counter:
- A Tribunal would not have clear jurisdiction to interpret it:
 - Jurisdiction only extends to Article 7, not to Article 25.
 - Questions related to Article IV are expressly made outside the Tribunal's competence.
 - Our right to withdraw is not prejudiced by this provision.

June 28, 1991

ANTARCTICA

The Antarctic Treaty Consultative Parties met in Madrid June 17-22 to continue their negotiations on an environmental protection Protocol to the Antarctic Treaty. The Parties reached agreement on extensive environmental protection measures that could have immediate benefit for Antarctica.

These new environmental provisions are based on U.S. initiatives. They focus on protecting native species of Antarctic flora and fauna, requiring environmental impact assessments, and controlling tourism, waste disposal and marine pollution. We strongly support the adoption of these new environmental protections.

The United States also accepts a 50-year ban on minerals.

The unresolved issue relates to the complex procedures required to amend or lift the ban. As originally drafted, the provision would have allowed one country to block a lifting of the ban. That would, in fact, make the moratorium into a de facto permanent ban.

In light of the almost daily progress made in environmental protection technology, we do not believe we should almost totally foreclose the options of future generations.

During the meeting in Madrid, we offered an approach that preserves the moratorium and provides minimal flexibility to lift or amend the ban. We proposed a procedure to permit countries, after over 50 years, to be allowed to withdraw from the minerals provisions, but then only to return to the status quo as it is today. Even this withdrawal could only come after a majority vote of all the Parties, including a majority of the Consultative Parties, and after five more years.

Our proposal reflects and builds upon the provisions of the underlying Antarctic Treaty. It provides a means of overcoming an impasse that could undermine both the Protocol and the Antarctic Treaty itself. And it preserves the moratorium and approach of the original proposal.

In Madrid, many supported our approach, in principle. A new proposal was offered during the final hours of the meeting. The new proposal, while incorporating our approach, included significant changes. We do not take our international commitments lightly and want to understand fully the implications of these changes. Therefore, in Madrid, we indicated our need to study the new proposal further, which we are now doing.

THE WHITE HOUSE

WASHINGTON

ENVIRONMENTAL POLICY REVIEW GROUP

4:00 - 5:00

July 2, 1991

The Roosevelt Room

AGENDA

- 1) FOET v. Watkins
- 2) Antarctic Treaty on Environmental Protection
- 3) Update on International NEPA
- 4) Update on NAFTA

* PRIVILEGED MATERIAL -- LITIGATION SENSITIVE *
** NOT FOR DISTRIBUTION **

Issue: How shall federal agencies address issues of potential global climate change under the National Environmental Policy Act (NEPA)?

Action Forcing Events: In a pending lawsuit, Foundation on Economic Trends (FOET) v. Watkins, et al. (D.D.C.), plaintiffs have sued the Departments of Agriculture, Energy and Interior claiming that these agencies have violated NEPA by failing to address climate change in their NEPA documents. Similar claims have been made in other lawsuits, and potential climate change issues are increasingly being raised in the intra-agency administrative processes through which NEPA documents are prepared. In preparing materials addressing potential climate change in their environmental impact statements (EISs) and other NEPA documents, agencies are struggling to maintain both internal consistency and consistency among all federal agencies.

In the FOET suit and similar cases, the government must respond to charges that the EIS evaluations of potential climate change were absent or inadequate. The response to each suit depends on the facts of each federal action and what was said in each EIS. But inconsistency in whether and how agencies consider potential climate change as part of their particular NEPA analyses could prove quite troublesome: arguments in one case that consideration of climate change was unnecessary or impossible could be undercut by the fact that potential climate change was indeed considered in another case, or even ruled to be a required topic of consideration by an administrative decisionmaker.

Meanwhile, legislation is pending on the Hill (H.R. 1271) that would expressly make climate change (along with a laundry list of other global environmental issues) an issue to be considered under NEPA. Although this legislation would not direct assessment of climate change in any specific case, it would probably invalidate the argument that climate change is, as a general matter, so unforeseeable that it need not be considered under NEPA. (A bill similar to H.R. 1271 passed the House last session; the Administration threatened a veto of that bill because it would have applied NEPA extraterritorially (see DOJ letter of Oct. 9, 1990).)

Background

The statute. NEPA is a procedural statute which requires that before any major federal action is taken which could significantly affect the environment, the action agency must assess the environmental impacts of the proposed action and alternatives to it. NEPA § 102, 42 U.S.C. 4332(2)(C).

