Implications of the 2020 Revised CEQ NEPA Regulations for NEPA/NHPA Sec. 106 Integration

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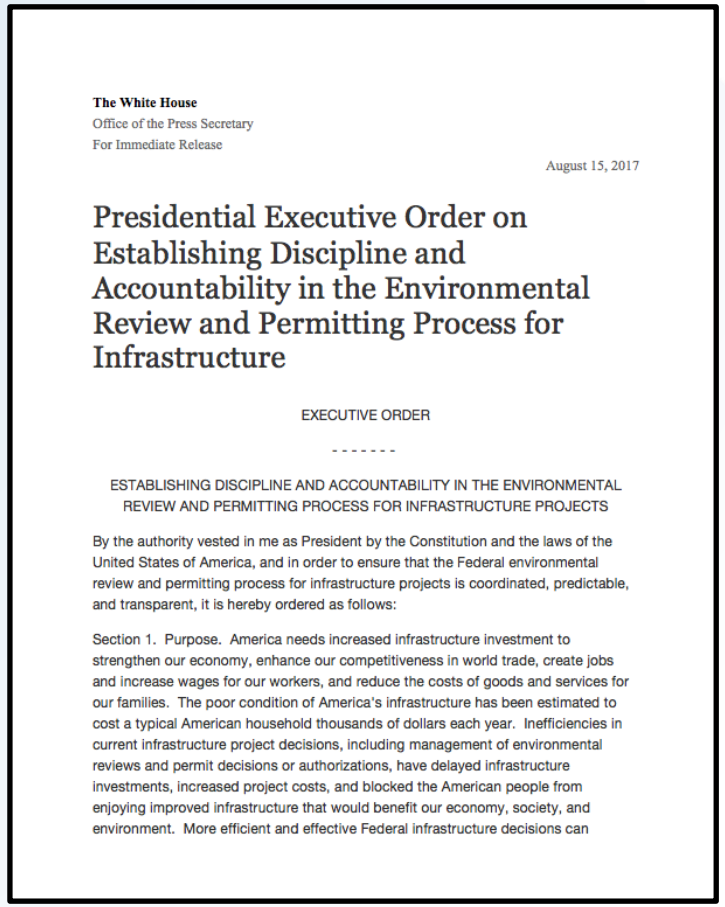
Presentation for the NAEP/ACRA Webinar

November 19, 2020

What's "Wrong" with NEPA?

EO 13807 - Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure (August 15, 2017)



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For Immediate Release

August 15, 2017

Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure

EXECUTIVE ORDER

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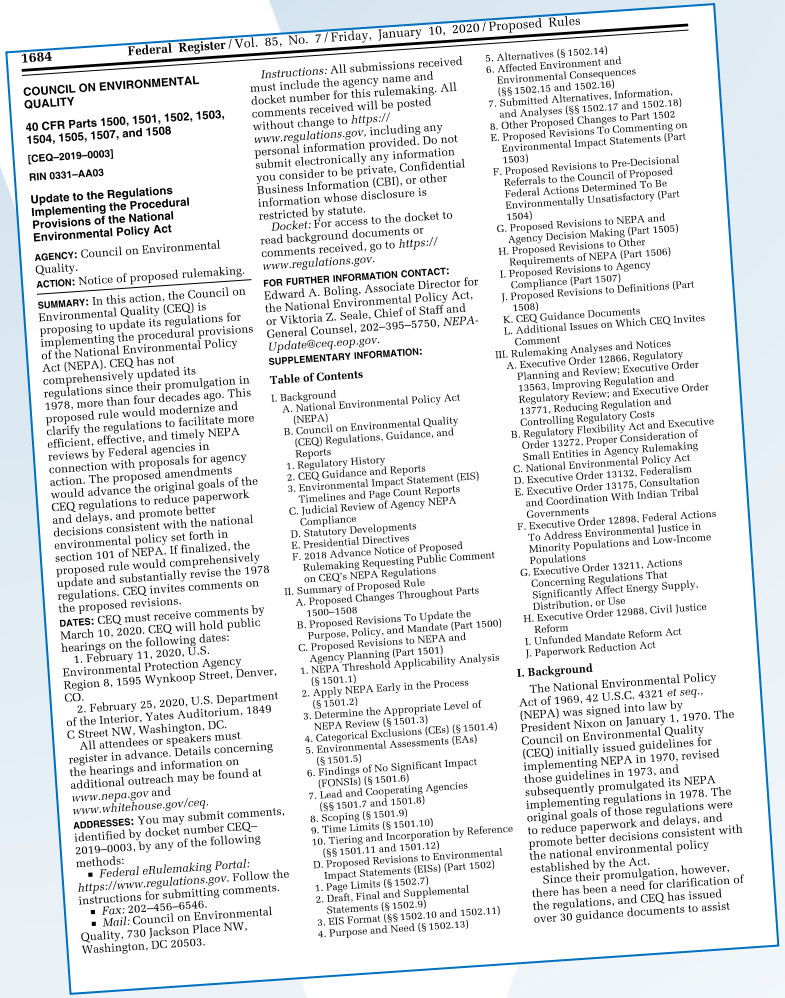
ESTABLISHING DISCIPLINE AND ACCOUNTABILITY IN THE ENVIRONMENTAL REVIEW AND PERMITTING PROCESS FOR INFRASTRUCTURE PROJECTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent, it is hereby ordered as follows:

Section 1. Purpose. America needs increased infrastructure investment to strengthen our economy, enhance our competitiveness in world trade, create jobs and increase wages for our workers, and reduce the costs of goods and services for our families. The poor condition of America's infrastructure has been estimated to cost a typical American household thousands of dollars each year. Inefficiencies in current infrastructure project decisions, including management of environmental reviews and permit decisions or authorizations, have delayed infrastructure investments, increased project costs, and blocked the American people from enjoying improved infrastructure that would benefit our economy, society, and environment. More efficient and effective Federal infrastructure decisions can

COUNCIL ON ENVIRONMENTAL QUALITY
40 CFR Parts 1500-1508
Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act



1684 Federal Register / Vol. 85, No. 7 / Friday, January 10, 2020 / Proposed Rules

COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1507, and 1508

[CEQ–2019–0003]

RIN 0331–AA03

Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

AGENCY: Council on Environmental Quality.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this action, the Council on Environmental Quality (CEQ) is proposing to update its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA). CEQ has not comprehensively updated its regulations since their promulgation in 1978, more than four decades ago. This proposed rule would modernize and clarify the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies in connection with proposals for agency action. The proposed amendments would advance the original goals of the CEQ regulations to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy set forth in section 101 of NEPA. If finalized, the proposed rule would comprehensively update and substantially revise the 1978 regulations. CEQ invites comments on the proposed revisions.

DATES: CEQ must receive comments by March 10, 2020. CEQ will hold public hearings on the following dates:

1. February 11, 2020, U.S. Environmental Protection Agency Region 8, 1595 Wynkoop Street, Denver, CO.

2. February 25, 2020, U.S. Department of the Interior, Yates Auditorium, 1849 C Street NW, Washington, DC.

All attendees or speakers must register in advance. Details concerning the hearings and information on additional outreach may be found at *www.nepa.gov* and *www.whitehouse.gov/ceq*.

ADDRESSES: You may submit comments, identified by docket number CEQ–2019–0003, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–456–6546.
- *Mail:* Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *https://www.regulations.gov*, including any personal information provided. Do not submit electronically any information you consider to be private, Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Edward A. Boling, Associate Director for the National Environmental Policy Act, or Viktoria Z. Seale, Chief of Staff and General Counsel, 202–395–5750, *NEPA-Update@ceq.eop.gov*.

SUPPLEMENTARY INFORMATION:

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I. Background

The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, (NEPA) was signed into law by President Nixon on January 1, 1970. The Council on Environmental Quality (CEQ) initially issued guidelines for implementing NEPA in 1970, revised those guidelines in 1973, and subsequently promulgated its NEPA implementing regulations in 1978. The original goals of those regulations were to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy established by the Act.

