

COUNCIL ON ENVIRONMENTAL QUALITY

FORTY MOST ASKED QUESTIONS CONCERNING CEQ'S NATIONAL ENVIRONMENTAL POLICY ACT REGULATIONS (40 CFR 1500 - 1508)

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QUESTIONS AND ANSWERS ABOUT THE NEPA REGULATIONS

1a. Q. What is meant by "range of alternatives" as referred to in Sec. 1505.1(e)?

A. The phrase "range of alternatives" refers to the alternatives discussed in environmental documents. It includes all reasonable alternatives which must be rigorously explored and objectively evaluated as well as those other alternatives which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. Section 1502.14. A decisionmaker must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents. Moreover, a decisionmaker must, in fact, consider all the alternatives discussed in an EIS. Section 1505.1(e).

1b. Q. How many alternatives have to be discussed when there is an infinite number of possible alternatives?

A. For some proposals there may exist a very large or even an infinite number of possible reasonable alternatives. For example, a proposal to designate wilderness areas within a National Forest could be said to involve an infinite number of alternatives from 0 to 100 percent of the forest. When there are potentially a very large number of alternatives, only a reasonable number of examples covering the full spectrum of alternatives must be analyzed and compared in the EIS. An appropriate series of alternatives might include dedicating 1, 10, 30, 50, 70, 90 or 100 percent of the Forest to wilderness. What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.

2a. Q. If an EIS is prepared in connection with an application for a permit or other Federal approval, must the EIS rigorously analyze and discuss alternatives that are outside the capability of the applicant or can it be limited to reasonable alternatives that can be carried out by the applicant?

A. Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.

2b. Q. Must the EIS analyze alternatives outside the jurisdiction or capability of the agency or beyond what Congress has authorized?

A. An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).

3. Q. What does the "no action" alternative include? If an agency is under a court order or legislative command to act, must the EIS address the "no action" alternative?

A. Section 1502.14(d) requires the alternatives analysis in the EIS to "include the alternative of no action." There are two distinct interpretations of "no action" that must be considered, depending on the nature of the proposal being evaluated. The first situation might involve an action such as updating a land management plan where ongoing programs initiated under existing legislation and regulations will continue, even as new plans are developed. In these cases "no action" is "no change" from current management direction or level of management intensity. To construct an alternative that is based on no management at all would be a useless academic exercise. Therefore, the "no action" alternative may be thought of in terms of continuing with the present course of action until the action is changed. Consequently, projected impacts of alternative management schemes would be compared in the EIS to those impacts projected for the existing plan. In this

case, alternatives would include management plans of both greater and lesser intensity, especially greater and lesser levels of resource development.

The second interpretation of "no action" is illustrated in instances involving federal decisions on proposals for projects. "No action" in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative to go forward.

Where a choice of "no action" by the agency would result in predictable actions by others, this consequence of the "no action" alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

In light of the above, it is difficult to think of a situation where it would not be appropriate to address a "no action" alternative. Accordingly, the regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act. This analysis provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives. It is also an example of a reasonable alternative outside the jurisdiction of the agency which must be analyzed. Section 1502.14(c). See Question 2 above. Inclusion of such an analysis in the EIS is necessary to inform the Congress, the public, and the President as intended by NEPA. Section 1500.1(a).

4a. Q. What is the "agency's preferred alternative"?

A. The "agency's preferred alternative" is the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The concept of the "agency's preferred alternative" is different from the "environmentally preferable alternative," although in some cases one alternative may be both. See Question 6 below. It is identified so that agencies and the public can understand the lead agency's orientation.

4b. Q. Does the "preferred alternative" have to be identified in the Draft EIS and the Final EIS or just in the Final EIS?

A. Section 1502.14(e) requires the section of the EIS on alternatives to "identify the agency's preferred alternative, if one or more exists, in the draft statement, and identify such alternative in the final statement . . ." This means that if the agency has a preferred alternative at the Draft EIS stage, that alternative must be labeled or identified as such in the Draft EIS. If the responsible federal official in fact has no preferred alternative at the Draft EIS stage, a preferred alternative need not be identified there. By the time the Final EIS is filed, Section 1502.14(e) presumes the existence of a preferred alternative and requires its identification in the Final EIS "unless another law prohibits the expression of such a preference."

4c. Q. Who recommends or determines the "preferred alternative"?

A. The lead agency's official with line responsibility for preparing the EIS and assuring its adequacy is responsible for identifying the agency's preferred alternative(s). The NEPA regulations do not dictate which official in an agency shall be responsible for preparation of EISs, but agencies can identify this official in their implementing procedures pursuant to Section 1507.3.

Even though the agency's preferred alternative is identified by the EIS preparer in the EIS, the statement must be objectively prepared and not slanted to support the choice of the agency's preferred alternative over the other reasonable and feasible alternatives.

5a. Q. Is the "proposed action" the same thing as the "preferred alternative"?

A. The "proposed action" may be, but is not necessarily, the agency's "preferred alternative." The proposed action may be a proposal in its initial form before undergoing analysis in the EIS process. If the proposed action is internally generated, such as preparing a land management plan, the proposed action might end up as the agency's preferred alternative. On the other hand, the proposed action may be granting an application

to a non-federal entity for a permit. The agency may or may not have a "preferred alternative" at the Draft EIS stage (see Question 4 above). In that case the agency may decide at the Final EIS stage, on the basis of the Draft EIS and the public and agency comments, that an alternative other than the proposed action is the agency's "preferred alternative."

Sb. Q. Is the analysis of the "proposed action" in an EIS to be treated differently from the analysis of alternatives?

A. The degree of analysis devoted to each alternative in the EIS is to be substantially similar to that devoted to the "proposed action." Section 1502.14 is titled "Alternatives including the proposed action" to reflect such comparable treatment. Section 1502.14(b) specifically requires "substantial treatment" in the EIS of each alternative including the proposed action. This regulation does not dictate an amount of information to be provided but rather prescribes a level of treatment which may in turn require varying amounts of information to enable a reviewer to evaluate and compare alternatives.

6a. Q. What is the meaning of the term "environmentally preferable alternative" as used in the regulations with reference to Records of Decision? How is the term "environment" used in the phrase?

A. Section 1505.2(b) requires that in cases where an EIS has been prepared, the Record of Decision (ROD) must identify all alternatives that were considered, ". . . specifying the alternative or alternatives which were considered to be environmentally preferable." The environmentally preferable alternative is the alternative that will promote the national environmental policy as expressed in NEPA's Section 101. Ordinarily, this means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources.

The Council recognizes that the identification of the environmentally preferable alternative may involve difficult judgments, particularly when one environmental value must be balanced against another. The public and other agencies reviewing a Draft EIS can assist the lead agency to develop and determine the environmentally preferable alternatives by providing their views in comments on the Draft EIS. Through the identification of the environmentally preferable alternative, the decisionmaker is clearly faced with a choice between that alternative and others, and must consider whether the decision accords with the Congressionally declared policies of the Act.

6b. Q. Who recommends or determines what is environmentally preferable?

A. The agency EIS staff is encouraged to make recommendations of the environmentally preferable alternative(s) during EIS preparation. In any event, the lead agency official responsible for the EIS is encouraged to identify the environmentally preferable alternative(s) in the EIS. In all cases, commentors from other agencies and the public are also encouraged to address this question. The agency must identify the environmentally preferable alternative in the ROD.

7. Q. What is the difference between the sections in the EIS on "alternatives" and "environmental consequences"? How do you avoid duplicating the discussion of alternatives in preparing these two sections?

A. The "alternatives" section is the heart of the EIS. This section rigorously explores and objectively evaluates all reasonable alternatives including the proposed action. Section 1502.14. It should include relevant comparisons on environmental and other grounds. The "environmental consequences" section of the EIS discusses the specific environmental impacts of each of the alternatives including the proposed action. Section 1502.16. In order to avoid duplication between these two sections, most of the "alternatives" section should be devoted to describing and comparing the alternatives. Discussion of the environmental impacts of these alternatives should be limited to a concise descriptive summary of such impact in comparative form, including charts or tables, thus sharply defining the issues and providing a clear basis for choice among options. Section 1502.14. The "environmental consequences" section should be devoted largely to a

scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives. It forms the analytic basis for the concise comparison in the "alternatives" section.

8. Q. Section 1501.2(d) of the NEPA regulations requires agencies to provide for the early application of NEPA to cases where actions are planned by private applicants or non-Federal entities and are, at some stage, subject to federal approval of permits, loans, loan guarantees, insurance, or other actions. What must and can agencies do to apply NEPA early in these cases?

A. Section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to ensure that environmental factors are considered at an early stage in the planning process and to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed.

Through early consultation, business applicants and approving agencies may gain better appreciation of each other's needs and foster a decisionmaking process which avoids later unexpected confrontations.

Federal agencies are required by Section 1507.3(b) to develop procedures to carry out Section 1501.2(d). The procedures should include an "outreach program", such as a means for prospective applicants to conduct pre-application consultations with the lead and cooperating agencies. Applicants need to find out, in advance of project planning, what environmental studies or other information will be required, and what mitigation requirements are likely in connection with the later federal NEPA process. Agencies should designate staff to advise potential applicants of the agency's NEPA information requirements and should publicize their pre-application procedures and information requirements in newsletters and other media used by potential applicants.

Complementing Section 1501.2(d), Section 1506.5(a) requires agencies to assist applicants by outlining the types of information required in those cases where the agency requires the applicant to submit environmental data for possible use by the agency in preparing an EIS.

Section 1506.5(b) allows agencies to authorize preparation of environmental assessments by applicants. Thus, the procedures should also include a means for anticipating and utilizing applicants' environmental studies or "early corporate environmental assessments" to fulfill some of the agency's NEPA obligations. However, in such cases the agency must still evaluate independently the environmental issues and take responsibility for the environmental assessment.

These provisions are intended to encourage and enable private and other non-federal entities to build environmental considerations into their own planning processes in a way that facilitates the application of NEPA and avoids delay.

9. Q. To what extent must an agency inquire into whether an applicant for a federal permit, funding, or other approval of a proposal will also need approval from another agency for the same proposal or some other related aspect of it?

A. Agencies must integrate the NEPA process into other planning at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Specifically, the agency must "provide for cases where actions are planned by . . . applicants," so that designated staff are available to advise potential applicants of studies or other information that will foreseeably be required for the later federal action; the agency shall consult with the applicant if the agency foresees its own involvement in the proposal; and it shall insure that the NEPA process commences at the earliest possible time. Section 1501.2(d). (See Question 8).

The regulations emphasize agency cooperation early in the NEPA process. Section 1501.6. Section 1501.7 on "scoping" also provides that all affected Federal agencies are to be invited to participate in scoping the environmental issues and to identify the various environmental review and consultation requirements that may apply to the proposed action. Further, Section 1502.25(b) requires that the Draft EIS list all the federal permits, licenses and other entitlements that are needed to implement the proposal.

These provisions create an affirmative obligation on federal agencies to inquire early, and to the maximum degree possible, to ascertain whether an applicant is or will be seeking other federal assistance or approval, or whether the applicant is waiting until a proposal has been substantially developed before requesting federal aid or approval.

Thus, a federal agency receiving a request for approval or assistance should determine whether the applicant has filed separate requests for federal approval or assistance with other federal agencies. Other federal agencies that are likely to become involved should then be contacted, and the NEPA process coordinated to insure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions. The agency should inform the applicant that action on its application may be delayed unless it submits all other federal applications (where feasible to do so) so that all the relevant agencies can work together on the scoping process and preparation of the EIS.

10a. Q. What actions by agencies and/or applicants are allowed during EIS preparation and during the 30-day review period after publication of a final EIS?

A. No federal decision on the proposed action shall be made or recorded until at least 30 days after the publication by EPA of notice that the particular EIS has been filed with EPA. Sections 1505.2 and 1506.10. Section 1505.2 requires this decision to be stated in a public Record of Decision.

Until the agency issues its Record of Decision, no action by an agency or an applicant shall be taken which would have an adverse environmental impact or limit the choice of reasonable alternatives. Section 1506.1(a). But this does not preclude preliminary planning or design work which is needed to support an application for permits or assistance. Section 1506.1(d).

When the impact statement in question is a program EIS, no major action concerning the program may be taken which may significantly affect the quality of the human environment, unless the particular action is justified independently of the program, is accompanied by its own adequate environmental impact statement and will not prejudice the ultimate decision on the program. Section 1506.1(c).

10b. Q. Do these limitations on action (described in Question 10a) apply to state and local agencies that have statutorily delegated responsibility for preparation of environmental documents required by NEPA, for example, under the HUD Block Grant program?

A. Yes, these limitations do apply without any variation from their application to federal agencies.

11. Q. What actions must a lead agency take during the NEPA process when it becomes aware that a non-federal applicant is about to take an action within an agency's jurisdiction that would either have an adverse environmental impact or limit the choice of reasonable alternatives (e.g., prematurely commit money or other resources towards the completion of the proposal)?

A. The federal agency must notify the applicant that the agency will take strong affirmative steps to insure that the objectives and procedures of NEPA are fulfilled. Section 1506.1(b). These steps could include seeking injunctive measures under NEPA, or the use of sanctions available under either the agency's permitting authority or statutes setting forth the agency's statutory mission. For example, the agency might advise an applicant that if it takes such action the agency will not process its application.

12a. Q. What actions are subject to the Council's new regulations and what actions are grandfathered under the old guidelines?

A. The effective date of the Council's regulations was July 30, 1979 (except for certain HUD programs under the Housing and Community Development Act, 42 U.S.C. 5304(h) and certain state highway programs that qualify under Section 102(2)(D) of NEPA for which the regulations became effective on November 30, 1979). All the provisions of the regulations are binding as of that date, including those covering decisionmaking, public participation, referrals, limitations on actions, EIS supplements, etc. For example, a Record of Decision would be prepared even for decisions where the Draft EIS was filed before July 30, 1979.

But in determining whether or not the new regulations apply to the preparation of a particular environmental document, the relevant factor is the date of filing of the draft of that document. Thus, the new regulations do not require the redrafting of an EIS or supplement if the Draft EIS or supplement was filed before July 30, 1979. However, a supplement prepared after the effective date of the regulations for an EIS issued in final before the effective date of the regulations would be controlled by the regulations.

Even though agencies are not required to apply the regulations to an EIS or other document for which the draft was filed prior to July 30, 1979, the regulations encourage agencies to follow the regulations "to the fullest extent practicable," i.e., if it is feasible to do so in preparing the final document. Section 1506.12(a).

12b. Q. Are projects authorized by Congress before the effective date of the Council's regulations grandfathered?

A. No. The date of Congressional authorization for a project is not determinative of whether the Council's regulations or former guidelines apply to the particular proposal. No incomplete projects or proposals of any kind are grandfathered in whole or in part. Only certain environmental documents, for which the draft was issued before the effective date of the regulations, are grandfathered and subject to the Councils' former Guidelines.

12c. Q. Can a violation of the regulations give rise to a cause of action?

A. While a trivial violation of the regulations would not give rise to an independent cause of action, such a cause of action would arise from a substantial violation of the regulations. Section 1500.3.

13. Q. Can the scoping process be used in connection with the preparation of an environmental assessment, i.e., before both the decision to proceed with an EIS and publication of a notice of intent?

A. Yes. Scoping can be a useful tool for discovering alternatives to a proposal, or significant impacts that may have been overlooked. In cases where an environmental assessment is being prepared to help an agency decide whether to prepare an EIS, useful information might result from early participation by other agencies and the public in the scoping process.

The regulations state that the scoping process is to be preceded by a Notice of Intent (NOI) to prepare an EIS. But that is only the minimum requirement. Scoping may be initiated earlier, as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively.

However, scoping that is done before the assessment, and in aid of its preparation, cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.

14a. Q. What are the respective rights and responsibilities of lead and cooperating agencies? What letters and memoranda must be prepared?

A. After a lead agency has been designated (Section 1501.5), that agency has the responsibility to solicit cooperation from other federal agencies that have jurisdiction by law or special expertise on any environmental issue that should be addressed in the EIS being prepared. Where appropriate, the lead agency should seek the cooperation of state and local agencies of similar qualifications. When the proposal may affect an Indian reservation, the agency should consult with the Indian tribe. Section 1508.5. The request for cooperation should come at the earliest possible time in the NEPA process.

After discussions with the candidate cooperating agencies, the lead agency and the cooperating agencies are to determine by letter or by memorandum which agencies will undertake cooperating responsibilities. To the extent possible at this stage, responsibilities for specific issues should be assigned. The allocation of responsibilities will be completed during scoping. Section 1501.7(a)(4).

Cooperating agencies must assume responsibility for the development of information and the preparation of environmental analyses at the request of the lead agency. Section 1501.6(b)(3). Cooperating agencies are now required by Section 1501.6 to devote staff resources that were normally primarily used to critique or comment on the Draft EIS after its preparation, much earlier in the NEPA process—primarily at the scoping and Draft EIS preparation stages. If a cooperating agency determines that its resource limitations preclude any involvement, or the degree of involvement (amount of work) requested by the lead agency, it must so inform the lead agency in writing and submit a copy of this correspondence to the Council. Section 1501.6(c).