Regulations. The treatment of potential climate change under NEPA may turn on the guidance given by CEQ in its NEPA regulations. Agencies proposing major federal actions are directed to consider the both "direct effects" and "indirect effects" of the proposed action, 40 C.F.R. 1502.16. These effects include "both beneficial and detrimental effects," 40 C.F.R. 1508.8, 1508.27.

For ongoing actions, the agency is required to prepare a supplemental NEPA document where "significant new circumstances or information relevant to environmental concerns" have arisen. 40 C.F.R. 1502.9(c).

In 1986 CEQ issued a regulation covering situations where the effects of a proposed action are "reasonably foreseeable" but full information about these effects is "incomplete" or "unavailable." In these cases the agency must summarize "existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts" and evaluate such impacts "based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. 1502.22. "Reasonably foreseeable" impacts are defined to include "impacts which have catastrophic consequences, even if their probability is low." 40 C.F.R. 1502.22. (Agencies are not currently required to assess "worst-case scenarios.")

Litigation. Courts have been asked to decide whether agency discussion of climate change is required under NEPA, but no court has yet spoken authoritatively. The question is posed in FOET v. Watkins, an action initially challenging all the programs of USDA, DOE, and DOI. Plaintiffs have recently narrowed their complaint to challenge approximately 50 specific programs of these three agencies, including Forest Service planning regulations, regional forest guides, individual Forest plans, the Forest Service's Renewable Resources Planning Act Assessment and Program, the USDA National Conservation Program, DOE energy conservation standards, energy technology R&D (such as Clean Coal Technology and Photovoltaics), BLM coal leasing, and cattle grazing on BLM lands. The litigation does not challenge

extraterritorial activities of the defendant agencies. A motion to dismiss the case on procedural grounds was denied in early 1990. The case has completed initial discovery and is scheduled for briefing at the end of July 1991 on "summary judgment" sought by the United States on jurisdictional and related grounds.

Although three agencies have been named as defendants in FOET, a government-wide perspective is warranted. Other agencies could conceivably be similarly challenged, since the several greenhouse gases are emitted or sequestered by a great variety of processes in virtually every sector of human activity. Meanwhile, the government's expertise on the foreseeability of climate change and its relation to different human activities resides in agencies such as NASA, NOAA and EPA as well as in the three defendant agencies. Further, the foreseeability of climate change is a question that has received attention throughout the government, in connection with international negotiations on a framework convention on climate change and proposed Congressional legislation.

An early issue has been "standing" -- whether plaintiffs are sufficiently affected by the alleged environmental impacts of the challenged government actions to have the right to be heard in court on this issue. Our motion to dismiss FOET for lack of standing was denied by the district court on the ground that plaintiffs have "informational standing," an interest in receiving the information that the NEPA analyses would produce. Other D.C. Circuit cases have occasionally endorsed the doctrine of "informational standing," limiting the likelihood of success were we to seek an interlocutory appeal on that question. Meanwhile, in City of Los Angeles v. NHTSA (D.C. Cir. Aug. 24, 1990), the D.C. Circuit issued a complex opinion dealing with plaintiffs' standing to raise potential climate change in challenges to NEPA documents triggered by NHTSA's CAFE rulemakings. One judge argued that the potential impact of climate change is so great that an environmental group with members in California, where sea level might rise due to global warming, is sufficiently affected to have standing; another argued that a plaintiff must show that the federal action is causally related to the ultimate alleged adverse impacts of climate change on the plaintiff, or that a court decision could redress this adverse impact by enjoining the federal action. The case was decided on other grounds, leaving this question uncertain.

We will renew our standing arguments in the summary judgment motion scheduled for late July, particularly in light of the Supreme Court's 1990 decision in Lujan v. National Wildlife Federation, strengthening the standing requirements for

environmental plaintiffs seeking to oppose motions for summary judgment.