Since their promulgation, however, there has been a need for clarification of the regulations, and CEQ has issued over 30 guidance documents to assist

Proposed Rule,
January 10, 2020

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Final Rule:
July 16, 2020

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Effective Date,
September 14, 2020

NEPA Legal Authority

General:

- The Statute (42 USC 4321)
- CEQ NEPA regulations (40 CFR 1500)
- CEQ NEPA guidance memoranda
- EPA NEPA guidance
- NEPA Court decisions

Agency-specific:

- Agency NEPA regulations
- Agency guidance, handbooks, and manuals

Changes to the Definition of "Major Federal Action" 40 CFR 1508.1(q)

(q) Major Federal action or action means an~~includes~~ activity or decisions ~~with effects that may be major and which are potentially~~ subject to Federal control and responsibility subject to the following:. ~~Major reinforces but does not have a meaning independent of significantly (§ 1508.27).~~

(1) Major Federal action does not include the following activities or decisions:

(i) Extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States;

(ii) Activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority;

(iii) Activities or decisions that do not result in final agency action~~include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals~~ under the Administrative Procedure Act or other statute that also includes a finality requirement;~~applicable law as agency action.~~

(iv) ~~Actions do not include bringing~~ jJudicial or administrative civil or criminal enforcement actions;~~.~~

(v)~~Actions do not include f~~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;

(vi) Non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project; and

(vii) Loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of such assistance (for example, action does not include farm ownership and operating loan guarantees by the Farm Service Agency pursuant to 7 U.S.C. 1925 and 1941 through 1949 and business loan guarantees by the Small Business Administration pursuant to 15 U.S.C. 636(a), 636(m), and 695 through 697g).

Categorical Exclusions Changes

1506.3(d) Adoption of Categorical Exclusions

(d) *Categorical exclusions*. An agency may adopt another agency's determination that a categorical exclusion applies to a proposed action if the action covered by the original categorical exclusion determination and the adopting agency's proposed action are substantially the same. The agency shall document the adoption.

1507.3(f)(5) Agency Procedures for Adopting Categorical Exclusions

(5) Establish a process that allows the agency to use a categorical exclusion listed in another agency's NEPA procedures after consulting with that agency to ensure the use of the categorical exclusion is appropriate. The process should ensure documentation of the consultation and identify to the public those categorical exclusions the agency may use for its proposed actions. Then, the agency may apply the categorical exclusion to its proposed actions.

40 CFR 1508.1(g) Effects

Effects or impacts are changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives.

40 CFR 1508.1(g)(2) Effects

(2) A “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

40 CFR 1502.23 – Methodology and Scientific Accuracy

Agencies shall ~~i~~ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents~~impact statements~~. Agencies shall make use of reliable existing data and resources. Agencies may make use of any reliable data sources, such as remotely gathered information or statistical models. They shall identify any methodologies used and shall make explicit reference ~~by footnote~~ to the scientific and other sources relied upon for conclusions in the statement. A~~n a~~gencies~~y~~ may place discussion of methodology in an appendix. Agencies are not required to undertake new scientific and technical research to inform their analyses. Nothing in this section is intended to prohibit agencies from compliance with the requirements of other statutes pertaining to scientific and technical research.

40 CFR 1501.3(b)(2) – Significance

- Significance criteria (10 criteria) in former 1508.27 replaced with:
  - (2) In considering the degree of the effects, agencies should consider the following, as appropriate to the specific action
    - (i) Short and Long term (context)
    - (ii) Effects may be both beneficial and adverse. (#1)
    - (iii) Effects on public health and safety. (#2)
    - (iv) Effects that would violate Federal, State, Tribal, or local law protecting the environment. (#10)

40 CFR 1501.3(b)(2) – Significance

Following criteria removed from the list of 10 intensity factors in 1508.27 of the 1978 Regulations:

(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 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

40 CFR 1501.3(b)(2) – Significance

Following criteria removed from the list of 10 intensity factors in 1508.27 of the 1978 Regulations:

(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

Key Alternatives Section 1502.14 – OUT WITH THE OLD…

- Alternatives are ”the heart of” the EIS
- Must “rigorously explore and objectively evaluate all reasonable alternatives”
- Should compare alternatives and impacts “thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public”
- Must “devote substantial treatment to each alternative considered in detail”
- Must include reasonable alternatives not within the jurisdiction of the lead agency

40 CFR 1502.14 – Alternatives

- CEQ has removed the previous language from the 1978 regulations that alternatives are "the heart of" the impact assessment process.
- In § 1502.14(b), deleted the language that stated agencies were required to "devote substantial treatment" to each alternative evaluated in detail; the new language reads: "Discuss each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits."