In other words, the potential cooperating agency must decide early if it is able to devote any of its resources to a particular proposal. For this reason the regulation states that an agency may reply to a request for cooperation that “other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement” (emphasis added). The regulation refers to the “action,” rather than to the EIS, to clarify that the agency is taking itself out of all phases of the federal action, not just draft EIS preparation. This means that the agency has determined that it cannot be involved in the later stages of EIS review and comment, as well as decisionmaking on the proposed action. For this reason, cooperating agencies with jurisdiction by law (those which have permitting or other approval authority) cannot opt out entirely of the duty to cooperate on the EIS. See also Question 15, relating specifically to the responsibility of EPA.

14b. Q. How are disputes resolved between lead and cooperating agencies concerning the scope and level of detail of analysis and the quality of data in impact statements?

A. Such disputes are resolved by the agencies themselves. A lead agency, of course, has the ultimate responsibility for the content of an EIS. But it is supposed to use the environmental analysis and recommendations of cooperating agencies with jurisdiction by law or special expertise to the maximum extent possible, consistent with its own responsibilities as lead agency. Section 1501.6(a)(2).

If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. Similarly, where cooperating agencies have their own decisions to make and they intend to adopt the environmental impact statement and base their decisions on it, one document should include all of the information necessary for the decisions by the cooperating agencies. Otherwise they may be forced to duplicate the EIS process by issuing a new, more complete EIS or Supplemental EIS, even though the original EIS could have sufficed if it had been properly done at the outset. Thus, both lead and cooperating agencies have a stake in producing a document of good quality. Cooperating agencies also have a duty to participate fully in the scoping process to ensure that the appropriate range of issues is determined early in the EIS process.

Because the EIS is not the Record of Decision, but instead constitutes the information and analysis on which to base a decision, disagreements about conclusions to be drawn from the EIS need not inhibit agencies from issuing a joint document or adopting another agency's EIS, if the analysis is adequate. Thus, if each agency has its own “preferred alternative,” both can be identified in the EIS. Similarly, a cooperating agency with jurisdiction by law may determine in its own ROD that alternative A is the environmentally preferable alternative even though the lead agency has decided in its separate ROD that Alternative B is environmentally preferable.

14c. Q. What are the specific responsibilities of federal and state cooperating agencies to review draft EISs?

A. Cooperating agencies (i.e., agencies with jurisdiction by law or special expertise) and agencies that are authorized to develop or enforce environmental standards, must comment on environmental impact statements within their jurisdiction, expertise or authority. Sections 1503.2, 1508.5. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should simply comment accordingly. Conversely, if the cooperating agency determines that the EIS is incomplete,

inadequate or inaccurate, or it has other comments, it should promptly make such comments, conforming to the requirements of specificity in section 1503.3.

14d. Q. How is the lead agency to treat the comments of another agency with jurisdiction by law or special expertise which has failed or refused to cooperate or participate in scoping or EIS preparation?

A. A lead agency has the responsibility to respond to all substantive comments raising significant issues regarding a Draft EIS. Section 1503.4. However, cooperating agencies are generally under an obligation to raise issues or otherwise participate in the EIS process during scoping and EIS preparation if they reasonably can do so. In practical terms, if a cooperating agency fails to cooperate at the outset, such as during scoping, it will find that its comments at a later stage will not be as persuasive to the lead agency.

15. Q. Are EPA's responsibilities to review and comment on the environmental effects of agency proposals under Section 309 of the Clean Air Act independent of its responsibility as a cooperating agency?

A. Yes. EPA has an obligation under Section 309 of the Clean Air Act to review and comment in writing on the environmental impact of any matter relating to the authority of the Administrator contained in proposed legislation, federal construction projects, other federal actions requiring EISs, and new regulations. 42 U.S.C. Sec. 7609. This obligation is independent of its role as a cooperating agency under the NEPA regulations.

16. Q. What is meant by the term "third party contracts" in connection with the preparation of an EIS? See Section 1506.5(c). When can "third party contracts" be used?

A. As used by EPA and other agencies, the term "third party contracts" refers to the preparation of EISs by contractors paid by the applicant. In the case of an EIS for a National Pollution Discharge Elimination System (NPDES) permit, the applicant, aware in the early planning stages of the proposed project of the need for an EIS, contracts directly with a consulting firm for its preparation. See 40 CFR 6.604(g). The "third party" is EPA which, under Section 1506.5(c), must select the consulting firm, even though the applicant pays for the cost of preparing the EIS. The consulting firm is responsible to EPA for preparing an EIS that meets the requirements of the NEPA regulations and EPA's NEPA procedures. It is in the applicant's interest that the EIS comply with the law so that EPA can take prompt action on the NPDES permit application. The "third party contract" method under EPA's NEPA procedures is purely voluntary, though most applicants have found it helpful in expediting compliance with NEPA.

If a federal agency uses "third party contracting," the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with Section 1506.5(c). Federal procurement requirements do not apply to the agency because it incurs no obligations or costs under the contract, nor does the agency procure anything under the contract.

17a. Q. If an EIS is prepared with the assistance of a consulting firm, the firm must execute a disclosure statement. What criteria must the firm follow in determining whether it has any "financial or other interest in the outcome of the project" which would cause a conflict of interest?

A. Section 1506.5(c), which specifies that a consulting firm preparing an EIS must execute a disclosure statement, does not define "financial or other interest in the outcome of the project." The Council interprets this term broadly to cover any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients). For example, completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit. If a consulting firm is aware that it has such an interest in the decision on the proposal, it should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process.

When a consulting firm has been involved in developing initial data and plans for the project, but does not have any financial or other interest in the outcome of the decision, it need not be disqualified from preparing the EIS. However, a disclosure statement in the draft EIS should clearly state the scope and extent of the firm's prior involvement to expose any potential conflicts of interest that may exist.

17b. Q. If the firm in fact has no promise of future work or other interest in the outcome of the proposal, may the firm later bid in competition with others for future work on the project if the proposed action is approved?

A. Yes.

18. Q. How should uncertainties about indirect effects of a proposal be addressed, for example, in cases of disposal of federal lands, when the identity or plans of future landowners is unknown?

A. The EIS must identify all the indirect effects that are known and make a good faith effort to explain the effects that are not known but are "reasonably foreseeable." Section 1508.8(b). In the example, if there is total uncertainty about the identity of future land owners or the nature of future land uses, then of course, the agency is not required to engage in speculation or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. The agency cannot ignore these uncertain but probable effects of its decisions.

19a. Q. What is the scope of mitigation measures that must be discussed?

A. The mitigation measures discussed in an EIS must cover the range of impacts of the proposal. The measures must include such things as design alternatives that would decrease pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts. Mitigation measures must be considered even for impacts that by themselves would not be considered "significant." Once the proposal itself is considered as a whole to have significant effects, all of its specific effects on the environment (whether or not "significant") must be considered, and mitigation measures must be developed where it is feasible to do so. Sections 1502.14(f), 1502.16(h), 1508.14.

19b. Q. How should an EIS treat the subject of available mitigation measures that are (1) outside the jurisdiction of the lead or cooperating agencies, or (2) unlikely to be adopted or enforced by the responsible agency?

A. All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would not be committed as part of the RODs of these agencies. Sections 1502.16(h), 1505.2(c). This will serve to alert agencies or officials who can implement these extra measures, and will encourage them to do so. Because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation. However, to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies. Sections 1502.16(h), 1505.2. If there is a history of nonenforcement or opposition to such measures, the EIS and Record of Decision should acknowledge such opposition or nonenforcement. If the necessary mitigation measures will not be ready for a long period of time, this fact, of course, should also be recognized.

21. Q. Where an EIS or an EA is combined with another project planning document (sometimes called "piggybacking"), to what degree may the EIS or EA refer to and rely upon information in the project document to satisfy NEPA's requirements?

A. Section 1502.25 of the regulations requires that draft EISs be prepared concurrently and integrated with environmental analyses and studies required by other federal statutes. In addition, Section 1506.4 allows any environmental document prepared in compliance with NEPA to be combined with any other agency document to reduce duplication and paperwork. However, these provisions were not intended to authorize the preparation of a short summary or outline EIS, attached to a detailed project report or land use plan containing the required environmental impact data. In such circumstances, the reader would have to refer constantly to the detailed report to understand the environmental impacts and alternatives which should have been found in the EIS itself.

The EIS must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of the reasonable alternatives. Section 1502.1. But, as long as the EIS is clearly identified and is self-supporting, it can be physically included in or attached to the project report or land use plan, and may use attached report material as technical backup.

Forest Service environmental impact statements for forest management plans are handled in this manner. The EIS identifies the agency's preferred alternative, which is developed in detail as the proposed management plan. The detailed proposed plan accompanies the EIS through the review process, and the documents are appropriately cross-referenced. The proposed plan is useful for EIS readers as an example, to show how one choice of management options translates into effects on natural resources. This procedure permits initiation of the 90-day public review of proposed forest plans, which is required by the National Forest Management Act.

All the alternatives are discussed in the EIS, which can be read as an independent document. The details of the management plan are not repeated in the EIS and vice versa. This is a reasonable functional separation of the documents: the EIS contains information relevant to the choice among alternatives; the plan is a detailed description of proposed management activities suitable for use by land managers. This procedure provides for concurrent compliance with the public review requirements of both NEPA and the National Forest Management Act.

Under some circumstances, a project report or management plan may be totally merged with the EIS, and the one document labeled as both "EIS" and "management plan" or "project report". This may be reasonable where the documents are short, or where the EIS format and the regulations for clear, analytical EISs also satisfy the requirements for a project report.

22. Q. May state and federal agencies serve as joint lead agencies? If so, how do they resolve law, policy and resource conflicts under NEPA and the relevant state environmental act? How do they resolve differences in perspective where, for example, national and local needs differ?

A. Under Section 1501.5(b), federal, state or local agencies, as long as they include one federal agency, may act as joint lead agencies to prepare an EIS. Section 1506.2 also strongly urges state and local agencies to cooperate fully with each other. This should cover joint research and studies, planning activities, public hearings, environmental assessments and the preparation of joint EISs under NEPA and the relevant "little NEPA" state laws, so that one document will satisfy both laws.

The regulations also recognize that certain inconsistencies may exist between the proposed federal action and any approved state or local plan or law. The joint document should discuss the extent to which the federal agency would reconcile its proposed action with such plan or law. Section 1506.2(d). (See Question 23).

Because there may be differences in perspectives as well as conflicts among federal, state and local goals for resources management, the Council has advised participating agencies to adopt a flexible, cooperative approach. The joint EIS should reflect all of their interests and missions, clearly identified as such. The final document would then indicate how state and local interests have been accommodated or would identify

conflicts in goals (e.g., how a hydroelectric project, which might induce second home development, would require new land use controls). The EIS must contain a complete discussion of scope and purpose of the proposal, alternatives, and impacts so that the discussion is adequate to meet the needs of local, state and federal decisionmakers.

23a. Q. How should an agency handle potential conflicts between a proposal and the objectives of Federal, state or local land use plans, policies and controls for the area concerned? See Section 1502.16(c).

A. The agency should first inquire of other agencies whether there are any potential conflicts. If there would be immediate conflicts, or if conflicts could arise in the future when the plans are finished (see Question 23(b) below), the EIS must acknowledge and describe the extent of those conflicts. If there are any possibilities of resolving the conflicts, these should be explained as well. The EIS should also evaluate the seriousness of the impact of the proposal on the land use plans and policies, and whether, or how much, the proposal will impair the effectiveness of land use control mechanisms for the area. Comments from officials of the affected area should be solicited early and should be carefully acknowledged and answered in the EIS.

23b. Q. What constitutes a "land use plan or policy" for purposes of this discussion?

A. The term "land use plans" includes all types of formally adopted documents for land use planning, zoning, and related regulatory requirements. Local general plans are included, even though they are subject to future change. Proposed plans should also be addressed if they have been formally proposed by the appropriate government body in a written form, and are being actively pursued by officials of the jurisdiction. Staged plans, which must go through phases of development such as the Water Resources Council's Level A, B, and C planning process should also be included even though they are incomplete.

The term "policies" includes formally adopted statements of land use policy as embodied in laws or regulations. It also includes proposals for action such as the initiation of a planning process, or a formally adopted policy statement of the local, regional or state executive branch, even if it has not been formally adopted by the local, regional or state legislative body.

23c. Q. What options are available for the decisionmaker when conflicts with such plans or policies are identified?

A. After identifying any potential land use conflicts, the decisionmaker must weigh the significance of the conflicts among all the other environmental and non-environmental factors that must be considered in reaching a rational and balanced decision. Unless precluded by other law from causing or contributing to any inconsistency with the land use plans, policies or controls, the decisionmaker retains the authority to go forward with the proposal, despite the potential conflict. In the Record of Decision, the decisionmaker must explain what the decision was, how it was made, and what mitigation measures are being imposed to lessen adverse environmental impacts of the proposal, among the other requirements of Section 1505.2. This provision would require the decisionmaker to explain any decision to override land use plans, policies or controls for the area.

24a. Q. When are EISs required on policies, plans or programs?

A. An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedures Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal "may exist in fact as well as by agency declaration that one exists." Section 1508.23.

24b. Q. When is an area-wide or overview EIS appropriate?

A. The preparation of an area-wide or overview EIS may be particularly useful when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography. For example, when a variety of energy projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.

24c. Q. What is the function of tiering in such cases?

A. Tiering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation by reference of general discussions and relevant specific discussion from an environmental impact statement of broader scope into one of lesser scope or vice versa. In the example given in Question 24b, this would mean that an overview EIS would be prepared for all of the energy activities reasonably foreseeable in a particular geographic area or resulting from a particular development program. This impact statement would be followed by site-specific or project-specific EISs. The tiering process would make each EIS of greater use and meaning to the public as the plan or program develops without duplication of the analysis prepared for the previous impact statement.

25a. Q. When is it appropriate to use appendices instead of including information in the body of an EIS?

A. The body of the EIS should be a succinct statement of all the information on environmental impacts and alternatives that the decisionmaker and the public need, in order to make the decision and to ascertain that every significant factor has been examined. The EIS must explain or summarize methodologies of research and modeling and the results of research that may have been conducted to analyze impacts and alternatives.

Lengthy technical discussions of modeling methodologies, baseline studies, or other work are best reserved for the appendix. In other words, if only technically trained individuals are likely to understand a particular discussion then it should go in the appendix, and a plain language summary of the analysis and conclusions of that technical discussion should go in the text of the EIS.

The final statement must also contain the agency's responses to comments on the draft EIS. These responses will be primarily in the form of changes in the document itself, but specific answers to each significant comment should also be included. These specific responses may be placed in the appendix. If the comments are especially voluminous, summaries of the comments and responses will suffice. (See Question 29 regarding the level of detail required for responses to comments.)

25b. Q. How does an appendix differ from incorporation by reference?

A. First, if at all possible, the appendix accompanies the EIS, whereas the material which is incorporated by reference does not accompany the EIS. Thus the appendix should contain information that reviewers will be likely to want to examine. The appendix should include material that pertains to preparation of a particular EIS. Research papers directly relevant to the proposal, lists of affected species, discussion of the methodology of models used in the analysis of impacts, extremely detailed responses to comments, or other information would be placed in the appendix.

The appendix must be complete and available at the time the EIS is filed. Five copies of the appendix must be sent to EPA with five copies of the EIS for filing. If the appendix is too bulky to be circulated, it instead must be placed in conveniently accessible locations or furnished directly to commentors upon request. If it is not circulated with the EIS, the Notice of Availability published by EPA must so state, giving a telephone number to enable potential commentors to locate or request copies of the appendix promptly.

Material that is not directly related to preparation of the EIS should be incorporated by reference. This would include other EISs, research papers in the general literature, technical background papers or other

material that someone with technical training could use to evaluate the analysis of the proposal. These must be made available either by citing the literature, furnishing copies to central locations, or sending copies to commentors directly upon request.

Care must be taken in all cases to ensure that material incorporated by reference, and the occasional appendix that does not accompany the EIS, are in fact available for the full minimum public comment period.

26a. Q. How detailed must an EIS index be?

A. The EIS index should have a level of detail sufficient to focus on areas of the EIS of reasonable interest to any reader. It cannot be restricted to the most important topics. On the other hand, it need not identify every conceivable term or phrase in the EIS. If an agency believes that a reader is reasonably likely to be interested in a topic, it should be included.

26b. Q. Is a keyword index required?

A. No. A keyword index is a relatively short list of descriptive terms that identifies the key concepts or subject areas in a document. For example, it could consist of 20 terms which describe the most significant aspects of an EIS that a future researcher would need: type of proposal, type of impacts, type of environment, geographical area, sampling or modelling methodologies used. This technique permits the compilation of EIS data banks, by facilitating quick and inexpensive access to stored materials. While a keyword index is not required by the regulations, it could be a useful addition for several reasons. First, it can be useful as a quick index for reviewers of the EIS, helping to focus on areas of interest. Second, if an agency keeps a listing of the keyword indexes of the EISs it produces, the EIS preparers themselves will have quick access to similar research data and methodologies to aid their future EIS work. Third, a keyword index will be needed to make an EIS available to future researchers using EIS data banks that are being developed. Preparation of such an index now when the document is produced will save a later effort when the data banks become operational.

27a. Q. If a consultant is used in preparing an EIS, must the list of preparers identify members of the consulting firm as well as the agency NEPA staff who were primarily responsible?

A. Section 1502.17 requires identification of the names and qualifications of persons who were primarily responsible for preparing the EIS or significant background papers, including basic components of the statement. This means that members of a consulting firm preparing material that is to become part of the EIS must be identified. The EIS should identify these individuals even though the consultant's contribution may have been modified by the agency.