It is quite possible that our summary judgment motion will not succeed in defeating all elements of the plaintiffs' claims. The court will then be tempted to proceed to the merits of those claims. The question on the merits could ultimately be framed as whether climate change is a "reasonably foreseeable adverse environmental effect" of federal actions. 40 C.F.R. 1502.22. Framing the question in this posture could offer the court the opportunity to hear expert witnesses debate whether climate change is generically foreseeable as a result of all human activities, and the opportunity for the judge to "decide" that question, as he indicated a year ago he might. Such an open-court proceeding could be seen as a test of government policy on climate change, and could be reminiscent of other highly-charged lawsuits on science such as the Scopes trial on teaching evolution. We would of course remind the court that the question under NEPA is whether an impact would be a reasonably foreseeable result of a particular proposed federal action, not of all human activities or even all federal programs as a group, and that the foreseeability of climate change is a highly technical question usually handled by experts, not judges. It remains unclear whether the judge would agree to remand the case to each agency for expert case-by-case consideration or reach the merits himself.

The climate change issue has also been raised occasionally in other NEPA litigation. As indicated above, the question was posed in City of Los Angeles v. NHTSA, an action brought by NRDC, who can be expected to raise the issue again. Other environmental groups have suggested raising the issue in connection with DOT highway funding decisions. U.S. DOE has raised the issue in an effort to forestall the shutdown of the Shoreham nuclear power plant; DOE has argued in this state court litigation that under the New York state version of NEPA, the state must consider the effects on climate change of replacing Shoreham with a fossil-fuel-fired plant.

The issue of climate change as an impact of federal actions under NEPA is thus likely to reappear in the future, irrespective of the resolution of the FOET case.

Administrative processes. NEPA documents are prepared through a public review and appeal process handled by the administrative structure of each federal agency. During this process the public has an opportunity to comment on drafts of the document. Interested parties must appeal disputes about the final document to administrative officials such as administrative

law judges (ALJs), and to higher levels of the agency, before going to court to challenge the document. This process occurs for numerous federal actions in numerous agencies and sub-agencies, every day, all around the country.

The question of climate change has already been raised in several NEPA administrative processes, and will no doubt continue to be raised. It is being raised in energy development projects, CAFE rulemakings, OCS leasing decisions, National Forest Plans, and even in occasional individual timber sales. Both private parties and other government agencies (in their consultative role under NEPA) have raised the issue in comments on draft NEPA documents.

Without guidance, these administrative decisions are likely to produce varying results from far-flung ALJs and project managers, even within one agency. Such discrepancies can cause intra-agency and inter-agency complications, as well as set precedent for treatment of the issue in future administrative actions.

Agency EIS preparations. Each agency is attempting to deal with this question in its continuing preparation of EISs required under NEPA. NHTSA and DOE are now routinely calculating the effects of proposed actions on net greenhouse gas emissions (but are not addressing the effects of those emissions on potential climate change). In its upcoming OCS Program draft EIS, DOI will provide a discussion of the uncertainties in forecasting climate change, the effect of the OCS program on net emissions of two greenhouse gases (CO₂ and methane), and the conclusion that the impact due to the OCS Program is not reasonably foreseeable. USDA is drafting a Federal Register notice to describe the state of scientific knowledge about potential climate change, relying principally on the IPCC Scientific Assessment (1990), in an effort to give generic guidance that sub-agencies can reference each time the question is raised. Other agencies, such as DOD, NASA, NSF, or HUD, could also conceivably become concerned with the potential effects of their programs on climate change.

Options for Decision:

1. In a directive or guidance from an appropriate executive authority, instruct all federal agencies to calculate the effects of their actions on net greenhouse gas emissions, following a consistent methodology.

Such a directive/guidance could be issued as:

- (a) an OMB circular,
- (b) an executive order,
- (c) CEQ guidance,
- (d) OSTP guidance,
- (e) an interagency task group, perhaps under the EPRG or the DPC Working Group on Global Change, or
- (f) some similar structure or combination of the above.

Pros:

- o would provide interagency and intra-agency consistency to evaluations that are now being conducted somewhat haphazardly
- o could help defeat or defuse FOET and related litigation
- o would assist in process of generating "Action Agenda" scorecard of U.S. policy actions affecting net greenhouse gas emissions
- o would not entail consideration of ultimate effect of emissions on potential climate change (the directive could contain an explanation of why such effects are too uncertain -- in both magnitude and direction -- to be "reasonably foreseeable adverse effects" under NEPA)
- o assessments of net greenhouse gas emissions, but not of ultimate effects on climate, would leave open the option to maintain in litigation that NEPA does not legally oblige consideration of potential climate change impacts, and that such assessments, pursuant to directive/guidance, implement a voluntary executive branch policy decision and not a NEPA obligation

Cons:

- o would require agencies to expend resources on estimating emissions (though agencies may do so anyhow under threat of litigation)
- o could call additional public attention to the issue, and to entity issuing directive/guidance

2. Let each agency develop generic guidance and methodologies for addressing climate change impacts of their programs, with case-by-case review by an expert executive body. The expert review body could be, e.g., OSTP, the Committee on Earth & Environmental Sciences (CEES), or another interagency group.

