

14 January 1998

Re: NEPA Technical Inquiry 0046 - Review of EPA Memorandum

Dear NEPA Call-In User:

This letter is in response to your March 14, 1997, request for NEPA Call-In to review a U.S. Environmental Protection Agency (EPA) memorandum and supporting documents directing Federal facilities not to accept protection from state environmental audit privileges and immunity statutes. Specifically, you wanted to know the impact of this EPA directive on GSA's National Environmental Policy Act (NEPA) implementation efforts.

An internal GSA transmittal memo from GSA General Counsel, states "The Environmental Protection Agency (EPA) and Department of Justice (DOJ) have written GSA to urge that GSA take all steps necessary, including issuance of policies and directives, to assure that no component of a Federal agency, including a contract operation at a Federal facility, claims a privilege or immunity under a state environmental audit privilege or immunity statute." The EPA memorandum states the agency opposes "any statutes which contain an evidentiary privilege that would create a legal right to conceal from the public and government officials information regarding potential risks to public health and the environment."

A state environmental audit privilege or immunity statute refers to a situation in which a regulated entity voluntarily discloses that it has violated environmental laws and receives immunity from civil or criminal penalties and/or privilege which could result in concealment of information from public or government interests. The EPA does not support this type of State regulation and has asked GSA to support their position by issuing policy which conforms to EPA's position. Further, the EPA has established policy to encourage self reporting of violations discovered during environmental audits or due diligence and has proposed incentives to foster this activity. Federal Register (FR), Volume 60, No 246, (60 FR 246), December 22, 1995, Page 66712 (enclosed), states the EPA policy is "firmly opposed to (State) statutory audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal conduct, present serious threat or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with Federal law."

NEPA requires a detailed statement on the environmental impact of a proposed action for Federal actions significantly affecting the environment. These detailed statements take the form of Environmental Assessments (EA's) and Environmental Impact Statements (EIS's). EA's and EIS's are not environmental audits although they may contain reference to and include information originally contained in an audit. According to 60 FR 246, an environmental audit is a "systematic, documented, periodic, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

NEPA Call-In reviewed the current GSA Central Office orders and instructional letters pertaining to NEPA and found no documents that discuss GSA policy regarding the disclosure of environmental violations or the discovery of environmental contamination.

NEPA Call-In then reviewed the NEPA implementation regulations contained in 40 Title Code of Federal Regulations (CFR), 1500-1508, and found that NEPA does not contain any specific requirements to report violations of environmental laws or environmental contamination. However, NEPA does contain implied reporting requirements applicable to this situation. EA's and EIS's are public documents as well as decision documents. Title 40 CFR Part 1503, "Commenting" (enclosed), specifically directs the agency to publicize the availability of the draft EIS to obtain comments from appropriate Federal, State, and local agencies. During the NEPA process all significant impacts to the human environment must be identified and assessed. If the preparer determines the contamination to be "significant" in accordance with Title 40 CFR Part 1508.27, "Significantly" (enclosed), the issue must be included in the draft EIS so document reviewers at the Federal, State and local level can evaluate and comment on the potential impact to the site, and compare with other sites being considered. Violations of environmental laws or environmental contamination present at a site should be included and evaluated in the EA's or EIS's discussion of impacts.

In addition, Section 2.7 of the Public Building Service's draft NEPA Desk Guide, which is currently being reviewed by the GSA Environmental Quality Advisory Group (EQAG) members, includes the following: "NEPA is, among other things, a public disclosure law. Therefore, it is important that the public have access to GSA decisionmaking processes and environmental information. Most information gathered during the NEPA process is subject to the Freedom of Information Act. In addition, during specific steps of the GSA NEPA process, the public is specifically invited to share and access information as part of GSA's public involvement process."

In summary, NEPA regulations do not contain specific reporting requirements; however, they are public documents. Therefore, all information in an EA or EIS, including that obtained from an environmental audit, is available for public review. The spirit and intent of the EPA policy on disclosure does not conflict with the disclosure requirements under NEPA or GSA implementation guidance. However, state regulations which offer audit privilege or blanket immunity may shield or limit access to significant site information during the conduct of NEPA process, and therefore conflict with the EPA policy, NEPA disclosure requirements and GSA NEPA implementation guidance.

The materials in this TI have been prepared for use by GSA employees and contractors and are made available at this site only to permit the general public to learn more about NEPA. The information is not intended to constitute legal advice or substitute for obtaining legal advice from an attorney licensed in your state and may or may not reflect the most current legal developments. Readers should also be aware that this response is based upon laws, regulations, and policies in place at the time it was prepared and that this response will not be updated to reflect changes to those laws, regulations and policies.

Sincerely,

(Original Signed)

NEPA Call-In Researcher