27b. Q. Should agency staff involved in reviewing and editing the EIS also be included in the list of preparers?

A. Agency personnel who wrote basic components of the EIS or significant background papers must, of course, be identified. The EIS should also list the technical editors who reviewed or edited the statements.

27c. Q. How much information should be included on each person listed?

A. The list of preparers should normally not exceed two pages. Therefore, agencies must determine which individuals had primary responsibility and need not identify individuals with minor involvement. The list of preparers should include a very brief identification of the individuals involved, their qualifications (expertise, professional disciplines) and the specific portion of the EIS for which they are responsible. This may be done in tabular form to cut down on length. A line or two for each person's qualifications should be sufficient.

28. Q. May an agency file xerox copies of an EIS with EPA pending the completion of printing the document?

A. Xerox copies of an EIS may be filed with EPA prior to printing only if the xerox copies are simultaneously made available to other agencies and the public. Section 1506.9 of the regulations, which governs EIS filing, specifically requires federal agencies to file with EPA no earlier than the EIS is distributed to the public. However, this section does not prohibit xeroxing as a form of reproduction and distribution. When an agency chooses xeroxing as the reproduction method, the EIS must be clear and legible to permit ease of reading and ultimate microfiching of the EIS. Where color graphs are important to the EIS, they should be reproduced and circulated with the xeroxed copy.

29a. Q. What response must an agency provide to a comment on a draft EIS which states that the draft EIS's methodology is inadequate or inadequately explained? For example, what level of detail must an agency include in its response to a simple postcard comment making such an allegation?

A. Appropriate responses to comments are described in Section 1503.4. Normally the responses should result in changes to the text of an EIS, not simply a separate answer at the back of the document. But, in addition, the agency must state what its response was, and if the agency decides that no substantive response is necessary, it must explain briefly why.

An agency is not under an obligation to issue a lengthy reiteration of its methodology for any portion of an EIS if the only comment addressing the methodology is a simple complaint that the EIS methodology is inadequate. But agencies must respond to comments, however brief, which are specific in their criticism of agency methodology. For example, if a commentator on an EIS said that an agency's air quality dispersion analysis or methodology was inadequate, and the agency had included a discussion of the analysis in the EIS, little if anything need be added in response to such a comment. However, if the commentator said that the dispersion analysis was inadequate because of its use of a certain computational technique, or that a dispersion analysis was inadequately explained because computational techniques were not included or referenced, then the agency would have to respond in a substantive and meaningful way to such a comment.

If a number of comments are identical or very similar, agencies may group the comments and prepare a single answer for each group. Comments may be summarized if they are especially voluminous. The comments or summaries must be attached to the EIS regardless of whether the agency believes they merit individual discussion in the body of the final EIS.

29b. Q. How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?

A. This question might arise in several possible situations. First, a commentator on a draft EIS may indicate that there is a possible new alternative which, in the agency's view, is not a reasonable alternative. Section 1502.14(a). If that is the case, the agency must explain why the comment does not warrant further agency response, citing authorities or reasons that support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response. Section 1503.4(a). For example, a commentator on a draft EIS on a coal fired power plant may suggest the alternative of using synthetic fuel. The agency may reject the alternative with a brief discussion (with authorities) of the unavailability of synthetic fuel within the time frame necessary to meet the need and purpose of the proposed facility.

A second possibility is that an agency may receive a comment indicating that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS. For example, a commentator on a draft EIS for a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures including the purchase and setaside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation on one of the alternatives discussed in the draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a commentator on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest and urge that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of constructing 2,000, 4,000, or 6,000 units. A commentator on the draft EIS might urge the consideration of constructing 5,000 units utilizing a different configuration of buildings. This alternative is within the spectrum of alternatives already considered and therefore could be addressed in the final EIS.

A fourth possibility is that a commentator points out an alternative which is not a variation of the proposal or of any alternative discussed in the draft impact statement, and is a reasonable alternative that warrants serious agency response. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commentator on a draft EIS on a nuclear power plant might suggest that a reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations).

If the new alternative was not raised by the commentator during scoping, but could have been, commentators may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the agency. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the agency must address it in a supplemental draft EIS. The agency is, in any case, ultimately responsible for preparing an adequate EIS that considers all alternatives.

30. Q. When a cooperating agency with jurisdiction by law intends to adopt a lead agency's EIS and it is not satisfied with the adequacy of the document, may the cooperating agency adopt only the part of the EIS with which it is satisfied? If so, would a cooperating agency with jurisdiction by law have to prepare a separate EIS or EIS supplement covering the areas of disagreement with the lead agency?

A. Generally, a cooperating agency may adopt a lead agency's EIS without recirculating it if it concludes that its NEPA requirements and its comments and suggestions have been satisfied. Section 1506.3(a),(c). If necessary, a cooperating agency may adopt only a portion of the lead agency's EIS and may reject that part of the EIS with which it disagrees, stating publicly why it did so. Section 1506.3(a).

A cooperating agency with jurisdiction by law (e.g., an agency with independent legal responsibilities with respect to a proposal) has an independent legal obligation to comply with NEPA. Therefore, if the cooperating agency determines that the EIS is wrong or inadequate, it must prepare a supplement to the EIS, replacing or adding any needed information, and must circulate the supplement as a draft for public and agency review and comment. A final supplemental EIS would be required before the agency could take action. The adopted portions of the lead agency EIS should be circulated with the supplement. Section 1506.3(b). A cooperating agency with jurisdiction by law will have to prepare its own Record of Decision for its action, in which it must explain how it reached its conclusions. Each agency should explain how and why its conclusions differ, if that is the case, from those of other agencies which issued their Records of Decision earlier.

An agency that did not cooperate in preparation of an EIS may also adopt an EIS or portion thereof. But this would arise only in rare instances, because an agency adopting an EIS for use in its own decision normally would have been a cooperating agency. If the proposed action for which the EIS was prepared is substantially the same as the proposed action of the adopting agency, the EIS may be adopted as long as it is recirculated as a final EIS and the agency announces what it is doing. This would be followed by the 30-day review period and issuance of a Record of Decision by the adopting agency. If the proposed action by the adopting agency is not substantially the same as that in the EIS (i.e., if an EIS on one action is being adapted for use in a decision on another action), the EIS would be treated as a draft and circulated for the normal public comment period and other procedures. Section 1506.3(b).

31a. Q. Do the Council's NEPA regulations apply to independent regulatory agencies like the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission?

A. The statutory requirements of NEPA's Section 102 apply to "all agencies of the federal government." The NEPA regulations implement the procedural requirements of NEPA as set forth in NEPA's Section 102(2) for all agencies of the federal government. The NEPA regulations apply to independent regulatory agencies, however, they do not direct independent regulatory agencies to make decisions in any particular way or in a way inconsistent with an agency's statutory charter. Sections 1500.3, 1500.6, 1507.1, and 1507.3.

31b. Q. Can an Executive Branch agency like the Department of the Interior adopt an EIS prepared by an independent regulatory agency such as FERC?

A. If an independent regulatory agency such as FERC has prepared an EIS in connection with its approval of a proposed project, an Executive Branch agency (e.g., the Bureau of Land Management in the Department of the Interior) may in accordance with Section 1506.3 adopt the EIS or a portion thereof for its use in considering the same proposal. In such a case the EIS must, to the satisfaction of the adopting agency, meet the standards for an adequate statement under the NEPA regulations (including scope and quality of analysis of alternatives) and must satisfy the adopting agency's comments and suggestions. If the independent regulatory agency fails to comply with the NEPA regulations, the cooperating or adopting agency may find that it is unable to adopt the EIS, thus forcing the preparation of a new EIS or EIS Supplement for the same action. The NEPA regulations were made applicable to all federal agencies in order to avoid this result, and to achieve uniform application and efficiency of the NEPA process.

32. Q. Under what circumstances do old EISs have to be supplemented before taking action on a proposal?

A. As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.

If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section 1502.9(c).

33a. Q. When must a referral of an interagency disagreement be made to the Council?

A. The Council's referral procedure is a pre-decision referral process for interagency disagreements. Hence, Section 1504.3 requires that a referring agency must deliver its referral to the Council not later than 25 days after publication by EPA of notice that the final EIS is available (unless the lead agency grants an extension of time under Section 1504.3(b)).

33b. Q. May a referral be made after this issuance of a Record of Decision?

A. No, except for cases where agencies provide an internal appeal procedure which permits simultaneous filing of the final EIS and the Record of Decision (ROD). Section 1506.10(b)(2). Otherwise, as stated above, the process is a pre-decision referral process. Referrals must be made within 25 days after the notice of availability of the final EIS, whereas the final decision (ROD) may not be made or filed until after 30 days from the notice of availability of the EIS. Sections 1504.3(b), 1506.10(b). If a lead agency has granted an extension of time for another agency to take action on a referral, the ROD may not be issued until the extension has expired.

34a. Q. Must Records of Decision (RODs) be made public? How should they be made available?

A. Under the regulations, agencies must prepare a "concise public record of decision," which contains the elements specified in Section 1505.2. This public record may be integrated into any other decision record prepared by the agency or it may be separate if decision documents are not normally made public. The Record of Decision is intended by the Council to be an environmental document (even though it is not explicitly mentioned in the definition of "environmental document" in Section 1508.10). Therefore, it must be made available to the public as required by Section 1506.6(b). However, there is no specific requirement for publication of the ROD itself, either in the Federal Register or elsewhere.

34b. Q. May the summary section in the final Environmental Impact Statement substitute for or constitute an agency's Record of Decision?

A. No. An environmental impact statement is supposed to inform the decisionmaker before the decision is made. Sections 1502.1, 1505.2. The Council's regulations provide for a 30-day comment period after notice is published that the final EIS has been filed with EPA before the agency may take further action. During that period, in addition to the agency's own internal final review, the public and other agencies can comment on the final EIS prior to the agency's final action on the proposal. In addition, the Council's regulations make clear that the requirements for the summary in an EIS are not the same as the requirements for a ROD. Sections 1502.12 and 1505.2.

34c. Q. What provisions should Records of Decision contain pertaining to mitigation and monitoring?

A. Lead agencies "shall include appropriate conditions (including mitigation measures and monitoring and enforcement programs) in grants, permits or other approvals" and shall "condition funding of actions on mitigation." Section 1505.3. Any such measures that are adopted must be explained and committed in the ROD.

The reasonable alternative mitigation measures and monitoring programs should have been addressed in the draft and final EIS. The discussion of mitigation and monitoring in a Record of Decision must be more detailed than a general statement that mitigation is being required but not so detailed as to duplicate discussion of mitigation in the EIS. The Record of Decision should contain a concise summary identification of the mitigation measures which the agency has committed itself to adopt.

The Record of Decision must also state whether all practical mitigation measures have been adopted and if not, why not. Section 1505.2(c). The Record of Decision must identify the mitigation measures and monitoring and enforcement programs that have been selected and plainly indicate that they are adopted as part of the agency's decision. If the proposed action is the issuance of a permit or other approval, the specific details of the mitigation measures shall then be included as appropriate conditions in whatever grants, permits, funding or other approvals are being made by the federal agency. Section 1505.3(a),(b). If the proposal is to be carried out by the federal agency itself, the Record of Decision should delineate the mitigation and monitoring measures in sufficient detail to constitute an enforceable commitment, or incorporate by reference the portions of the EIS that do so.

34d. Q. What is the enforceability of a Record of Decision?

A. Pursuant to generally recognized principles of federal administrative law, agencies will be held accountable for preparing Records of Decision that conform to the decisions actually made and for carrying out the actions set forth in the Record of Decision. This is based on the principle that an agency must comply with its own decisions and regulations once they are adopted. Thus, the terms of a Record of Decision are enforceable by agencies and private parties. A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein.

35. Q. How long should the NEPA process take to complete?

A. When an EIS is required, the process will obviously take longer than when an EA is the only document prepared. But the Council's NEPA regulations encourage streamlined review, adoption of deadlines, elimination of duplicative work, eliciting suggested alternatives and other comments early through scoping, cooperation among agencies, and consultation with applicants during project planning. The Council has advised agencies that under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process. For most major actions, this period is well within the planning time that is needed in any event, apart from NEPA.

The time required for the preparation of program EISs may be greater. The Council also recognizes that some projects will entail difficult long-term planning and/or the acquisition of certain data which of necessity will require more time for the preparation of the EIS. Indeed, some proposals should be given more time for the thoughtful preparation of an EIS and development of a decision which fulfills NEPA's substantive goals.

For cases in which only an environmental assessment will be prepared, the NEPA process should take no more than 3 months, and in many cases substantially less, as part of the normal analysis and approval process for the action.

36a. Q. How long and detailed must an environmental assessment (EA) be?

A. The environmental assessment is a concise public document which has three defined functions. (1) It briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) it aids an agency's compliance with NEPA when no EIS is necessary, i.e., it helps to identify better alternatives and mitigation measures; and (3) it facilitates preparation of an EIS when one is necessary. Section 1508.9(a).

Since the EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. Section 1508.9(b).

While the regulations do not contain page limits for EAs, the Council has generally advised agencies to keep the length of EAs to not more than approximately 10-15 pages. Some agencies expressly provide page guidelines (e.g., 10-15 pages in the case of the Army Corps). To avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant issues.

36b. Q. Under what circumstances is a lengthy EA appropriate?

A. Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 and where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.

37a. Q. What is the level of detail of information that must be included in a finding of no significant impact (FONSI)?

A. The FONSI is a document in which the agency briefly explains why an action will not have a significant effect on the human environment and, therefore, why an EIS will not be prepared. Section 1508.13. The

finding itself need not be detailed, but must succinctly state the reasons for deciding that the action will have no significant environmental effects and, if relevant, must show which factors were weighted most heavily in the determination. In addition to this statement, the FONSI must include, summarize, or attach and incorporate by reference, the environmental assessment.

37b. Q. What are the criteria for deciding whether a FONSI should be made available for public review for 30 days before the agency's final determination whether to prepare an EIS?

A. Public review is necessary, for example, (a) if the proposal is a borderline case, i.e., when there is a reasonable argument for preparation of an EIS; (b) if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area; (c) when there is either scientific or public controversy over the proposal; or (d) when it involves a proposal which is or is closely similar to one which normally requires preparation of an EIS. Sections 1501.4(e)(2), 1508.27. Agencies also must allow a period of public review of the FONSI if the proposed action would be located in a floodplain or wetland. E.O. 11988, Sec. 2(a)(4); E.O. 11990, Sec. 2(b).

38. Q. Must (EAs) and FONSI be made public? If so, how should this be done?

A. Yes, they must be made available to the public. Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSI. These are public "environmental documents" under 1506.6(b), and, therefore, agencies must give public notice of their availability. A combination of methods may be used to give notice, and the methods should be tailored to the needs of particular cases. Thus, a Federal Register notice of availability of the documents with notices in national publications and mailed to interested national groups might be appropriate for proposals that are national in scope. Local newspaper notices may be more appropriate for regional or site-specific proposals.

The objective, however, is to notify all interested or affected parties. If this is not being achieved, then the methods should be reevaluated and changed. Repeated failure to reach the interested or affected public would be interpreted as a violation of the regulations.

39. Q. Can an EA and FONSI be used to impose enforceable mitigation measures, monitoring programs, or other requirements, even though there is no such requirement in the regulations in such cases for a formal Record of Decision?

A. Yes. In cases where an environmental assessment is the appropriate environmental document, there still may be mitigation measures or alternatives that would be desirable to consider and adopt even though the impacts of the proposal will not be "significant." In such cases, the EA should include a discussion of these measures or alternatives to "assist agency planning and decisionmaking" and to "aid an agency's compliance with [NEPA] when no environmental impact statement is necessary." Section 1501.3(b), 1508.9(a)(2). The appropriate mitigation measures can be imposed as enforceable permit conditions, or adopted as part of the agency final decision in the same manner mitigation measures are adopted in the formal Record of Decision that is required in EIS cases.

40. Q. If an environmental assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?

A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. Sections 1508.8 and 1508.27.

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such possible mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identified certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal and the potential mitigation for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicants resubmits the entire proposal and the EA and FONSI for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N. W.
WASHINGTON, D. C.

April 30, 1981

MEMORANDUM FOR GENERAL COUNSELS, NEPA LIAISONS AND
PARTICIPANTS IN SCOPING

SUBJECT:

Scoping Guidance

As part of its continuing oversight of the implementation of the NEPA regulations, the Council on Environmental Quality has been investigating agency experience with scoping. This is the process by which the scope of the issues and alternatives to be examined in an EIS is determined. In a project led by Barbara Bramble of the General Counsel's staff the Council asked federal agencies to report their scoping experiences; Council staff held meetings and workshops in all regions of the country to discuss scoping practice; and a contract study was performed for the Council to investigate what techniques work best for various kinds of proposals. Out of this material has been distilled a series of recommendations for successfully conducting scoping. The attached guidance document consists of advice on what works and what does not, based on the experience of many agencies and other participants in scoping. It contains no new legal requirements beyond those in the NEPA regulations. It is intended to make generally available the results of the Council's research, and to encourage the use of better techniques for ensuring public participation and efficiency in the scoping process.