40 CFR 1502.14 – Alternatives

- Section 1502.14(c) in the 1978 regulations has been removed, which reads: "Include alternatives not within the jurisdiction of the lead agency."
- New language is added in the re-numbered § 1502.14(f) that requires agencies to: "Limit their consideration to a reasonable number of alternatives."

How Many Alternatives are Required?

- CEQ's NPRM – January 10, 2020
  - 85 FR 1702. What the presumptive number of alternatives should be (e.g., a maximum of three alternatives including the no action alternative).
- CEQ's Final Rule – July 16, 2020
  - 85 FR 43331. CEQ did not receive sufficient information to establish a minimum, but adds a new paragraph (f) to the final rule to state that agencies shall limit their consideration to a reasonable number of alternatives. The revisions to the regulations to promote earlier solicitation of information and identification of alternatives, and timely submission of comments, will assist agencies in establishing how many alternatives are reasonable to consider and assessing whether any particular submitted alternative is reasonable to consider.

40 CFR 1506.5(b) EIS Preparation

An agency also may direct an applicant or authorize a contractor to prepare an environmental document [EISs and EAs] under the supervision of the agency.

(4) Contractors or applicants preparing environmental assessments or environmental impact statements shall submit a disclosure statement to the lead agency that specifies any financial or other interest in the outcome of the action. Such statement need not include privileged or confidential trade secrets or other confidential business information

40 CFR 1506.1(b) Limitations on actions

(b) If any agency is considering an application from a non-Federal entity~~,~~ and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to ~~i~~ensure that the objectives and procedures of NEPA are achieved. This section does not preclude development by applicants of plans or designs or performance of other activities~~work~~ necessary to support an application for Federal, State, Tribal, or local permits or assistance. An agency considering a proposed action for Federal funding may authorize such activities, including, but not limited to, acquisition of interests in land (e.g., fee simple, rights-of-way, and conservation easements),

Wild Virginia v. Council on Envtl. Quality, No. 3:20-cv-00045 (W.D. Va. Filed July 29, 2020)

This allows applicants to predetermine many aspects of the project, going directly against legal precedent and previous CEQ guidance. See Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989) (acknowledging the harm to the environment caused by "the deeply rooted human psychological instinct not to tear down projects once they are built[, and the] difficulty of stopping a bureaucratic steam roller, once started"); Council on Envtl. Quality, 1997 Effectiveness Study 11–12 ("[T]he 'NEPA process' is often triggered too late to be fully effective. . . . It is critical for top policy leaders and managers to integrate NEPA early into their policymaking and programming if their agencies are to get the full benefit of NEPA.").

PUBLIC COMMENT ON THE RULEMAKING

COMMENT: *Commenters stated concern that the number of Federal projects subjected to NEPA review will decrease if the proposed threshold analysis model is accepted, as Tribes coordinate their NEPA review and section 106 of the NHPA responsibilities concurrently. The threshold analysis standard will therefore result in fewer section 106 undertakings being completed as a by-product of this new threshold analysis. Commenters also stated the proposed amendments would allow Federal agencies to decide on a project-by-project basis whether NEPA compliance is required. Commenters stated if Federal funding or permitting is involved in a proposed action, even on a limited basis, some form of environmental review is needed in order to ensure that Federal resources are not used in connection with unnecessary and uninformed destruction of Tribal or cultural resources. An increase in the loss of nonrenewable cultural and historical sites and information is unacceptable especially when it will be primarily based on arbitrary decisions such as the amount of Federal involvement or money.*

PUBLIC COMMENT ON THE RULEMAKING

COMMENT: *Comment: Commenters stated that NEPA regulations must explicitly mandate in § 1502.15(a)(8) that use of sacred sites and ceremonial lands receive due consideration even when the land does not qualify as a historic property under the NHPA or other Federal protections.*