Pros:

- o would provide intra-agency consistency; central review would aid interagency consistency
- o would afford agencies greater flexibility to tailor their approaches
- o could help defeat or defuse FOET and related litigation
- o might not entail consideration of ultimate effect of emissions on potential climate change (such a choice could be left to each agency or to the central reviewing body); leaves open question of any obligation under NEPA
- o might assist in generating "Action Agenda" scorecard, but agencies might choose not to calculate effects

Cons:

- o agency approaches might be inconsistent with each other
- o process of agency development followed by central review could be time-consuming
- o some agencies may not develop generic guidance and methodology, leaving them with no consistent intra-agency position

3. Convene an informal interagency group to fashion a consistent approach to handling climate change in NEPA documents.

Pros:

- o could promote consistency
- o informal group, without supervisory review, may raise less public attention

Cons:

- o a large group may not reach consensus without a central referee
- o might not produce most useful approach to assessing climate issues under NEPA
- o may not go far enough to defeat or defuse litigation

4. Let agencies continue on their own, developing approaches as they see fit without guidance or review.

Pros:

- o avoids central review and attendant public attention
- o reduces agency expenditure of resources

Cons:

- o raises likelihood of further litigation
- o would not achieve interagency consistency
- o omits needed expertise from NOAA, NASA
- o may not produce most useful approach to assessing climate issues under NEPA

Options as to content of any guidance or review:

A. -- pursuant to executive branch policy. Instruct agencies that NEPA requires no analyses of potential climate change, because a causal linkage between potential climate change and specific agency actions is categorically not "reasonably foreseeable." This instruction would make clear that the option to instruct agencies to assess the effects of their actions on net greenhouse gas emissions is a matter of executive branch policy and not a NEPA obligation.

on a regional basis

B. -- pursuant to NEPA. Instruct agencies that NEPA (and the CEQ regulation on "incomplete information" (1502.22)) requires agencies, in appropriate cases, to describe the effects of programs on net greenhouse gas emissions, and/or the state of science on forecasting potential climate change (including the uncertainties in such efforts), but that NEPA does not require agencies to forecast the ultimate potential climate change effects of their actions because such a specific causal linkage is not "reasonably foreseeable."

on a regional basis

THE WHITE HOUSE

WASHINGTON

November 19, 1990

MEMORANDUM FOR ENVIRONMENTAL POLICY REVIEW GROUP MEMBERS

FROM: ROGER B. PORTER *RBP*
SUBJECT: World Bank's Global Environment Facility

At tomorrow's meeting of the Environmental Policy Review Group we will discuss, among other issues, the World Bank's proposed Global Environment Facility. A copy of a short paper on the subject is attached. I would appreciate very much if you could review it before the meeting. This is the only paper that will be distributed before the meeting.

The EPRG meeting is scheduled for Tuesday, November 20 at 1:30 p.m. in the Roosevelt Room. Please confirm your attendance with Richard Porter at 456-6722.

Attachment

October 19, 1990

GLOBAL ENVIRONMENT FACILITY

Issues

Should the United States set conditions for participating in the World Bank's proposed Global Environment Facility? If so, what financial support should the U.S. be prepared to provide for the facility?

Discussion

At a meeting on September 22-23, the World Bank and other donors agreed to proceed with establishment of a new and separate global environment facility within the Bank. Another meeting will be held during late November to consider the details of such a facility.

Because most donor countries have perceived the issue in political terms, the nature of the proposed facility has yet to be defined. According to Bank staff, the facility would fund pilot projects (or components of them) that address global as well as national environmental objectives and that would not otherwise be funded. Examples include mixed-use reforestation, biodiversity protection, fuel substitution, and energy conservation (beyond conventional efficiency standards).

At the September meeting, the United States was isolated in its opposition to the establishment of a new and separate facility that would isolate environmental resources from resources for other development activities. We did, however, acknowledge the case for providing additional concessionality on environmental projects to cover the incremental cost of a project's global benefits.