NICHOLAS C. YOST

General Counsel Scoping Guidance

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I. Introduction

A. Background of this document.

In 1978, with the publication of the proposed NEPA regulations (since adopted as formal rules, 40 C.F.R. Parts 1500-1508), the Council on Environmental Quality gave formal recognition to an increasingly used term -- scoping. Scoping is an idea that has long been familiar to those involved in NEPA compliance: In order to gauge effectively the preparation of an environmental impact statement (EIS), one must determine the scope of the document - that is, what will be covered, and in what detail. Planning of this kind was a normal component of EIS preparation. But the consideration of issues and choice of alternatives to be examined was in too many cases completed outside of public view. The innovative approach to scoping in the regulations is that the process is open to the public and state and local governments, as well as to affected federal agencies. This open process gives rise to important new opportunities for better and more efficient NEPA analyses; and simultaneously places new responsibilities on public and agency participants alike to surface their concerns early. Scoping helps insure that real problems are identified early and properly studied; that issues that are of no concern do not consume time and effort; that the draft statement when first made public is balanced and thorough; and that the delays occasioned by re-doing an inadequate draft are avoided. Scoping does not create problems that did not already exist; it ensures that problems that would have been raised anyway are identified early in the process. Many members of the public as well as agency staffs engaged in the NEPA process have told the Council that the open scoping requirement is one of the most far-reaching changes engendered by the NEPA regulations. They have predicted that scoping could have a profound positive effect on environmental analyses, on the impact statement process itself, and ultimately on decisionmaking. Because the concept of open scoping was new, the Council decided to encourage agencies' innovation without unduly restrictive guidance. Thus the regulations relating to scoping are very simple. They state that "there shall be an early and open process for determining the scope of issues to be addressed" which "shall be termed scoping," but they lay down few specific requirements. (Section 1501.7). They require an open process with public notice; identification of significant and insignificant issues; allocation of EIS preparation assignments; identification of related analysis requirements in order to avoid duplication of work; and the planning of a schedule for EIS preparation that meshes with the agency's decisionmaking schedule. (Section 1501.7(a)). The regulations encourage but do not require, setting time limits and page limits for the EIS, and holding scoping meetings. (Section 1501.7(b)). Aside from these general outlines, the regulations left the agencies on their own. The Council did not believe, and still does not, that it is necessary or appropriate to dictate the specific manner in which over 100 federal agencies should deal with the public. However, the Council has received several requests for more guidance. In 1980 we decided to investigate the agency

and public response to the scoping requirement, to find out what was working and what was not, and to share this with all agencies and the public. The Council first conducted its own survey, asking federal agencies to report some of their scoping experiences. The Council then contracted with the American Arbitration Association and Clark McGlennon Associates to survey the scoping techniques of major agencies and to study several innovative methods in detail. Council staff conducted a two-day workshop in Atlanta in June 1980, to discuss with federal agency NEPA staff and several EIS contractors what seems to work best in scoping of different types of proposals, and discussed scoping with federal, state and local officials in meetings in all 10 federal regions. This document is a distillation of all the work that has been done so far by many people to identify valuable scoping techniques. It is offered as a guide to encourage success and to help avoid pitfalls. Since scoping methods are still evolving, the Council welcomes any comments on this guide, and may add to it or revise it in coming years.

B. What scoping is and what it can do.

Scoping is often the first contact between proponents of a proposal and the public. This fact is the source of the power of scoping and of the trepidation that it sometimes evokes. If a scoping meeting is held, people on both sides of an issue will be in the same room and, if all goes well, will speak to each other. The possibilities that flow from this situation are vast. Therefore, a large portion of this document is devoted to the productive management of meetings and the de-fusing of possible heated disagreements. Even if a meeting is not held, the scoping process leads EIS preparers to think about the proposal early on, in order to explain it to the public and affected agencies. The participants respond with their own concerns about significant issues and suggestions of alternatives. Thus as the draft EIS is prepared, it will include, from the beginning, a reflection or at least an acknowledgement of the cooperating agencies' and the public's concerns. This reduces the need for changes after the draft is finished, because it reduces the chances of overlooking a significant issue or reasonable alternative. It also in many cases increases public confidence in NEPA and the decisionmaking process, thereby reducing delays, such as from litigation, later on when implementing the decisions. As we will discuss further in this document, the public generally responds positively when its views are taken seriously, even if they cannot be wholly accommodated. But scoping is not simply another "public relations" meeting requirement. It has specific and fairly limited objectives: (a) to identify the affected public, and agency concerns; (b) to facilitate an efficient EIS preparation process, through assembling the cooperating agencies, assigning EIS writing tasks, ascertaining all the related permits and reviews that must be scheduled concurrently, and setting time or page limits; (c) to define the issues and alternatives that will be examined in detail in the EIS while simultaneously devoting less attention and time to issues which cause no concern; and (d) to save time in the overall process by helping to ensure that draft statements adequately address relevant issues, reducing the possibility that new comments will cause a statement to be rewritten or supplemented.

Sometimes the scoping process enables early identification of a few serious problems with a proposal, which can be changed or solved because the proposal is still being developed. In these cases, scoping the EIS can actually lead to the solution of a conflict over the proposed action itself. We have found that this extra benefit of scoping occurs fairly frequently. But it cannot be expected in most cases, and scoping can still be considered successful when conflicts are clarified but not solved. This guide does not presume that resolution of conflicts over proposals is a principal goal of scoping, because it is only possible in limited circumstances. Instead, the Council views the principal goal of scoping to be an adequate and efficiently prepared EIS. Our suggestions and recommendations are aimed at reducing the conflicts among affected interests that impede this limited objective. But we are aware of the possibilities of more general conflict resolution that are inherent in any productive

discussions among interested parties. We urge all participants in scoping processes to be alert to this larger context, in which scoping could prove to be the first step in environmental problem-solving.

Scoping can lay a firm foundation for the rest of the decisionmaking process. If the EIS can be relied upon to include all the necessary information for formulating policies and making rational choices, the agency will be better able to make a sound and prompt decision. In addition, if it is clear that all reasonable alternatives are being seriously considered, the public will usually be more satisfied with the choice among them.

II. Advice for Government Agencies Conducting Scoping

A. General context.

Scoping is a process, not an event or a meeting. It continues throughout the planning for an EIS, and may involve a series of meetings, telephone conversations, or written comments from different interested groups. Because it is a process, participants must remain flexible. The scope of an EIS occasionally may need to be modified later if a new issue surfaces, no matter how thorough the scoping was. But it makes sense to try to set the scope of the statement as early as possible.

Scoping may identify people who already have knowledge about a site or an alternative proposal or a relevant study, and induce them to make it available. This can save a lot of research time and money. But people will not come forward unless they believe their views and materials will receive serious consideration. Thus scoping is a crucial first step toward building public confidence in a fair environmental analysis and ultimately a fair decisionmaking process. One further point to remember: the lead agency cannot shed its responsibility to assess each significant impact or alternative even if one is found after scoping. But anyone who hangs back and fails to raise something that reasonably could have been raised earlier on will have a hard time prevailing during later stages of the NEPA process or if litigation ensues. Thus a thorough scoping process does provide some protection against subsequent lawsuits.

B. Step-by-step through the process.

1. Start scoping after you have enough information.

Scoping cannot be useful until the agency knows enough about the proposed action to identify most of the affected parties, and to present a coherent proposal and a suggested initial list of environmental issues and alternatives. Until that time there is no way to explain to the public or other agencies what you want them to get involved in. So the first stage is to gather preliminary information from the applicant, or to compose a clear picture of your proposal, if it is being developed by the agency.

2. Prepare an information packet.

In many cases, scoping of the EIS has been preceded by preparation of an environmental assessment (EA) as the basis for the decision to proceed with an EIS. In such cases, the EA will, of course, include the preliminary information that is needed. If you have not prepared an EA, you should put together a brief information packet consisting of a description of the proposal, an initial list of impacts and alternatives, maps, drawings, and any other material or references that can help the interested public to understand what is being proposed. The proposed work plan of the EIS is not usually sufficient for this purpose. Such documents rarely contain a description of the goals of the proposal to enable readers to develop

alternatives. At this stage, the purpose of the information is to enable participants to make an intelligent contribution to scoping the EIS. Because they will be helping to plan what will be examined during the environmental review, they need to know where you are now in that planning process. Include in the packet a brief explanation of what scoping is, and what procedure will be used, to give potential participants a context for their involvement. Be sure to point out that you want comments from participants on very specific matters. Also reiterate that no decision has yet been made on the contents of the EIS, much less on the proposal itself. Thus, explain that you do not yet have a preferred alternative, but that you may identify the preferred alternative in the draft EIS. (See Section 1502.14(e)). This should reduce the tendency of participants to perceive the proposal as already a definite plan. Encourage them to focus on recommendations for improvements to the various alternatives. Some of the complaints alleging that scoping can be a waste of time stem from the fact that the participants may not know what the proposal is until they arrive at a meeting. Even the most intelligent among us can rarely make useful, substantive comments on the spur of the moment. Don't expect helpful suggestions to result if participants are put in such a position.

3. Design the scoping process for each project.

There is no established or required procedure for scoping. The process can be carried out by meetings, telephone conversations, written comments, or a combination of all three. It is important to tailor the type, the timing and the location of public and agency comments to the proposal at hand. For example, a proposal to adopt a land management plan for a National Forest in a sparsely populated region may not lend itself to calling a single meeting in a central location. While people living in the area and elsewhere may be interested, any meeting place will be inconvenient for most of the potential participants. One solution is to distribute the information packet, solicit written comments, list a telephone number with the name of the scoping coordinator, and invite comments to be phoned in. Otherwise, small meetings in several locations may be necessary when face-to-face communication is important. In another case, a site-specific construction project may be proposed. This would be a better candidate for a central scoping meeting. But you must first find out if anyone would be interested in attending such a meeting. If you simply assume that a meeting is necessary, you may hire a hall and a stenographer, assemble your staff for a meeting, and find that nobody shows up. There are many proposals that just do not generate sufficient public interest to cause people to attend another public meeting. So a wise early step is to contact known local citizens groups and civic leaders. In addition, you may suggest in your initial scoping notice and information packet that all those who desire a meeting should call to request one. That way you will only hear from those who are seriously interested in attending. The question of where to hold a meeting is a difficult one in many cases. Except for site specific construction projects, it may be unclear where the interested parties can be found. For example, an EIS on a major energy development program may involve policy issues and alternatives to the program that are of interest to public groups all over the nation, and to agencies headquartered in Washington, D.C., while the physical impacts might be expected to be felt most strongly in a particular region of the country. In such a case, if personal contact is desired, several meetings would be necessary, especially in the affected region and in Washington, to enable all interests to be heard. As a general guide, unless a proposal has no site specific impacts, scoping meetings should not be confined to Washington. Agencies should try to elicit the views of people who are closer to the affected regions. The key is to be flexible. It may not be possible to plan the whole scoping process at the outset, unless you know who all the potential players are. You can start with written comments, move on to an informal meeting, and hold further meetings if desired. There are several reasons to hold a scoping meeting. First, some of the best effects of scoping stem from the fact that all parties have the opportunity to meet one another and to listen to the concerns of the others. There is no satisfactory substitute for personal

contact to achieve this result. If there is any possibility that resolution of underlying conflicts over a proposal may be achieved, this is always enhanced by the development of personal and working relationships among the parties. Second, even in a conflict situation people usually respond positively when they are treated as partners in the project review process. If they feel confident that their views were actually heard and taken seriously, they will be more likely to be satisfied that the decisionmaking process was fair even if they disagree with the outcome. It is much easier to show people that you are listening to them if you hold a face-to-face meeting where they can see you writing down their points, than if their only contact is through written comments. If you suspect that a particular proposal could benefit from a meeting with the affected public at any time during its review, the best time to have the meeting is during this early scoping stage. The fact that you are willing to discuss openly a proposal before you have committed substantial resources to it will often enhance the chances for reaching an accord. If you decide that a public meeting is appropriate, you still must decide what type of meeting, or how many meetings, to hold. We will discuss meetings in detail below in "Conducting a Public Meeting." But as part of designing the scoping process, you must decide between a single meeting and multiple ones for different interest groups, and whether to hold a separate meeting for government agency participants. The single large public meeting brings together all the interested parties, which has both advantages and disadvantages. If the meeting is efficiently run, you can cover a lot of interests and issues in a short time. And a single meeting does reduce agency travel time and expense. In some cases it may be an advantage to have all interest groups hear each others' concerns, possibly promoting compromise. It is definitely important to have the staffs of the cooperating agencies, as well as the lead agency, hear the public views of what the significant issues are; and it will be difficult and expensive for the cooperating agencies to attend several meetings. But if there are opposing groups of citizens who feel strongly on both sides of an issue, the setting of the large meeting may needlessly create tension and an emotional confrontation between the groups. Moreover, some people may feel intimidated in such a setting, and won't express themselves at all. The principal drawback of the large meeting, however, is that it is generally unwieldy. To keep order, discussion is limited, dialogue is difficult, and often all participants are frustrated, agency and public alike. Large meetings can serve to identify the interest groups for future discussion, but often little else is accomplished. Large meetings often become "events" where grandstanding substitutes for substantive comments. Many agencies resort to a formal hearing-type format to maintain control, and this can cause resentments among participants who came to the meeting expecting a responsive discussion. For these reasons, we recommend that meetings be kept small and informal, and that you hold several, if necessary, to accommodate the different interest groups. The other solution is to break a large gathering into small discussion groups, which is discussed below. Using either method increases the likelihood that participants will level with you and communicate their underlying concerns rather than make an emotional statement just for effect. Moreover, in our experience, a separate meeting for cooperating agencies is quite productive. Working relationships can be forged for the effective participation of all involved in the preparation of the EIS. Work assignments are made by the lead agency, a schedule may be set for production of parts of the draft EIS, and information gaps can be identified early. But a productive meeting such as this is not possible at the very beginning of the process. It can only result from the same sort of planning and preparation that goes into the public meetings. We discuss below the special problems of cooperating agencies, and their information needs for effective participation in scoping.

4. Issuing the public notice.

The preliminary look at the proposal, in which you develop the information packet discussed above, will enable you to tell what kind of public notice will be most appropriate and effective. Section 1501.7 of the NEPA regulations requires that a notice of intent to

prepare an EIS must be published in the Federal Register prior to initiating scoping. This means that one of the appropriate means of giving public notice of the upcoming scoping process could be the same Federal Register notice. And because the notice of intent must be published anyway, the scoping notice would be essentially free. But use of the Federal Register is not an absolute requirement, and other means of public notice often are more effective, including local newspapers, radio and TV, posting notices in public places, etc. (See Section 1506.6 of the regulations.) What is important is that the notice actually reach the affected public. If the proposal is an important new national policy in which national environmental groups can be expected to be interested, these groups can be contacted by form letter with ease. (See the Conservation Directory for a list of national groups.) Similarly, for proposals that may have major implications for the business community, trade associations can be helpful means of alerting affected groups. The Federal Register notice can be relied upon to notify others that you did not know about. But the Federal Register is of little use for reaching individuals or local groups interested in a site specific proposal. Therefore notices in local papers, letters to local government officials and personal contact with a few known interested individuals would be more appropriate. Land owners abutting any proposed project site should be notified individually. Remember that issuing press releases to newspapers, and radio and TV stations is not enough, because they may not be used by the media unless the proposal is considered "newsworthy." If the proposal is controversial, you can try alerting reporters or editors to an upcoming scoping meeting for coverage in special weekend sections used by many papers. But placing a notice in the legal notices section of the paper is the only guarantee that it will be published.

