CITATION: VAOPGCPREC 8-89
Vet. Aff. Op. Gen. Couns. Prec. 8-89

DATE: 3-8-89

TEXT:

VA Loan Guaranty Program Compliance with NEPA

1. This is in response to your request for a legal opinion regarding the applicability of the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4361 hereinafter referred to as NEPA) to the VA Loan Guaranty Program. It is the legal opinion of this office that NEPA does not require that the VA home loan guaranty program comply with the NEPA procedural requirements regarding 'major Federal actions significantly affecting the quality of the human environment' because the VA actions providing loan guaranty benefits to individual veterans, and not being predicated upon subdivision approvals, do not fall within the above-stated statutory ambit of Federal actions.

2. Under the provisions of title 38, section 1803 of the United States Code, any loan to a veteran eligible for loan guaranty benefits, made in compliance with existing law and regulations, is automatically guaranteed by the United States. To be eligible for such a guaranteed loan, a veteran must meet the basic eligibility requirements as to periods of military service specified at 38 U.S.C. § 1802.

3. In order to protect the United States' interests, a VA guaranteed loan may not exceed the reasonable value of the real property. See 38 U.S.C. § 1810(b)(5). The guaranty is issued to the lender as an inducement to grant a 100 percent loan to the veteran and is in the form of a three-party contract between the lender, the veteran, and the Veterans Administration. There is no contract with a developer, nor is the guaranty intended to assist the developer in any way.

4. Section 102 of NEPA provides, in part, that:

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

(A, B) The text of these subsections has been omitted.

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human

environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

(D-I) The text of these subsections has been omitted.

5. Regulations issued by the Council on Environmental Quality (CEQ) provide the following guidance respecting what actions should be considered as triggering the procedural NEPA requirements for 'major Federal actions significantly affecting the quality of the human environment:'

'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstances where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act to other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter

agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

42 C.F.R. § 1508.18.

'Significantly' as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

42 C.F.R. § 1508.27.

6. It is clear that NEPA does not require an environmental impact statement to be prepared for every Federal action. It requires such a procedure only in instances that involve 'major Federal actions significantly affecting the quality of the human environment.' The distinction between what must be considered a major Federal action and a not-so-major Federal action has never been clearly made.

7. Federal courts have attempted to add definition to this nebulous distinction in a number of cases. In Silva v. Romney, 342 F. Supp. 783 (D. Mass. 1972), the court held that the grant of a mortgage guaranty by the Department of Housing and Urban Development (HUD) in the amount of $4 million, and an interest grant of $156,000 for a housing project to be located on approximately 11 acres of underdeveloped land and to include 138 dwelling units housing between 450 and 475 persons, constituted a major Federal action significantly affecting the environment, thus triggering the NEPA procedural requirements. In Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971), the court disagreed with a determination by HUD that no environmental impact statement was necessary in connection with a $300 million 221 unit, 16 story high rise

apartment building. The court reasoned that because the area around the proposed project had no high-rise buildings, the new building would change the character of the neighborhood, and by housing a significant number of students, it would concentrate population in the area and serve to draw a greater concentration in the future. Thus, the court determined that this Federal action was covered by the NEPA requirements. It should be noted that these actions in these cases involved millions of dollars and many people.

8. In other cases the courts have pointed out that if Federal actions are not substantial in size and do not constitute significant environmental impacts, the NEPA requirements will not be triggered. In Township of Ridley v. Blanchette, 421 F. Supp. 435 (E.D. Pa. 1976), the court in determining that NEPA was not triggered by the construction of a crossover on a railroad line in a residential area, stated:

Those cases which have found the existence of major federal action have ordinarily involved highway extensions, large structures which alter the neighborhood, major dams or river projects, and other projects which can generally be characterized as involving sizeable federal funding (over one-half-million dollars, and usually well over one million), large increments of time for the planning and construction stages, the displacement of many people or animals, or the reshaping of large areas of topography.

In sum, 'major' is a term of reasonable connotation, and serves to differentiate between projects which do not involve sufficiently serious effects to justify the costs of completing an impact statement, and those projects with potential effects which appear to offset the costs in time and resources of preparing a statement.

Id., at 446. In Hanly v. Kleindienst, 471 F. 2d 823 (2d Cir. 1972), the court noted that no impact statement should be required where the impact would be minor or unimportant, or where there was no sensible reason for preparing one. Id. at 831. In Echo Park v. Romney, 3 ERC 1255 (C.D. Cal. 1971), the court held that a HUD decision not to prepare an environmental impact statement in connection with a 66-unit project for which the corporate developer had sought insurance assistance was warranted.

9. In Jones v. Lynn, 477 F.2d 885 (1973), the court, in determining that an environmental impact statement was required with respect to an entire multi-phased, multi-million dollar urban renewal project, noted that environmental impact statements were not necessarily required on the separate parcels of the project. The court stated:

In such a case it would not seem sensible to adopt the piecemeal approach which HUD seeks to adopt, whereby it will prepare a modified impact statement separately for each proposed construction as a mortgage insurance application is

filed, an approach akin to equating an appraisal of each tree to one of the forest. If HUD is expected to be part of the financing of most of the unplanned and/or undeveloped parcels, it seems a perversion of NEPA for it to approach each parcel, wholly depending in its timing of environmental review on the filing of applications for assistance and considering anew the scene as it is changed by each subsequent approval. Not only would this be wasteful of bureaucratic resources, but the plurality of possible appeals would suggest a wasteful prolongation of time spent in litigation.

Id., at 891.

10. Based upon our reading of the case law concerning what the courts have determined to be 'major Federal actions significantly affecting the quality of the human environment,' it is our opinion that since the VA loan guaranty program separately examines each application by a veteran for home loan insurance, and does not approve substantial blocks of property such as subdivisions (unlike HUD procedures which allow approval of loan insurance for developers on multiple unit projects), these separate VA actions approving home loan insurance do not fall within the ambit of Federal actions contemplated by NEPA requiring environmental impact statements.

11. It should be noted that at the time the VA promulgated its present home loan guaranty procedures, which eliminated subdivision processing and the concomitant environmental reviews, the VA had previously notified CEQ of this proposed change and requested comments. No adverse comments were received from CEQ.

HELD:

The procedural requirements of the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4361, popularly referred to as NEPA) which mandate that Federal agencies prepare environmental impact statements for all 'major Federal actions significantly affecting the quality of the human environment,' do not apply to the VA loan guaranty program. This is because the actions of the VA loan guaranty program in examining each separate application for loan insurance does not fall within the ambit of Federal actions contemplated by NEPA.

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