

The Oil Disaster and the Act that might have prevented it

By Barbara Joy Cooley, president, Committee of the Islands

When is a safety net not safe? When it has a big hole in it. In the case of the Deepwater Horizon oil drilling permit, the environmental safety net was supposed to be the National Environmental Protection Act (NEPA), and the big hole was made by a troubled government agency called the Minerals Management Service (MMS).

For years, before I joined the board of the Committee of the Islands, my job was to conduct public information and participation programs that were part of the NEPA process as applied by the U.S. Department of Energy. I worked for a government contractor, Battelle Memorial Institute, that was highly respected for its knowledge of NEPA.

Just what is NEPA and how is it supposed to work? According to the U.S. Environmental Protection Agency, NEPA is a federal law dating from 1970 which requires federal agencies to “use all practicable means to create and maintain conditions under which man and nature can exist in productive harmony.” When it is about to take an important action – such as granting a permit or lease for oil drilling – a federal agency first determines which level of analysis it is going to use to determine environmental effects. There are three sequential levels: a categorical exclusion from NEPA, an environmental assessment, and an environmental impact statement.

A categorical exclusion is supposed to apply only to undertakings that have previously been determined to have no significant environmental impact. If the categorical exclusion does not apply, an environmental assessment is done. If the assessment finds that there would be no significant impact, then an environmental impact statement does not have to be prepared; otherwise it does. The processes for the environmental assessment and environmental impact statement also provide opportunities for public input – including input from environmental groups and local government officials.

MMS erred in granting exclusion

The MMS erred on the first level, granting a categorical exclusion from NEPA for the Deepwater Horizon drilling plans. It is difficult to understand how MMS could assume that a deepwater oil drilling operation could produce “no significant environmental impact.” The categorical exclusion was intended to be used for minor projects with minimal impact -- such as outhouses built along hiking trails – *not* deepwater oil drilling. Nevertheless, the MMS grants hundreds of categorical exclusions per year for projects in the Gulf of Mexico.

The governmental entity that keeps an eye on federal agencies, attempting to be sure that the NEPA process is properly followed, is the Council on Environmental Quality (CEQ). On February 18, 2010, a memo from the CEQ director to the heads of all federal departments and agencies gave new guidance about when and how categorical exclusions are to be applied. Why? Because the CEQ was very concerned about abuse and overuse of the categorical exclusion. Here’s the CEQ’s concern as expressed in the memo:

“Though categorical exclusions have been one method used since the 1970s to satisfy Federal

agencies' NEPA obligations, the expansion of the number and range of activities categorically excluded combined with the extensive use of categorical exclusions has underscored the need for guidance about the promulgation and use of CEs [categorical exclusions]. **An inappropriate reliance on categorical exclusions may thwart the purposes of NEPA, compromising the quality and transparency of agency decision making as well as the opportunity for meaningful public participation and review.**"

So why would BP, or any oil company for that matter, want the MMS to use the categorical exclusion level in granting oil drilling permits? Because it saves lots of time and money. Doing an environmental assessment, and especially an environmental impact statement, is expensive, and requires opportunities for public participation and review. The record shows that the MMS granted BP a categorical exclusion from NEPA for Deepwater Horizon on April 6, 2009. And then, despite the February 18, 2010, memo from the CEQ, BP lobbyists were trying to expand the exclusion only a week and a half before the explosion.

A culture of ethical failure

According to several reports and investigations, MMS is ethically challenged. One report issued by Inspector General Earl Devaney in 2008 described a "culture of ethical failure" in the MMS, a culture in which MMS employees accepted gifts from oil company employees. The MMS is rife with conflicts of interests because it collects royalties from the companies it is regulating. About \$13 billion in royalties are collected by the MMS every year.

The MMS was an agency prone to overuse and abuse the categorical exclusion to thwart the intent of NEPA. Fortunately, there are now plans to split the MMS into two agencies – one for collecting royalties, and another for regulating.

If the MMS would have required an environmental assessment or environmental impact statement as part of the Deepwater Horizon permitting, then it is almost certain that BP would not have been free to conduct its drilling in the more profitable but less reliable manner. The public could have reviewed BP's plan for drilling, and could have demanded more protection of the environment.

But the public – including environmental groups and local government officials – had no chance whatsoever to do that in the case of Deepwater Horizon's permit.

Right now, the CEQ is reviewing the categorical exclusion loophole. You can tell them what you think about it by writing to Horst G. Greczmiel, Associate Director, NEPA Oversight, Council on Environmental Quality, 722 Jackson Place NW, Washington, DC 20503.

And you can find a daily update on the Deepwater Horizon disaster by clicking on the link to it on the Committee of the Islands web site at www.coti.org/links.cfm.