5. Conducting a public meeting.

In our study of agency practice in conducting scoping, the most interesting information on what works and doesn't work involves the conduct of meetings. Innovative techniques have been developed, and experience shows that these can be successful. One of the most important factors turns out to be the training and experience of the moderator. The U.S. Office of Personnel Management and others give training courses on how to run a meeting effectively. Specific techniques are taught to keep the meeting on course and to deal with confrontations. These techniques are sometimes called "meeting facilitation skills." When holding a meeting, the principle thing to remember about scoping is that it is a process to initiate preparation of an EIS. It is not concerned with the ultimate decision on the proposal. A fruitful scoping process leads to an adequate environmental analysis, including all reasonable alternatives and mitigation measures. This limited goal is in the interest of all the participants, and thus offers the possibility of agreement by the parties on this much at least. To run a successful meeting you must keep the focus on this positive purpose. At the point of scoping therefore, in one sense all the parties involved have a common goal, which is a thorough environmental review. If you emphasize this in the meeting you can stop any grandstanding speeches without a heavy hand, by simply asking the speaker if he or she has any concrete suggestions for the group on issues to be covered in the EIS. By frequently drawing the meeting back to this central purpose of scoping, the opponents of a proposal will see that you have not already made a decision, and they will be forced to deal with the real issues. In addition, when people see that you are genuinely seeking their opinion, some will volunteer useful information about a particular subject or site that they may know better than anyone on your Staff. As we stated above, we found that informal meetings in mall groups are the most satisfactory for eliciting useful issues and information. Small groups can be formed in two ways: you can invite different interest groups to different meetings, or you can break a large number into small groups for discussion. One successful model is used by the Army Corps of Engineers, among others. In cases where a public meeting is desired, it is publicized and scheduled for a location that will be convenient for as many potential participants as possible. The information packet is made available in several ways, by sending it to those known to be interested, giving a telephone number in

the public notices for use in requesting one, and providing more at the door of the meeting place as well. As participants enter the door, each is given a number. Participants are asked to register their name, address and/or telephone number for use in future contact during scoping and the rest of the NEPA process. The first part of the meeting is devoted to a discussion of the proposal in general, covering its purpose, proposed location, design, and any other aspects that can be presented in a lecture format. A question and answer period concerning this information is often held at this time. Then if there are more than 15 or 20 attendees at the meeting, the next step is to break it into small groups for more intensive discussion. At this point, the numbers held by the participants are used to assign them to small groups by sequence, random drawing, or any other method. Each group should be no larger than 12, and 8-10 is better. The groups are informed that their task is to prepare a list of significant environmental issues and reasonable alternatives for analysis in the EIS. These lists will be presented to the main group and combined into a master list, after the discussion groups are finished. The rules for how priorities are to be assigned to the issues identified by each group should be made clear before the large group breaks up. Some agencies ask each group member to vote for the 5 or 10 most important issues. After tallying the votes of individual members, each group would only report out those issues that received a certain number of votes. In this way only those items of most concern to the members would even make the list compiled by each group. Some agencies go further, and only let each group report out the top few issues identified. But you must be careful not to ignore issues that may be considered a medium priority by many people. They may still be important, even if not in the top rank. Thus instead of simply voting, the members of the groups should rank the listed issues in order of perceived importance. Points may be assigned to each item on the basis of the rankings by each member, so that the group can compile a list of its issues in priority order. Each group should then be asked to assign cut-off numbers to separate high, medium and low priority items. Each group should then report out to the main meeting all of its issues, but with priorities clearly assigned. One member of the lead agency or cooperating agency staff should join each group to answer questions and to listen to the participants' expressions of concern. It has been the experience of many of those who have tried this method that it is better not to have the agency person lead the group discussions. There does need to be a leader, who should be chosen by the group members. In this way, the agency staff member will not be perceived as forcing his opinions on the others. If the agency has a sufficient staff of formally trained "meeting facilitators," they may be able to achieve the same result even where agency staff people lead the discussion groups. But absent such training, the staff should not lead the discussion groups. A good technique is to have the agency person serve as the recording secretary for the group, writing down each impact and alternative that is suggested for study by the participants. This enhances the neutral status of the agency representative, and ensures that he is perceived as listening and reacting to the views of the group. Frequently, the recording of issues is done with a large pad mounted on the wall like a blackboard, which has been well received by agency and public alike, because all can see that the views expressed actually have been heard and understood. When the issues are listed, each must be clarified or combined with others to eliminate duplication or fuzzy concepts. The agency staff person can actually lead in this effort because of his need to reflect on paper exactly what the issues are. After the group has listed all the environmental impacts and alternatives and any other issues that the members wish to have considered, they are asked to discuss the relative merits and importance of each listed item. The group should be reminded that one of its tasks is to eliminate insignificant issues. Following this, the members assign priorities or vote using one of the methods described above. The discussion groups are then to return to the large meeting to report on the results of their ranking. At this point further discussion may be useful to seek a consensus on which issues are really insignificant. But the moderator must not appear to be ruthlessly eliminating issues that the participants ranked of high or medium importance. The best that can usually be achieved is to "deemphasize" some of them, by placing them in the low priority category.

6. What to do with the comments.

After you have comments from the cooperating agencies and the interested public, you must evaluate them and make judgments about which issues are in fact significant and which ones are not. The decision of what the EIS should contain is ultimately made by the lead agency. But you will now know what the interested participants consider to be the principal areas for study and analysis. You should be guided by these concerns, or be prepared to briefly explain why you do not agree. Every issue that is raised as a priority matter during scoping should be addressed in some manner in the EIS, either by in-depth analysis, or at least a short explanation showing that the issue was examined, but not considered significant for one or more reasons. Some agencies have complained that the time savings claimed for scoping have not been realized because after public groups raise numerous minor matters, they cannot focus the EIS on the significant issues. It is true that it is always easier to add issues than it is to subtract them during scoping. And you should realize that trying to eliminate a particular environmental impact or alternative from study may arouse the suspicions of some people. cooperating agencies may be even more reluctant to eliminate issues in their areas of special expertise than the public participants. But the way to approach it is to seek consensus on which issues are less important. These issues may then be deemphasized in the EIS by a brief discussion of why they were not examined in depth. If no consensus can be reached, it is still your responsibility to select the significant issues. The lead agency cannot abdicate its role and simply defer to the public. Thus a group of participants at a scoping meeting should not be able to "vote" an insignificant matter into a big issue. If a certain issue is raised and in your professional judgment you believe it is not significant, explain clearly and briefly in the EIS why it is not significant. There is no need to devote time and pages to it in the EIS if you can show that it is not relevant or important to the proposed action. But you should address in some manner all matters that were raised in the scoping process, either by an extended analysis or a brief explanation showing that you acknowledge the concern. Several agencies have made a practice of sending out a post-scoping document to make public the decisions that have been made on what issues to cover in the EIS. This is not a requirement, but in certain controversial cases it can be worthwhile. Especially when scoping has been conducted by written comments, and there has been no face-to-face contact, a post-scoping document is the only assurance to the participants that they were heard and understood until the draft EIS comes out. Agencies have acknowledged to us that "letters instead of meetings seem to get disregarded easier." Thus a reasonable quid pro quo for relying on comment letters would be to send out a post-scoping document as feedback to the commentors. The post-scoping document may be as brief as a list of impacts and alternatives selected for analysis; it may consist of the "scope of work" produced by the lead and cooperating agencies for their own EIS work or for the contractor; or it may be a special document that describes all the issues and explains why they were selected.

7. Allocating work assignments and setting schedules.

Following the public participation in whatever form, and the selection of issues to be covered, the lead agency must allocate the EIS preparation work among the available resources. If there are no cooperating agencies, the lead agency allocates work among its own personnel or contractors. If there are cooperating agencies involved, they may be assigned specific research or writing tasks. The NEPA regulations require that they normally devote their own resources to the issues in which they have special expertise or jurisdiction by law. (Sections 1501.6(b)(3), (5), and 1501.7(a)(4)). In all cases, the lead agency should set a schedule for completion of the work, designate a project manager and assign the reviewers, and must set a time limit for the entire NEPA analysis if requested to do so by an applicant. (Section 1501.8).

8. A few ideas to try.

- a. Route design workshop As part of a scoping process, a successful innovation by one agency involved route selection for a railroad. The agency invited representatives of the interested groups (identified at a previous public meeting) to try their hand at designing alternative routes for a proposed rail segment. Agency staff explained design constraints and evaluation criteria such as the desire to minimize damage to prime agricultural land and valuable wildlife habitat. The participants were divided into small groups for a few hours of intensive work. After learning of the real constraints on alternative routes, the participants had a better understanding of the agency's and applicant's viewpoints. Two of the participants actually supported alternative routes that affected their own land because the overall impacts of these routes appeared less adverse. The participants were asked to rank the five alternatives they had devised and the top two were included in the EIS. But the agency did not permit the groups to apply the same evaluation criteria to the routes proposed by the applicant or the agency. Thus public confidence in the process was not as high as it could have been, and probably was reduced when the applicant's proposal was ultimately selected. The Council recommends that when a hands-on design workshop is used, the assignment of the group be expanded to include evaluation of the reasonableness of all the suggested alternatives.
- b. Hotline Several agencies have successfully used a special telephone number, essentially a hotline, to take public comments before, after, or instead of a public meeting. It helps to designate a named staff member to receive these calls so that sane continuity and personal relationships can be developed.
- c. Videotape of sites A videotape of proposed sites is an excellent tool for explaining site differences and limitations during the lecture-format part of a scoping meeting.
- d. Videotape meetings one agency has videotaped whole scoping meetings. Staff found that the participants took their roles more seriously and the taping appeared not to precipitate grandstanding tactics.
- e. Review committee Success has been reported from one agency which sets up review committees, representing all interested groups, to oversee the scoping process. The committees help to design the scoping process. In cooperation with the lead agency, the committee reviews the materials generated by the scoping meeting. Again, however, the final decision on EIS content is the responsibility of the lead agency.
- f. Consultant as meeting moderator In some hotly contested cases, several agencies have used the EIS consultant to actually run the scoping meeting. This is permitted under the NEPA regulations and can be useful to de-fuse a tense atmosphere if the consultant is perceived as a neutral third party. But the responsible agency officials must attend the meetings. There is no substitute for developing a relationship between the agency officials and the affected parties. Moreover, if the responsible officials are not prominently present, the public may interpret that to mean that the consultant is actually making the decisions about the EIS, and not the lead agency.
- g. Money saving tips Remember that money can be saved by using conference calls instead of meetings, tape-recording the meetings instead of hiring a stenographer, and finding out whether people want a meeting before announcing it.

C. Pitfalls.

We list here some of the problems that have been experienced in certain scoping cases, in order to enable others to avoid the same difficulties.

1. Closed meetings.

In response to informal advice from CEQ that holding separate meetings for agencies and the public would be permitted under the regulations and could be more productive, one agency scheduled a scoping meeting for the cooperating agencies same weeks in advance of the public meeting. Apparently, the lead agency felt that the views of the cooperating agencies would be more candidly expressed if the meeting were closed. In any event, several members of the public learned of the meeting and asked to be present. The lead agency acquiesced only after newspaper reporters were able to make a story out of the closed session. At the meeting, the members of the public were informed that they would not be allowed to speak, nor to record the proceedings. The ill feeling aroused by this chain of events may not be repaired for a long time. Instead, we would suggest the following possibilities:

- a. Although separate meetings for agencies and public groups may be more efficient, there is no magic to them. By all means, if someone insists on attending the agency meeting, let him. There is nothing as secret going on there as he may think there is if you refuse him admittance. Better yet, have your meeting of cooperating agencies after the public meeting. That may be the most logical time anyway, since only then can the scope of the EIS be decided upon and assignments made among the agencies. If it is well done, the public meeting will satisfy most people and show them that you are listening to them.
- b. Always permit recording. In fact, you should suggest it for public meetings. All parties will feel better if there is a record of the proceeding. There is no need for a stenographer, and tape is inexpensive. It may even be better than a typed transcript, because staff and decision-makers who did not attend the meeting can listen to the exchange and may learn a lot about public perceptions of the proposal.
- c. When people are admitted to a meeting, it makes no sense to refuse their requests to speak. However, you can legitimately limit their statements to the subject at hand-scoping. You do not have to permit some participants to waste the others' time if they refuse to focus on the impacts and alternatives for inclusion in the EIS. Having a tape of the proceedings could be useful after the meeting if there is some question that speakers were improperly silenced. But it takes an experienced moderator to handle a situation like this.
- d. The scoping stage is the time for building confidence and trust on all sides of a proposal, because this is the only time when there is a cannon enterprise. The attitudes formed at this stage can carry through the project review process. Certainly it is difficult for things to get better. So foster the good will as long as you can by listening to what is being said during scoping. It is possible that out of that dialogue may appear recommendations for changes and mitigation measures that can turn a controversial fight into an acceptable proposal.

2. Contacting interested groups.

Some problems have arisen in scoping where agencies failed to contact all the affected parties, such as industries or state and local governments. In one case, a panel was assembled to represent various interests in scoping an EIS on a wildlife-related program. The agency had an excellent format for the meeting, but the panel did not represent industries that would be affected by the program or interested state and local governments. As a result, the EIS may fail to reflect the issues of concern to these parties. Another agency reported to us that it failed to contact parties directly because staff feared that if they missed someone they would be accused of favoritism. Thus they relied on the issuance of press releases which were not effective. Many people who did not learn about the meetings in time sought additional meeting opportunities, which cost extra money and delayed the process. In our experience, the attempt to reach people is worth the effort. Even if you miss someone, it will be clear that you tried. You can enlist a few representatives of an interest

group to help you identify and contact others. Trade associations, chambers of commerce, local civic groups, and local and national conservation groups can spread the word to members.

3. Tiering.

Many people are not familiar with the way environmental impact statements can be "tiered" under the NEPA regulations, so that issues are examined in detail at the stage that decisions on them are being made. See Section 1508.28 of the regulations. For example, if a proposed program is under review, it is possible that site specific actions are not yet proposed. In such a case, these actions are not addressed in the EIS on the program, but are reserved for a later tier of analysis. If tiering is being used, this concept must be made clear at the outset of any scoping meeting, so that participants do not concentrate on issues that are not going to be addressed at this time. If you can specify when these other issues will be addressed it will be easier to convince people to focus on the matters at hand.

4. Scoping for unusual programs.

One interesting scoping case involved proposed changes in the Endangered Species Program. Among the impacts to be examined were the effects of this conservation program on user activities such as mining, hunting, and timber harvest, instead of the other way around. Because of this reverse twist in the impacts to be analyzed, some participants had difficulty focusing on useful issues. Apparently, if the subject of the EIS is unusual, it will be even harder than normal for scoping participants to grasp what is expected of them. In the case of the Endangered Species Program EIS, the agency planned an intensive 3 day scoping session, successfully involved the participants, and reached accord on several issues that would be important for the future implementation of the program. But the participants were unable to focus on impacts and program alternatives for the EIS. We suggest that if the intensive session had been broken up into 2 or 3 meetings separated by days or weeks, the participants might have been able to get used to the new way of thinking required, and thereby to participate more productively. Programmatic proposals are often harder to deal with in a scoping context than site specific projects. Thus extra care should be taken in explaining the goals of the proposal and in making the information available well in advance of any meetings.

D. Lead and Cooperating Agencies.

Some problems with scoping revolve around the relationship between lead and cooperating agencies. Some agencies are still uncomfortable with these roles. The NEPA regulations, and the 40 Questions and Answers about the NEPA Regulations 46 Fed. Reg. 18026, (March 23, 1981) describe in detail the way agencies are now asked to cooperate on environmental analyses. (See Questions 9, 14, and 30.) We will focus here on the early phase of that cooperation. It is important for the lead agency to be as specific as possible with the cooperating agencies. Tell them what you want them to contribute during scoping: environmental impacts and alternatives. Some agencies still do not understand the purpose of scoping. Be sure to contact and involve representatives of the cooperating agencies who are responsible for NEPA-related functions. The lead agency will need to contact staff of the cooperating agencies who can both help to identify issues and alternatives and commit resources to a study, agree to a schedule for EIS preparation, or approve a list of issues as sufficient. In some agencies that will be at the district or state office level (e.g., Corps of Engineers, Bureau of Land Management, and Soil Conservation Service) for all but exceptional cases. In other agencies you must go to regional offices for scoping comments and commitments (e.g., EPA, Fish and Wildlife Service, Water and Power Resources Service). In still others, the field offices do not have NEPA responsibilities or expertise and

you will deal directly with headquarters (e.g., Federal Energy Regulatory Commission, Interstate Commerce Commission). In all cases you are looking for the office that can give you the answers you need. So keep trying until you find the organizational level of the cooperating agency that can give you useful information and that has the authority to make commitments. As stated in 40 Questions and Answers about the NEPA Regulations, the lead agency has the ultimate responsibility for the content of the EIS, but if it leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. (46 Fed. Reg. 18030, Question 14b.) At the same time, the cooperating agency will be concerned that the EIS contain material sufficient to satisfy its decisionmaking needs. Thus, both agencies have a stake in producing a document of good quality. The cooperating agencies should be encouraged not only to participate in scoping but also to review the decisions made by the lead agency about what to include in the EIS. Lead agencies should allow any information needed by a cooperating agency to be included, and any issues of concern to the cooperating agency should be covered, but it usually will have to be at the expense of the cooperating agency. Cooperating agencies have at least as great a need as the general public for advance information on a proposal before any scoping takes place. Agencies have reported to us that information from the lead agency is often too sketchy or comes too late for informed participation. Lead agencies must clearly explain to all cooperating agencies what the proposed action is conceived to be at this time, and what present alternatives and issues the lead agency sees, before expecting other agencies to devote time and money to a scoping session. Informal contacts among the agencies before scoping gets underway are valuable to establish what the cooperating agencies will need for productive scoping to take place. Some agencies will be called upon to be cooperators more frequently than others, and they may lack the resources to respond to the numerous requests. The NEPA regulations permit agencies without jurisdiction by law (i.e., no approval authority over the proposal) to decline the cooperating agency role. (Section 1501.6(c)). But agencies that do have jurisdiction by law cannot opt out entirely and may have to reduce their cooperating effort devoted to each EIS. (See Section 1501.6(c) and 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18030, Question 14a.) Thus, cooperators would be greatly aided by a priority list from the lead agency showing which proposals most need their help. This will lead to a more efficient allocation of resources. Some cooperating agencies are still holding back at the scoping stage in order to retain a critical position for later in the process. They either avoid the scoping sessions or fail to contribute, and then raise objections in comments on the draft EIS. We cannot emphasize enough that the whole point of scoping is to avoid this situation. As we stated in 40 Questions and Answers about the NEPA Regulations, "if the new alternative [or other issue] was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the [lead] agency." (46 Fed. Reg. 18035, Question 29b.)