CEQ RESPONSE: *Cultural resources under § 1502.16(a)(8) includes Tribal cultural resources and cultural effects are referenced in the definition of "effects" in § 1508.1(g)(1). As stated in the proposed rule, the addition of "Tribal" throughout the rule facilitates full consideration of Tribal cultural resources and potential effects of Federal agency actions on Tribal lands, cultural resources, and areas of religious or ceremonial significance.*

PUBLIC COMMENT ON THE RULEMAKING

COMMENT*: Several commenters expressed concerns that CEQ failed to consider how the proposed regulations will affect Indian Tribes and the requirements for agencies to comply with section 106 of the National Historic Preservation Act (NHPA). One commenter stated that the proposed changes introduce confusion and delay into the integration of NEPA and section 106, and would provide less protection for Tribal environments and historic properties. Another commenter stated that the adopted regulations should reaffirm the joint CEQ-Advisory Council on Historic Preservation (ACHP) guidance on integrating the NEPA and section 106 compliance processes, which clarifies Federal agency and project proponent obligations to facilitate Tribal participation at the earliest possible stage and on a continuing basis.*

PUBLIC COMMENT ON THE RULEMAKING

Commenters stated that the proposed rule fails to adequately require agencies to consider a project's impacts on Tribal cultural resources because they are not specifically mentioned. Commenters stated that the existing CEQ rules refer to "historic and cultural" resources but never define either term and generally rely on the NHPA definition of "historic resource" or "archaeological site," neither of which captures the essence of what constitutes a Tribal cultural resource and its religious, traditional, or cultural values.

PUBLIC COMMENT ON THE RULEMAKING

CEQ RESPONSE: *In the final rule, the interpretation of cultural resources is with the same as the 1978 regulations and already includes Tribal cultural resources under § 1502.16(a)(8) and the definition of "effects" in § 1508.1(g)(1). The addition of "Tribal" throughout the final rule supports this consideration of Tribal cultural resources. The final rule fully supports integration and coordination of NEPA reviews with required reviews under other statutes where NEPA applies. Nothing in the final rule changes the obligation to comply with other statutes.*

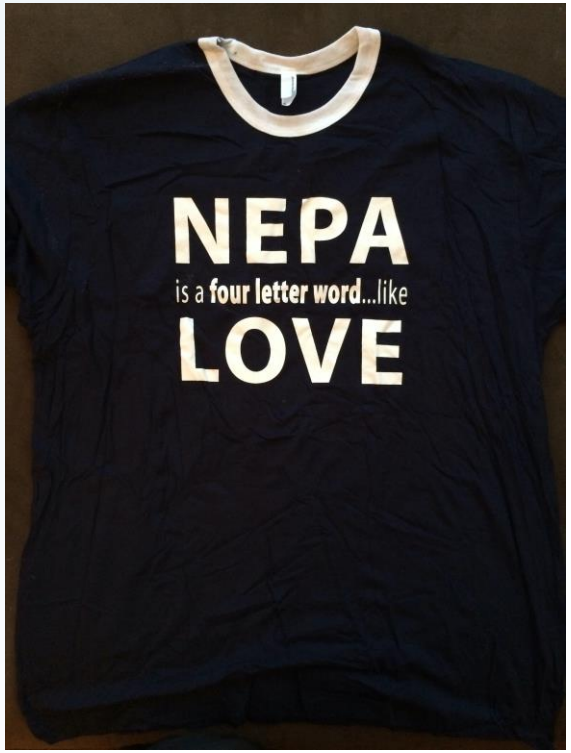
PUBLIC COMMENT ON THE RULEMAKING

COMMENT: *Some commenters observed that there is a lack of training and agency staff with expertise in anthropology, sociology, and archaeology sufficient to support necessary Tribal consultation and consideration of Tribal information, which has implications for environmental justice.*

CEQ RESPONSE: *CEQ acknowledges the comment but notes that it and the various action agencies have the ability to consult with such experts housed elsewhere inside the Federal Government.*

What's Next?

- Agency-specific regulations
- Pending legal challenges
- Incoming Biden Administration
  - Congressional Review Act
  - New Rulemaking
  - Executive Order(s)
  - ???



Thank you!

Michael D. Smith

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