European countries have declared a willingness to contribute to a core fund which would be programmed by the Bank over a three-year period. Japan, while not prepared to contribute to a core fund, is prepared to make cofinancing available from its bilateral aid program.

According to the U.S. Executive Director to the World Bank, there is a good chance that agreement will be reached at the November meeting to go ahead with a facility, with or without the United States. The funding level for the facility has not been agreed. Some donor countries have endorsed a three-year total of SDR 1 billion. However, it may be possible to achieve a U.S. share in the range of \$50 million over three

for use by World Bank, UNEP, UNDP

years. Should the U.S. decide to support the facility, it is unlikely that any funds would be required before FY 1992.

Options for U.S. Participation in a Facility

1. Do not support creation of a global environment facility.

Advantages

- No additional budgetary cost to USG.
- Consistent with previous U.S. positions.
- Disassociates U.S. from a precedent that some might consider bad.

Disadvantages

- Reduced U.S. influence over the shape of the facility.
- Weakens primacy of the World Bank vis a vis other agencies (e.g., UNEP, FAO) concerning environmental financing. The U.S. has less control over these other agencies.
- The U.S. would be exposed to criticism from other countries and environmental groups.

2. Seek an acceptable global environment facility. The following criteria would need to be met before the U.S. would agree to participate.

- The primary funding for all environment projects must come from the regular World Bank windows. This ensures that environmental activities compete with other development activities in the allocation of Bank resources.
- The facility would be used to enhance the concessionality of environment projects to the degree that incremental costs are incurred by the borrowing country to achieve global benefits.
- The facility would be open only to countries that commit to appropriate environmental policies.

- grants to subsidize the cost of global benefits in a project
- conditions attached to funds.

If option 2 is selected, we will need to work with World Bank staff and other donors prior to the World Bank meeting, scheduled for Wednesday, November 28.

Advantages

- Sets precedent of forcing environment activities to compete for resources with other development activities.
- By using the World Bank as a focal point for environment resource transfer issues, U.S. leverage is strengthened.
- Minimizes criticism of USG from foreign countries and environmental groups.

Disadvantages

- Additional USG funding may be required, forcing difficult offset decisions (see below).
- Careful monitoring would be required to prevent abuse in estimating appropriate subsidy levels.
- May be too late for the U.S. to gain credit for supporting the facility.

Options for U.S. Financial Support for a Facility

1. World Bank net income. The World Bank has FY 1990 net income in the range of \$1 - 1.2 billion. The Bank is now considering the use of an unallocated \$250 million. Some portion of this could be used to fund the global environment facility, at least during a trial period.

Advantages

- Requires no immediate funding from U.S. or other donor countries.
- Offers ready-made burdensharing.

Disadvantages

- A long shot. There is no assurance that the Bank would agree. Third world countries may object, insisting on additional funding from donors.

- Time is short for influencing the Bank. An internal paper on the use of net income is being prepared.

2. Parallel financing. The USG could offer to provide parallel financing on a case-by-case basis through the Agency for International Development. AID expects to obligate more than \$300 million for environment projects in FY 1991. AID would retain program responsibility.

Advantages

"co financing"

- Could be structured to avoid additional budgetary costs.
- Enables AID to exert greater control over the use of funds.

Disadvantages

- May not be attractive to the World Bank, because of lack of control over the use of funds.
- Provides U.S. with less leverage to shape the nature of the facility.

3. Joint financing. The World Bank could be given programming control over funds appropriated to AID.

Advantages

- More attractive to World Bank, because of greater control.
- Compared with parallel financing, provides greater leverage in shaping the global facility.

Disadvantages

- Would represent an additional earmarking of AID funds.
- World Bank procurement rules would be used, implying reduced benefits to U.S. suppliers.

4. Direct contribution. The U.S. could agree to contribute to the facility, either in FY 1992 or as part of the next IDA replenishment (which will begin in 1994). If

If AID retains control, does USG get credit for this - needs to be worked out.

demo proj, 3 yr period, study of how to measure global impact base.

necessary, we could offer to support the facility through parallel financing as a transition arrangement.

Advantages

- Provides greatest leverage for shaping the facility.
- Maximizes political benefits to the U.S.

Disadvantages

- Forces a difficult budget offset decision.
- May not satisfy critics of World Bank's performance on environmental issues.