III. Advice for Public Participants

Scoping is a new opportunity for you to enter the earliest phase of the decisionmaking process on proposals that affect you. Through this process you have access to public officials before decisions are made and the right to explain your objections and concerns. But this opportunity carries with it a new responsibility. No longer may individuals hang back until the process is almost complete and then spring forth with a significant issue or alternative that might have been raised earlier. You are now part of the review process, and your role is to inform the responsible agencies of the potential impacts that should be studied, the problems a proposal may cause that you foresee, and the alternatives and mitigating measures that offer promise. As noted above, and in 40 Questions and Answers, no longer will a comment raised for the first time after the draft EIS is finished be accorded the same serious consideration it would otherwise have merited if the issue had been raised during scoping. Thus you have a responsibility to come forward early with known issues. In

return, you get the chance to meet the responsible officials and to make the case for your alternative before they are committed to a course of action. To a surprising degree this avenue has been found to yield satisfactory results. There's no guarantee, of course, but when the alternative you suggest is really better, it is often hard for a decisionmaker to resist. There are several problems that commonly arise that public participants should be aware of:

A. Public input is often only negative

The optimal timing of scoping within the NEPA process is difficult to judge. On the one hand, as explained above (Section II.B.1.), if it is attempted too early, the agency cannot explain what it has in mind and informed participation will be impossible. On the other, if it is delayed, the public may find that significant decisions are already made, and their comments may be discounted or will be too late to change the project. Sane agencies have found themselves in a tactical cross-fire when public criticism arises before they can even define their proposal sufficiently to see whether they have a worthwhile plan.

Understandably, they would be reluctant after such an experience to invite public criticism early in the planning process through open scoping. But it is in your interest to encourage agencies to come out with proposals in the early stage because that enhances the possibility of your comments being used. Thus public participants in scoping should reduce the emotion level wherever possible and use the opportunity to make thoughtful, rational presentations on impacts and alternatives. Polarizing over issues too early hurts all parties. If agencies get positive and useful public responses from the scoping process, they will more frequently come forward with proposals early enough so that they can be materially improved by your suggestions.

B. Issues are too broad

The issues that participants tend to identify during scoping are much too broad to be useful for analytical purposes. For example, "cultural impacts" - what does this mean? "What precisely are the impacts that should be examined? When the EIS preparers encounter a comment as vague as this they will have to make their own judgment about what you meant, and you may find that your issues are not covered. Thus, you should refine the broad general topics, and specify which issues need evaluation and analysis.

C. Impacts are not identified

Similarly, people (including agency staff) frequently identify "causes" as issues but fail to identify the principal "effects" that the EIS should evaluate in depth. For example, oil and gas development is a cause of many impacts. Simply listing this generic category is of little help. You must go beyond the obvious causes to the specific effects that are of concern. If you want scoping to be seen as more than just another public meeting, you will need to put in extra work.

IV. Brief Points For Applicants.

Scoping can be an invaluable part of your early project planning. Your main interest is in getting a proposal through the review process. This interest is best advanced by finding out early where the problems with the proposal are, who the affected parties are, and where accommodations can be made. Scoping is an ideal meeting place for all the interest groups if you proposal are, who the affected parties are, and where accommodations can be made. Scoping is an ideal meeting place for all the interest groups if you have not already contacted them. In several cases, we found that the compromises made at this stage allowed a project to move efficiently through the permitting process virtually unopposed. The NEPA

regulations place an affirmative obligation on agencies to "provide for cases where actions are planned by private applicants" so that designated staff are available to consult with the applicants, to advise applicants of information that will be required during review, and to insure that the NEPA process commences at the earliest possible time. (Section 1501.2(d)). This section of the regulations is intended to ensure that environmental factors are considered at an early stage in the applicant's planing process. (See 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18028, Questions 8 and 9.) Applicants should take advantage of this requirement in the regulations by approaching the agencies early to consult on alternatives, mitigation requirements, and the agency's information needs. ibis early contact with the agency can facilitate a prompt initiation of the scoping process in cases where an EIS will be prepared. You will need to furnish sufficient information about your proposal to enable the lead agency to formulate a coherent presentation for cooperating agencies and the public. But don't wait until your choices are all made and the alternatives have been eliminated. (Section 1506.1). During scoping, be sure to attend any of the public meetings unless the agency is dividing groups by interest affiliation. You will be able to answer any questions about the proposal, and even more important, you will be able to hear the objections raised, and find out what the real concerns of the public are. This is, of course, vital information for future negotiations with the affected parties.

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GUIDANCE REGARDING NEPA REGULATIONS

40 CFR Part 1500

MEMORANDUM

For: Heads of Federal Agencies

From: A. Alan Hill, Chairman, Council on Environmental Quality

Re: Guidance Regarding NEPA Regulations

The Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) were issued on November 29, 1978. These regulations became effective for, and binding upon, most federal agencies on July 30, 1979, and for all remaining federal agencies on November 30, 1979.

As part of the Council's NEPA oversight responsibilities it solicited through an August 14, 1981, notice in the Federal Register public and agency comments regarding a series of questions that were developed to provide information on the manner in which federal agencies were implementing the CEQ regulations. On July 12, 1982, the Council announced the availability of a document summarizing the comments received from the public and other agencies and also identifying issue areas which the Council intended to review. On August 12, 1982, the Council held a public meeting to address those issues and hear any other comments which the public or other interested agencies might have about the NEPA process. The issues addressed in this guidance were identified during this process.

There are many ways in which agencies can meet their responsibilities under NEPA and the 1978 regulations. The purpose of this document is to provide the Council's guidance on various ways to carry out activities under the regulations.

Scoping

The Council on Environmental Quality (CEQ) regulations direct federal agencies which have made a decision to prepare an environmental impact statement to engage in a public scoping process. Public hearings or meetings, although often held, are not required; instead the manner in which public input will be sought is left to the discretion of the agency.

The purpose of this process is to determine the scope of the EIS so that preparation of the document can be effectively managed. Scoping is intended to ensure that problems are identified early and properly studied, that issues of little significance do not consume time and effort, that the draft EIS is thorough and balanced, and that delays occasioned by an inadequate draft EIS are avoided. The scoping process should identify the public and agency concerns; clearly define the environmental issues and alternatives to be examined in the EIS including the elimination of nonsignificant issues; identify related issues which originate from separate legislation, regulation, or Executive Order (e.g. historic preservation or endangered species concerns); and identify state and local agency requirements which must be addressed. An effective scoping process can help reduce unnecessary paperwork and time delays in preparing

and processing the EIS by clearly identifying all relevant procedural requirements.

In April 1981, the Council issued a "Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping" on the subject of Scoping Guidance. The purpose of this guidance was to give agencies suggestions as to how to more effectively carry out the CEQ scoping requirement. The availability of this document was announced in the Federal Register at 46 FR 25461. It is still available upon request from the CEQ General Counsel's office.

The concept of lead agency (§1508.16) and cooperating agency (§1508.5) can be used effectively to help manage the scoping process and prepare the environmental impact statement. The lead agency should identify the potential cooperating agencies. It is incumbent upon the lead agency to identify any agency which may ultimately be involved in the proposed action, including any subsequent permitting [48 FR 34264]a actions. Once cooperating agencies have been identified they have specific responsibility under the NEPA regulations (40 CFR 1501.6). Among other things cooperating agencies have responsibilities to participate in the scoping process and to help identify issues which are germane to any subsequent action it must take on the proposed action. The ultimate goal of this combined agency effort is to produce an EIS which in addition to fulfilling the basic intent of NEPA, also encompasses to the maximum extent possible all the environmental and public involvement requirements of state and federal laws, Executive Orders, and administrative policies of the involved agencies. Examples of these requirements include the Fish and Wildlife Coordination Act, the Clean Air Act, the Endangered Species Act, the National Historic Preservation Act, the Wild and Scenic Rivers Act, the Farmland Protection Policy Act, Executive Order 11990 (Protection of Wetlands), and Executive Order 11998 (Floodplain Management).

It is emphasized that cooperating agencies have the responsibility and obligation under the CEQ regulations to participate in the scoping process. Early involvement leads to early identification of significant issues, better decisionmaking, and avoidance of possible legal challenges. Agencies with "jurisdiction by law" must accept designation as a cooperating agency if requested (40 CFR 1501.6).

One of the functions of scoping is to identify the public involvement/public hearing procedures of all appropriate state and federal agencies that will ultimately act upon the proposed action. To the maximum extent possible, such procedures should be integrated into the EIS process so that joint public meetings and hearings can be conducted. Conducting joint meetings and hearings eliminates duplication and should significantly reduce the time and cost of processing an EIS and any subsequent approvals. The end result will be a more informed public cognizant of all facets of the proposed action.

It is important that the lead agency establish a process to properly manage scoping. In appropriate situations the lead agency should consider designating a project coordinator and forming an interagency project review team. The project coordinator would be the key person in monitoring time schedules and responding to any problems which may arise in both scoping and preparing the EIS. The project review team would be established early in scoping and maintained throughout the process of preparing the EIS. This review team would include state and local agency representatives. The review team would meet periodically to ensure that the EIS is complete, concise, and prepared in a timely manner.

A project review team has been used effectively on many projects. Some of the more important functions this review team can serve include: (1) A source of information, (2)

a coordination mechanism, and (3) a professional review group. As an information source, the review team can identify all federal, state, and local environmental requirements, agency public meeting and hearing procedures, concerned citizen groups, data needs and sources of existing information, and the significant issues and reasonable alternatives for detailed analysis, excluding the non-significant issues. As a coordination mechanism, the team can ensure the rapid distribution of appropriate information or environmental studies, and can reduce the time required for formal consultation on a number of issues (e.g., endangered species or historic preservation). As a professional review group the team can assist in establishing and monitoring a tight time schedule for preparing the EIS by identifying critical points in the process, discussing and recommending solutions to the lead agency as problems arise, advising whether a requested analysis or information item is relevant to the issues under consideration, and providing timely and substantive review comments on any preliminary reports or analyses that may be prepared during the process. The presence of professionals from all scientific disciplines which have a significant role in the proposed action could greatly enhance the value of the team.

The Council recognizes that there may be some problems with the review team concept such as limited agency travel funds and the amount of work necessary to coordinate and prepare for the periodic team meetings. However, the potential benefits of the team concept are significant and the Council encourages agencies to consider utilizing interdisciplinary project review teams to aid in EIS preparation. A regularly scheduled meeting time and location should reduce coordination problems. In some instances, meetings can be arranged so that many projects are discussed at each session. The benefits of the concept are obvious: timely and effective preparation of the EIS, early identification and resolution of any problems which may arise, and elimination, or at least reduction of, the need for additional environmental studies subsequent to the approval of the EIS.

Since the key purpose of scoping is to identify the issues and alternatives for consideration, the scoping process should "end" once the issues and alternatives to be addressed in the EIS have been clearly identified. Normally this would occur during the final stages of preparing the draft EIS and before it is officially circulated for public and agency review.

The Council encourages the lead agency to notify the public of the results of the scoping process to ensure that all issues have been identified. The lead agency should document the results of the scoping process in its administrative record.

The NEPA regulations place a new and significant responsibility on agencies and the public alike during the scoping process to identify all significant issues and reasonable alternatives to be addressed in the EIS. Most significantly, the Council has found that scoping is an extremely valuable aid to better decisionmaking. Thorough scoping may also have the effect of reducing the frequency with which proposed actions are challenged in court on the basis of an inadequate EIS. Through the techniques identified in this guidance, the lead agency will be able to document that an open public involvement process was conducted, that all reasonable alternatives were identified, that significant issues were identified and non-significant issues eliminated, and that the environmental public involvement requirements of all agencies were met, to the extent possible, in a single "one-stop" process.

Categorical Exclusions

Section 1507 of the CEQ regulations directs federal agencies when establishing implementing procedures to identify those actions which experience has indicated will not have a significant environmental effect and to categorically exclude them from NEPA review. In our August 1981 request for public comments, we asked the question "Have categorical exclusions been adequately identified and defined?".

The responses the Council received indicated that there was considerable belief that categorical exclusions were not adequately identified and defined. A number of commentators indicated that agencies had not identified all categories of actions that meet the categorical exclusion definition (§1508.4) or that agencies were overly restrictive in their interpretations of categorical exclusions. Concerns were expressed that agencies were requiring [48 FR 34265] too much documentation for projects that were not major federal actions with significant effects and also that agency procedures to add categories of actions to their existing lists of categorical exclusions were too cumbersome.

The National Environmental Policy Act and the CEQ regulations are concerned primarily with those "major federal actions significantly affecting the quality of the human environment" (42 U.S.C. 4332). Accordingly, agency procedures, resources, and efforts should focus on determining whether the proposed federal action is a major federal action significantly affecting the quality of the human environment. If the answer to this question is yes, an environmental impact statement must be prepared. If there is insufficient information to answer the question, an environmental assessment is needed to assist the agency in determining if the environmental impacts are significant and require an EIS. If the assessment shows that the impacts are not significant, the agency must prepare a finding of no significant impact. Further stages of this federal action may be excluded from requirements to prepare NEPA documents.

The CEQ regulations were issued in 1978 and most agency implementing regulations and procedures were issued shortly thereafter. In recognition of the experience with the NEPA process that agencies have had since the CEQ regulations were issued, the Council believes that it is appropriate for agencies to examine their procedures to insure that the NEPA process utilizes this additional knowledge and experience. Accordingly, the Council strongly encourages agencies to re-examine their environmental procedures and specifically those portions of the procedures where "categorical exclusions" are discussed to determine if revisions are appropriate. The specific issues which the Council is concerned about are (1) the use of detailed lists of specific activities for categorical exclusions, (2) the excessive use of environmental assessments/findings of no significant impact and (3) excessive documentation.

The Council has noted some agencies have developed lists of specific activities which qualify as categorical exclusions. The Council believes that if this approach is applied narrowly it will not provide the agency with sufficient flexibility to make decisions on a project-by-project basis with full consideration to the issues and impacts that are unique to a specific project. The Council encourages the agencies to consider broadly defined criteria which characterize types of actions that, based on the agency's experience, do not cause significant environmental effects. If this technique is adopted, it would be helpful for the agency to offer several examples of activities frequently performed by that agency's personnel which would normally fall in these categories. Agencies also need to consider whether the cumulative effects of several small actions would cause sufficient environmental impact to take the actions out of the categorically excluded class.

The Council also encourages agencies to examine the manner in which they use the

environmental assessment process in relation to their process for identifying projects that meet the categorical exclusion definition. A report(1) to the Council indicated that some agencies have a very high ratio of findings of no significant impact to environmental assessments each year while producing only a handful of EIS's. Agencies should examine their decisionmaking process to ascertain if some of these actions do not, in fact, fall within the categorical exclusion definition, or, conversely, if they deserve full EIS treatment.

As previously noted, the Council received a number of comments that agencies require an excessive amount of environmental documentation for projects that meet the categorical exclusion definition. The Council believes that sufficient information will usually be available during the course of normal project development to determine the need for an EIS and further that the agency's administrative record will clearly document the basis for its decision. Accordingly, the Council strongly discourages procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded.

Categorical exclusions promulgated by an agency should be reviewed by the Council at the draft stage. After reviewing comments received during the review period and prior to publication in final form, the Council will determine whether the categorical exclusions are consistent with the NEPA regulations.

Adoption Procedures

During the recent effort undertaken by the Council to review the current NEPA regulations, several participants indicated federal agencies were not utilizing the adoption procedures as authorized by the CEQ regulations. The concept of adoption was incorporated into the Council's NEPA Regulations (40 CFR 1506.3) to reduce duplicative EISs prepared by Federal agencies. The experiences gained during the 1970's revealed situations in which two or more agencies had an action relating to the same project; however, the timing of the actions was different. In the early years of NEPA implementation, agencies independently approached their activities and decisions. This procedure lent itself to two or even three EISs on the same project. In response to this situation the CEQ regulations authorized agencies, in certain instances, to adopt environmental impact statements prepared by other agencies.

In general terms, the regulations recognize three possible situations in which adoption is appropriate. One is where the federal agency participated in the process as a cooperating agency. (40 CFR 1506.3(c)). In this case, the cooperating agency may adopt a final EIS and simply issue its record of decision.(2) However, the cooperating agency must independently review the EIS and determine that its own NEPA procedures have been satisfied.

A second case concerns the federal agency which was not a cooperating agency, but is, nevertheless, undertaking an activity which was the subject of an EIS. (40 CFR 1506.3(b)). This situation would arise because an agency did not anticipate that it would be involved in a project which was the subject of another agency's EIS. In this instance where the proposed action is substantially the same as that action described in the EIS, the agency may adopt the EIS and recirculate (file with EPA and distribute to agencies and the public) it as a final EIS. However, the agency must independently review the EIS to determine that it is current and that its own NEPA procedures have been satisfied. When recirculating the final EIS the agency should provide information which identifies what federal action is involved.

The third situation is one in which the proposed action is not substantially the same as that covered by the EIS. In this case, any agency may adopt an EIS or a portion thereof by circulating the EIS as a draft or as a portion of the agency's draft and preparing a final EIS. (40 CFR 1506.3(a)). Repetitious analysis and time consuming data collection can be easily eliminated utilizing this procedure.

The CEQ regulations specifically address the question of adoption only in terms of preparing EIS's. However, the objectives that underlie this portion of the regulations -- i.e., reducing delays and eliminating duplication -- apply with equal force to the issue of adopting other environmental documents. Consequently, the Council encourages agencies to put in place a mechanism for [48 FR 34266] adopting environmental assessments prepared by other agencies. Under such procedures the agency could adopt the environmental assessment and prepare a Finding of No Significant Impact based on that assessment. In doing so, the agency should be guided by several principles:

- First, when an agency adopts such an analysis it must independently evaluate the information contained therein and take full responsibility for its scope and content.**
- Second, if the proposed action meets the criteria set out in 40 CFR 1501.4(e)(2), a Finding of No Significant Impact would be published for 30 days of public review before a final determination is made by the agency on whether to prepare an environmental impact statement.**

Contracting Provisions

Section 1506.5(c) of the NEPA regulations contains the basic rules for agencies which choose to have an environmental impact statement prepared by a contractor. That section requires the lead or cooperating agency to select the contractor, to furnish guidance and to participate in the preparation of the environmental impact statement. The regulation requires contractors who are employed to prepare an environmental impact statement to sign a disclosure statement stating that they have no financial or other interest in the outcome of the project. The responsible federal official must independently evaluate the statement prior to its approval and take responsibility for its scope and contents.

During the recent evaluation of comments regarding agency implementation of the NEPA process, the Council became aware of confusion and criticism about the provisions of Section 1506.5(c). It appears that a great deal of misunderstanding exists regarding the interpretation of the conflict of interest provision. There is also some feeling that the conflict of interest provision should be completely eliminated.(3)

Applicability of §1506.5(c)

This provision is only applicable when a federal lead agency determines that it needs contractor assistance in preparing an EIS. Under such circumstances, the lead agency or a cooperating agency should select the contractor to prepare the EIS.(4)

This provision does not apply when the lead agency is preparing the EIS based on information provided by a private applicant. In this situation, the private applicant can obtain its information from any source. Such sources could include a contractor hired

by the private applicant to do environmental, engineering, or other studies necessary to provide sufficient information to the lead agency to prepare an EIS. The agency must independently evaluate the information and is responsible for its accuracy.

Conflict of Interest Provisions

The purpose of the disclosure statement requirement is to avoid situations in which the contractor preparing the environmental impact statement has an interest in the outcome of the proposal. Avoidance of this situation should, in the Council's opinion, ensure a better and more defensible statement for the federal agencies. This requirement also serves to assure the public that the analysis in the environmental impact statement has been prepared free of subjective, self-serving research and analysis.

Some persons believe these restrictions are motivated by undue and unwarranted suspicion about the bias of contractors. The Council is aware that many contractors would conduct their studies in a professional and unbiased manner. However, the Council has the responsibility of overseeing the administration of the National Environmental Policy Act in a manner most consistent with the statute's directives and the public's expectations of sound government. The legal responsibilities for carrying out NEPA's objectives rest solely with federal agencies. Thus, if any delegation of work is to occur, it should be arranged to be performed in as objective a manner as possible.

Preparation of environmental impact statements by parties who would suffer financial losses if, for example, a "no action" alternative were selected, could easily lead to a public perception of bias. It is important to maintain the public's faith in the integrity of the EIS process, and avoidance of conflicts in the preparation of environmental impact statements is an important means of achieving this goal.

The Council has discovered that some agencies have been interpreting the conflicts provision in an overly burdensome manner. In some instances, multidisciplinary firms are being excluded from environmental impact statements preparation contracts because of links to a parent company which has design and/or construction capabilities. Some qualified contractors are not bidding on environmental impact statement contracts because of fears that their firm may be excluded from future design or construction contracts. Agencies have also applied the selection and disclosure provisions to project proponents who wish to have their own contractor for providing environmental information. The result of these misunderstandings has been reduced competition in bidding for EIS preparation contracts, unnecessary delays in selecting a contractor and preparing the EIS, and confusion and resentment about the requirement. The Council believes that a better understanding of the scope of §1506.5(c) by agencies, contractors and project proponents will eliminate these problems.

Section 1506.5(c) prohibits a person or entity entering into a contract with a federal agency to prepare an EIS when that party has at that time and during the life of the contract pecuniary or other interests in the outcomes of the proposal. Thus, a firm which has an agreement to prepare an EIS for a construction project cannot, at the same time, have an agreement to perform the construction, nor could it be the owner of the construction site. However, if there are no such separate interests or arrangements, and if the contract for EIS preparation does not contain any incentive clauses or guarantees of any future work on the project, it is doubtful that an inherent conflict of interest will exist. Further, §1506.5(c) does not prevent an applicant from submitting information to an agency. The lead federal agency should evaluate potential conflicts of

interest prior to entering into any contract for the preparation of environmental documents.

Selection of Alternatives in Licensing and Permitting Situations

Numerous comments have been received questioning an agency's obligation, under the National Environmental Policy Act, to evaluate alternatives to a proposed action developed by an applicant for a federal permit or license. This concern arises from a belief that projects conceived and developed by private parties should not be questioned or second-guessed by the government. There has been discussion of developing two standards to determining the range of alternatives to be evaluated: The "traditional" standard for projects which are initiated and developed by a Federal agency, and a second standard of evaluating only those alternatives presented by an applicant for a permit or license.

Neither NEPA nor the CEQ regulations make a distinction between actions initiated by a Federal agency and by applicants. Early NEPA case law, while emphasizing the need for a rigorous examination of alternatives, did [48 FR 34267] not specifically address this issue. In 1981, the Council addressed the question in its document, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations".(5) The answer indicated that the emphasis in determining the scope of alternatives should be on what is "reasonable". The Council said that, "Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense rather than simply desirable from the standpoint of the applicant."

Since issuance of that guidance, the Council has continued to receive requests for further clarification of this question. Additional interest has been generated by a recent appellate court decision. *Roosevelt Campobello International Park Commission v. E.P.A.* (6) dealt with EPA's decision of whether to grant a permit under the National Pollutant Discharge Elimination System to a company proposing a refinery and deep-water terminal in Maine. The court discussed both the criteria used by EPA in its selecting of alternative sites to evaluate, and the substantive standard used to evaluate the sites. The court determined that EPA's choice of alternative sites was "focused by the primary objectives of the permit applicant . . ." and that EPA had limited its consideration of sites to only those sites which were considered feasible, given the applicant's stated goals. The court found that EPA's criteria for selection of alternative sites was sufficient to meet its NEPA responsibilities.

This decision is in keeping with the concept that an agency's responsibilities to examine alternative sites has always been "bounded by some notion of feasibility" to avoid NEPA from becoming "an exercise in frivolous boilerplate".(7) NEPA has never been interpreted to require examination of purely conjectural possibilities whose implementation is deemed remote and speculative. Rather, the agency's duty is to consider "alternatives as they exist and are likely to exist."(8) In the *Roosevelt Campobello* case, for example, EPA examined three alternative sites and two alternative modifications of the project at the preferred alternative site. Other factors to be developed during the scoping process -- comments received from the public, other government agencies and institutions, and development of the agency's own environmental data -- should certainly be incorporated into the decision of which alternatives to seriously evaluate in the EIS. There is, however, no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives.

Tiering

Tiering of environmental impact statements refers to the process of addressing a broad, general program, policy or proposal in an initial environmental impact statement (EIS), and analyzing a narrower site-specific proposal, related to the initial program, plan or policy in a subsequent EIS. The concept of tiering was promulgated in the 1978 CEQ regulations; the preceding CEQ guidelines had not addressed the concept. The Council's intent in formalizing the tiering concept was to encourage agencies, "to eliminate repetitive discussions and to focus on the actual issues ripe for decisions at each level of environmental review."(9)

Despite these intentions, the Council perceives that the concept of tiering has caused a certain amount of confusion and uncertainty among individuals involved in the NEPA process. This confusion is by no means universal; indeed, approximately half of those commenting in response to our question about tiering (10) indicated that tiering is effective and should be used more frequently. Approximately one-third of the commentators responded that they had no experience with tiering upon which to base their comments. The remaining commentators were critical of tiering. Some commentators believed that tiering added an additional layer of paperwork to the process and encouraged, rather than discouraged, duplication. Some commentators thought that the inclusion of tiering in the CEQ regulations added an extra legal requirement to the NEPA process. Other commentators said that an initial EIS could be prepared when issues were too broad to analyze properly for any meaningful consideration. Some commentators believed that the concept was simply not applicable to the types of projects with which they worked; others were concerned about the need to supplement a tiered EIS. Finally, some who responded to our inquiry questioned the courts' acceptance of tiered EISs.

The Council believes that misunderstanding of tiering and its place in the NEPA process is the cause of much of this criticism. Tiering, of course, is by no means the best way to handle all proposals which are subject to NEPA analysis and documentation. The regulations do not require tiering; rather, they authorize its use when an agency determines it is appropriate. It is an option for an agency to use when the nature of the proposal lends itself to tiered EIS(s).

Tiering does not add an additional legal requirement to the NEPA process. An environmental impact statement is required for proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. In the context of NEPA, "major Federal actions" include adoption of official policy, formal plans, and programs as well as approval of specific projects, such as construction activities in a particular location or approval of permits to an outside applicant. Thus, where a Federal agency adopts a formal plan which will be executed throughout a particular region, and later proposes a specific activity to implement that plan in the same region, both actions need to be analyzed under NEPA to determine whether they are major actions which will significantly affect the environment. If the answer is yes in both cases, both actions will be subject to the EIS requirement, whether tiering is used or not. The agency then has one of two alternatives: Either preparation of two environmental impact statements, with the second repeating much of the analysis and information found in the first environmental impact statement, or tiering the two documents. If tiering is utilized, the site-specific EIS contains a summary of the issues discussed in the first statement and the agency will incorporate by reference discussions from the first statement. Thus, the second, or site-specific statement, would focus primarily on the issues relevant to the specific proposal, and

would not duplicate material found in the first EIS. It is difficult to understand, given this scenario, how tiering can be criticized for adding an unnecessary layer to the NEPA process; rather, it is intended to streamline the existing process.

The Council agrees with commentators who stated that there are stages in the development of a proposal for a program, plan or policy when the issues are too broad to lend themselves to meaningful analysis in the framework of an EIS. The CEQ regulations specifically define a "proposal" as existing at, "that stage in the development of an action when an agency subject to [NEPA] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing the goal and the effects can be meaningfully evaluated." (11) Tiering is not intended to force an agency to prepare an EIS before this stage is reached; rather, it is a technique to be used once meaningful analysis can [48 FR 34268] be performed. An EIS is not required before that stage in the development of a proposal, whether tiering is used or not.

The Council also realizes that tiering is not well suited to all agency programs. Again, this is why tiering has been established as an option for the agency to use, as opposed to a requirement.

A supplemental EIS is required when an agency makes substantial changes in the proposed action relevant to environmental concerns, or when there are significant new circumstances or information relevant to environmental concerns bearing on the proposed action, and is optional when an agency otherwise determines to supplement an EIS.(12) The standard for supplementing an EIS is not changed by the use of tiering; there will no doubt be occasions when a supplement is needed, but the use of tiering should reduce the number of those occasions.

Finally, some commentators raised the question of courts' acceptability of tiering. This concern is understandable, given several cases which have reversed agency decisions in regard to a particular programmatic EIS. However, these decisions have never invalidated the concept of tiering, as stated in the CEQ regulations and discussed above. Indeed, the courts recognized the usefulness of the tiering approach in case law before the promulgation of the tiering regulation. Rather, the problems appear when an agency determines not to prepare a site-specific EIS based on the fact that a programmatic EIS was prepared. In this situation, the courts carefully examine the analysis contained in the programmatic EIS. A court may or may not find that the programmatic EIS contains appropriate analysis of impacts and alternatives to meet the adequacy test for the site-specific proposal. A recent decision by the Ninth Circuit Court of Appeals (13) invalidated an attempt by the Forest Service to make a determination regarding wilderness and non-wilderness designations on the basis of a programmatic EIS for this reason. However, it should be stressed that this and other decisions are not a repudiation of the tiering concept. In these instances, in fact, tiering has not been used; rather, the agencies have attempted to rely exclusively on programmatic or "first level" EISs which did not have site-specific information. No court has found that the tiering process as provided for in the CEQ regulations is an improper manner of implementing the NEPA process.

In summary, the Council believes that tiering can be a useful method of reducing paperwork and duplication when used carefully for appropriate types of plans, programs and policies which will later be translated into site-specific projects. Tiering should not be viewed as an additional substantive requirement, but rather a means of accomplishing the NEPA requirements in an efficient manner as possible.

Footnotes

1. **Environmental Law Institute, NEPA In Action Environmental Offices in Nineteen Federal Agencies, A Report To the Council on Environmental Quality, October 1981.**
2. **Records of decision must be prepared by each agency responsible for making a decision, and cannot be adopted by another agency.**
3. **The Council also received requests for guidance on effective management of the third-party environmental impact statement approach. However, the Council determined that further study regarding the policies behind this technique is warranted, and plans to undertake that task in the future.**
4. **There is no bar against the agency considering candidates suggested by the applicant, although the Federal agency must retain its independence. If the applicant is seen as having a major role in the selection of the contractor, contractors may feel the need to please both the agency and the applicant. An applicant's suggestion, if any, to the agency regarding the choice of contractors should be one of many factors involved in the selection process.**
5. **46 FR 18026 (1981).**
6. **684 F.2d 1041 (1st Cir. 1982).**
7. **Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978).**
8. **Monarch Chemical Works, Inc. v. Exxon, 466 F.Supp. 639, 650 (1979), quoting Carolina Environmental Study Group v. U.S., 510 F.2d 796, 801 (1975).**
9. **Preamble, FR, Vol. 43, No. 230, p. 55984, 11/29/78.**
10. **"Is tiering being used to minimize repetition in an environmental assessment and in environmental impact statements?", 46 FR 41131, August 14, 1981.**
11. **40 CFR 1508.23 (emphasis added).**
12. **40 CFR 1502.9(c).**
13. **California v. Block, 18 ERC 1149 (1982).**

a[48 FR 34264] indicates that the subsequent text may be cited to 48 Fed. Reg. 34264 (1983). Ed. Note.

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EXECUTIVE OFFICE OF THE PRESIDENT

Council on Environmental Quality

AGENCY: Council on Environmental Quality, Executive Office of the President

ACTION: Information only--Memorandum to Heads of Federal Departments and Agencies Regarding Pollution Prevention and the National Environmental Policy Act

SUMMARY: This memorandum provides guidance to the federal agencies on incorporating pollution prevention principles, techniques, and mechanisms into their planning and decisionmaking processes and evaluating and reporting those efforts in documents prepared pursuant to the National Environmental Policy Act.

FOR FURTHER INFORMATION CONTACT: Lucinda Low Swartz, Deputy General Counsel, Council on Environmental Quality, 722 Jackson Place, N.W., Washington, D.C. 20503. Telephone: 202/395-5754.

SUPPLEMENTARY INFORMATION:

MEMORANDUM

TO: Heads of Federal Departments and Agencies

FROM: Michael R. Deland

SUBJECT: Pollution Prevention and the National Environmental Policy Act

DATE: January 12, 1993

Introduction

Although substantial improvements in environmental quality have been made in the last 20 years by focusing federal energies and federal dollars on pollution abatement and on cleaning up pollution once it has occurred, achieving similar improvements in the future will require that polluters and regulators focus more of their efforts on pollution prevention. For example, reducing non-point source pollution--such as runoff from agricultural lands and urban roadways--and addressing cross-media environmental problems--such as the solid waste disposal problem posed by the sludge created in the abatement of air and water pollution--may not be possible with "end-of-the-pipe" solutions. Pollution prevention techniques seek to reduce the amount and/or toxicity of pollutants being generated. In addition, such techniques promote increased efficiency in the use of raw materials and in conservation of natural resources and can be a more cost-effective means of controlling pollution than does direct regulation. Many strategies have been developed and used to reduce pollution and protect resources, including using fewer toxic inputs, redesigning products, altering manufacturing and maintenance processes, and conserving energy.

This memorandum seeks to encourage all federal departments and agencies, in furtherance of their responsibilities under the National Environmental Policy Act (NEPA), to incorporate pollution prevention principles, techniques, and mechanisms into their planning and decisionmaking processes and to evaluate and report those efforts, as appropriate, in documents prepared pursuant to NEPA.

Background

NEPA provides a longstanding umbrella for a renewed emphasis on pollution prevention in all federal activities. Indeed, NEPA's very purpose is "to promote efforts which will prevent or eliminate damage to the environment...." 42 USC § 4321.

Section 101 of NEPA contains Congress' express recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment" and declaration of the policy of the federal government "to use all practicable means and measures...to create and maintain conditions under which man and nature can exist in productive harmony...." 42 USC § 4331(a). In order to carry out this environmental policy, Congress required all agencies of the federal government to act to preserve, protect, and enhance the environment. See 42 USC § 4331(b).

Further, Section 102 of NEPA requires the federal agencies to document the consideration of environmental values in their decisionmaking in "detailed statements" known as environmental impact statements (EIS). 42 USC § 4332(2)(C)). As the United States Supreme Court has noted, the "sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences." Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

The very premise of NEPA's policy goals, and the thrust for implementation of those goals in the federal government through the EIS process, is to avoid, minimize, or compensate for adverse environmental impacts before an action is taken. Virtually the entire structure of NEPA compliance has been designed by CEQ with the goal of preventing, eliminating, or minimizing environmental degradation. Thus, compliance with the goals and procedural requirements of NEPA, thoughtfully and fully implemented, can contribute to the reduction of pollution from federal projects, and from projects funded, licensed, or approved by federal agencies.

Defining Pollution Prevention

CEQ defines and uses the term "pollution prevention" broadly. In keeping with NEPA and the CEQ regulations implementing the procedural provisions of the statute, CEQ is not seeking to limit agency discretion in choosing a particular course of action, but rather is providing direction on the incorporation of pollution prevention considerations into agency planning and decisionmaking.

"Pollution prevention" as used in this guidance includes, and is not limited to, reducing or eliminating hazardous or other polluting inputs, which can contribute to both point and non-point source pollution; modifying manufacturing, maintenance, or other industrial practices; modifying product designs; recycling (especially in-process, closed loop recycling); preventing the disposal and transfer of pollution from one media to another; and increasing energy efficiency and conservation. Pollution prevention can be implemented at any stage--input, use or generation, and treatment--and may involve any technique--process modification, waste stream segregation, inventory control, good housekeeping or best management practices, employee training, recycling, and substitution. Indeed, any reasonable mechanism which successfully avoids, prevents, or reduces pollutant discharges or emissions other than by the traditional method of treating pollution at the discharge end of a pipe or a stack should, for purposes of this guidance, be considered pollution prevention.

Federal Agency Responsibilities

Pursuant to the policy goals found in NEPA Section 101 and the procedural requirements

found in NEPA Section 102 and in the CEQ regulations, the federal departments and agencies should take every opportunity to include pollution prevention considerations in the early planning and decisionmaking processes for their actions, and, where appropriate, should document those considerations in any EISs or environmental assessments (EA) prepared for those actions. In this context, federal actions encompass policies and projects initiated by a federal agency itself, as well as activities initiated by a non-federal entity which need federal funding or approval. Federal agencies are encouraged to consult EPA's Pollution Prevention Information Clearinghouse which can serve as a source of innovative ideas for reducing pollution.

1. Federal Policies, Projects, and Procurements

The federal government develops and implements a wide variety of policies, legislation, rules, and regulations; designs, constructs, and operates its own facilities; owns and manages millions of acres of public lands; and has a substantial role as a purchaser and consumer of commercial goods and services--all of these activities provide tremendous opportunities for pollution prevention which the federal agencies should grasp to the fullest extent practicable. Indeed, some agencies have already begun their own creative pollution prevention initiatives:

Land Management

The United States Forest Service has instituted best management practices on several national forests. These practices include leaving slash and downed logs in harvest units, maintaining wide buffer zones around streams, and encouraging biological diversity by mimicking historic burn patterns and other natural processes in timber sale design and layout. The beneficial effects have been a reduction in erosion, creation of fish and wildlife habitat, and the elimination of the need to burn debris after logging--in other words, a reduction of air and water pollution.

The National Park Service and the Bureau of Reclamation have implemented integrated pest management programs which minimize or eliminate the use of pesticides. In addition, in some parks storm water runoffs from parking lots have been eliminated by replacing asphalt with the use of a "geo-block" system (interlocking concrete blocks with openings for grass plantings). The lot is mowed as a lawn but has the structural strength to support vehicles.

The Tennessee Valley Authority (TVA) has developed a transmission line right-of-way maintenance program which requires buffer zones around sensitive areas for herbicide applications and use of herbicides which have soil retention properties which allow less frequent treatment and better control. TVA is also testing whole tree chipping to clear rights-of-way in a single pass application, allowing for construction vehicle access but reducing the need for access roads with the nonpoint source pollution associated with leveling, drainage, or compaction. In addition, TVA is using more steel transmission line poles to replace traditional wooden poles which have been treated with chemicals.

For construction projects it undertakes, the Department of Veterans Affairs discusses in NEPA documents and implements pollution prevention measures such as oil separation in storm water drainage of parking structures, soil erosion and sedimentation controls, and the use of recycled asphalt.

Office Programs

Many agencies, including the Department of Agriculture's Economic Research Service and Soil Conservation Service, Department of the Army, Department of the Interior, Consumer Product Safety Commission, and Tennessee Valley Authority, have implemented pollution

prevention initiatives in their daily office activities. These initiatives embrace recycling programs covering items such as paper products (e.g., white paper, newsprint, cardboard), aluminum, waste oil, batteries, tires, and scrap metal; procurement and use of "environmentally safe" products and products with recycled material content (e.g., batteries, tires, cement mixed with fly ash and recycled oil, plastic picnic tables); purchase and use of alternative-fueled vehicles in agency fleets; and encouragement of carpooling with employee education programs and locator assistance.

In planning the relocation of its headquarters, the Consumer Product Safety Commission (CPSC) is considering only buildings located within walking distance of the subway system as possible sites. By conveniently siting its headquarters facility, CPSC expects to triple the number of employees relying on public transportation for commuting and to substantially increase the number of agency visitors using public transportation for attendance at agency meetings or events.

Waste Reduction

The Department of Energy (DOE) has instituted an aggressive waste minimization program which has produced substantial results. DOE's nuclear facilities have reduced the sizes of radiological control areas in order to reduce low-level radioactive waste. Other facilities have scrap metal segregation programs which reduce solid waste and allow useable material to be sold and recycled. DOE facilities also are replacing solvents and cleaners containing hazardous materials with less or non-toxic materials.

The Department of the Army has a similar waste reduction program and is vigorously pursuing source reduction changes to industrial processes to eliminate toxic chemical usage that ultimately generates hazardous wastes. The Army's program includes material substitution techniques as well as alternative application technologies. For example, in an EIS and subsequent record of decision for proposed actions on Kwajalein Atoll, the Army committed to segregate solvents from waste oils in the Kwajalein power plant which will prevent continual contamination of large quantities of used engine oil with solvents. Oil recycling equipment will also be installed on power plant diesel generators allowing reuse of waste oil.

The Federal Aviation Administration (FAA) has also implemented a waste minimization program designed to eliminate or reduce the amount and toxicity of wastes generated by all National Airspace System facilities. This program includes using chemical life extenders and recycling additives to reduce the quantity and frequency of wastes generated at FAA facilities and providing chlorofluorocarbon (CFC) recycling equipment to each sector in the FAA to that CFCs used in industrial chillers, refrigeration equipment, and air conditioning units can be recaptured, recycled, and reused.

Inventory Control

DOE is improving procurement and inventory control of chemicals and control of materials entering radiologically controlled areas. This can minimize or prevent non-radioactive waste from entering a radioactive waste stream, thus reducing the amount of low-level waste needing disposal.

In two laboratories operated by the Consumer Product Safety Commission, pollution prevention is being practiced by limiting quantities of potentially hazardous materials on hand.

The Tennessee Valley Authority's nuclear program has established a chemical traffic control program to control the use and disposal of hazardous materials. As a result of the program,

hazardous materials are being replaced by less hazardous alternatives and use of hazardous chemicals and products has been reduced by 66%.

2. Federal Approvals

In addition to initiating their own policies and projects, federal agencies provide funding in the form of loans, contracts, and grants and/or issue licenses, permits, and other approvals for projects initiated by private parties and state and local government agencies. As with their own projects and consistent with their statutory authorities, federal agencies could urge private applicants to include pollution prevention considerations into the siting, design, construction, and operation of privately owned and operated projects. These considerations could then be included in the NEPA documentation prepared for the federally-funded or federally-approved project, and any pollution prevention commitments made by the applicant would be monitored and enforced by the agency. Thus, using their existing regulatory authority, federal agencies can effectively promote pollution prevention throughout the private sector. Below are some existing examples of incorporation of pollution prevention into federal approvals:

The Nuclear Regulatory Commission has required licensees to perform mitigation measures during nuclear power plant construction. These measures include controlling drainage by means of ditches, berms, and sedimentation basins; prompt revegetation to control erosion; and stockpiling and reusing topsoil. Similarly, mitigation measures required during the construction of transmission facilities include the removal of vegetation by cutting and trimming rather than bulldozing and avoiding multiple stream crossings, wet areas, and areas with steep slopes and highly erodible soils. The mitigation conditions in licenses serve to prevent pollution from soil erosion and to minimize waste from construction.

In the implementation of its programs, the Department of Agriculture encourages farmers to follow management practices designed to reduce the environmental impacts of farming. Such practices include using biological pest controls and integrated pest management to reduce the toxicity and application of pesticides, controlling nutrient loadings by installing buffer strips around streams and replacing inorganic fertilizers with animal manures, and reducing soil erosion through modified tillage and irrigation practices. Further, encouraging the construction of structures such as waste storage pits, terraces, irrigation water conveyances or pipelines, and lined or grassed waterways reduces runoff and percolation of chemicals into the groundwater.

The Department of Transportation's Maritime Administration is conducting research on a Shipboard Piloting Expert System. If installed on vessels, this system would provide a navigation and pilotage assistance capability which would instantly provide warnings to a ship master or pilot of pending hazards and recommended changes in vessel heading to circumvent the hazard. The system could prevent tanker collisions or groundings which cause catastrophic releases of pollutants.

The Department of the Interior's Minerals Management Service (MMS) prepares EISs which examine the effects of potential outer continental shelf (OCS) oil exploration on the environment and the various mitigation measures that may be needed to minimize such effects. Some pollution prevention measures which are analyzed in these EISs and which have been adopted for specific lease sales include measures designed to minimize the effects of drilling fluids discharge, waste disposal, oil spills, and air emissions. For example, MMS requires OCS operations to use curbs, gutters, drip pans, and drains on drilling platforms and rig decks to collect contaminants such as oil which may be recycled.

Incorporating Pollution Prevention into NEPA Documents

NEPA and the CEQ regulations establish a mechanism for building environmental considerations into federal decisionmaking. Specifically, the regulations require federal agencies to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 CFR § 1501.2. This mechanism can be used to incorporate pollution prevention in the early planning stages of a proposal.

In addition, prior to preparation of an EIS, the federal agency proposing the action is required to conduct a scoping process during which the public and other federal agencies are able to participate in discussions concerning the scope of issues to be addressed in the EIS. See 40 CFR § 1501.7. Including pollution prevention as an issue in the scoping process would encourage those outside the federal agency to provide insights into pollution prevention technologies which might be available for use in connection with the proposal or its possible alternatives.

Pollution prevention should also be an important component of mitigation of the adverse impacts of a federal action. To the extent practicable, pollution prevention considerations should be included in the proposed action and in the reasonable alternatives to the proposal, and should be addressed in the environmental consequences section of the EIS. See 40 CFR §§ 1502.14(f), 1502.16(h), and 1508.20.

Finally, when an agency reaches a decision on an action for which an EIS was completed, a public record of decision must be prepared which provides information on the alternatives considered and the factors weighed in the decisionmaking process. Specifically, the agency must state whether all practicable means to avoid or minimize environmental harm were adopted, and if not, why they were not. A monitoring and enforcement program must be adopted if appropriate for mitigation. See 40 CFR § 1505.2(c). These requirements for the record of decision and for monitoring and enforcement could be an effective means to inform the public of the extent to which pollution prevention is included in a decision and to outline how pollution prevention measures will be implemented.

A discussion of pollution prevention may also be appropriate in an EA. While an EA is designed to be a brief discussion of the environmental impacts of a particular proposal, the preparer could also include suitable pollution prevention techniques as a means to lessen any adverse impacts identified. See 40 CFR § 1508.9. Pollution prevention measures which contribute to an agency's finding of no significant impact must be carried out by the agency or made part of a permit or funding determination.

Conclusion

Pollution prevention can provide both environmental and economic benefits, and CEQ encourages federal agencies to consider pollution prevention principles in their planning and decisionmaking processes in accordance with the policy goals of NEPA Section 101 and to include such considerations in documents prepared pursuant to NEPA Section 102, as appropriate. In its role as a regulator, a policymaker, a manager of federal lands, a grantor of federal funds, a consumer, and an operator of federal facilities which can create pollution, the federal government is in a position to help lead the nation's efforts to prevent pollution before it is created. The federal agencies should act now to develop and incorporate pollution prevention considerations in the full range of their activities.

David B. Struhs

Chief of Staff

Billing Code: 3125-01-M

For a discussion of such strategies and activities, see the Council on Environmental Quality's 20th Environmental Quality report, at 215-257 (1989); 21st Environmental Quality report, at 79-133 (1990); and 22nd Environmental Quality report, at 151-158 (1991). It should be noted that EPA, in accordance with the Pollution Prevention Act of 1990 (Pub. L. No. 101-508, §§ 6601 et seq.), uses a different definition, one which describes pollution prevention in terms of source reduction and other practices which reduce or eliminate the creation of pollutants through increased efficiency in the use of raw materials, energy, water, or other resources or the protection of natural resources by conservation. "Source reduction" is defined as any practice which reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment prior to recycling, treatment, or disposal and which reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants. Under Section 309 of the Clean Air Act (42 USC § 7609), EPA is directed to review and comment on all major federal actions, including construction projects, proposed legislation, and proposed regulations. In addition, the Pollution Prevention Act of 1990 directs EPA to encourage source reduction practices in other federal agencies. EPA is using this authority to identify opportunities for pollution prevention in the federal agencies and to suggest how pollution prevention concepts can be addressed by the agencies in their EISs and incorporated into the wide range of government activities. As a guidance document, this memorandum does not impose any new legal requirements on the agencies and does not require any changes to be made to any existing agency environmental regulations.

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EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

MEMORANDUM TO HEADS OF AGENCIES ON THE APPLICATION OF THE
NATIONAL ENVIRONMENTAL POLICY ACT TO PROPOSED FEDERAL ACTIONS IN
THE UNITED STATES WITH TRANSBOUNDARY EFFECTS

FROM: KATHLEEN A. MCGINTY
CHAIR

DATE: JULY 1, 1997

In recent months, the Council has been involved in discussions with several agencies concerning the applicability of the National Environmental Policy Act (NEPA) to transboundary impacts that may occur as the result of proposed federal actions in the United States. To set forth a consistent interpretation of NEPA, CEQ is today issuing the attached guidance on NEPA analysis for transboundary impacts. In it, we advise that NEPA requires analysis and disclosure of transboundary impacts of proposed federal actions taking place in the United States.

We recommend that agencies which take actions with potential transboundary impacts consult as necessary with CEQ concerning specific procedures, proposals or programs which may be affected.

COUNCIL ON ENVIRONMENTAL QUALITY GUIDANCE ON NEPA ANALYSES FOR TRANSBOUNDARY IMPACTS

JULY 1, 1997

The purpose of this guidance is to clarify the applicability of the National Environmental Policy Act (NEPA) to proposed federal actions in the United States, including its territories and possessions, that may have transboundary effects extending across the border and affecting another country's environment. While the guidance arises in the context of negotiations undertaken with the governments of Mexico and Canada to develop an agreement on transboundary environmental impact assessment in North America,¹ the guidance pertains to all federal agency actions that are normally subject to NEPA, whether covered by an international agreement or not.

It is important to state at the outset the matters to which this guidance is addressed and those to which it is not. This guidance does not expand the range of actions to which NEPA currently applies. An action that does not otherwise fall under NEPA would not now fall under NEPA by virtue of this guidance. Nor does this guidance apply NEPA to so-called "extraterritorial actions"; that is, U.S. actions that take place in another country or otherwise outside the jurisdiction of the United States². The guidance pertains only to those proposed actions currently covered by NEPA that take place within the United States and its territories, and it does not change the applicability of NEPA law, regulations or case law to those actions. Finally, the guidance is consistent with long-standing principles of international law.

NEPA LAW AND POLICY

NEPA declares a national policy that encourages productive and enjoyable harmony between human beings and their environment, promotes efforts which will prevent or eliminate damage to the environment and biosphere, stimulates the health and welfare of human beings, and enriches the understanding of ecological systems.³ Section 102(1) of NEPA “authorizes and directs that, to the fullest extent possible the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [the] Act.”⁴ NEPA’s explicit statement of policies calls for the federal government “to use all practical means and measures to create and maintain conditions under which man and nature can exist in productive harmony”⁵ In addition, Congress directed federal agencies to “use all practical means to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.”⁶ Section 102(2)(C) requires federal agencies to assess the environmental impacts of and alternatives to proposed major federal actions significantly affecting the quality of the human environment.⁷ Congress also recognized the “worldwide and long-range character of environmental problems” in NEPA and directed agencies to assist other countries in anticipating and preventing a decline in the quality of the world environment.⁸

Neither NEPA nor the Council on Environmental Quality’s (CEQ) regulations implementing the procedural provisions of NEPA define agencies’ obligations to analyze effects of actions by administrative boundaries. Rather, the entire body of NEPA law directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, regardless of where those impacts might occur. Agencies must analyze indirect effects, which are caused by the action, are later in time or farther removed in distance, but are still reasonably foreseeable, including growth-inducing effects and related effects on the ecosystem,⁹ as well as cumulative effects.¹⁰ Case law interpreting NEPA has reinforced the need to analyze impacts regardless of geographic boundaries within the United States,¹¹ and has also assumed that NEPA requires analysis of major federal actions that take place entirely outside of the United States but could have environmental effects within the United States.¹²

Courts that have addressed impacts across the United States’ borders have assumed that the same rule of law applies in a transboundary context. In Swinomish Tribal Community v. Federal Energy Regulatory Commission,¹³ Canadian intervenors were allowed to challenge the adequacy of an environmental impact statement (EIS) prepared by FERC in connection with its approval of an amendment to the City of Seattle’s license that permitted raising the height of the Ross Dam on the Skagit River in Washington State. Assuming that NEPA required consideration of Canadian impacts, the court concluded that the report had taken the requisite “hard look” at Canadian impacts. Similarly, in Wilderness Society v.

Morton,¹⁴ the court granted intervenor status to Canadian environmental organizations that were challenging the adequacy of the trans-Alaska pipeline EIS. The court granted intervenor status because it found that there was a reasonable possibility that oil spill damage could significantly affect Canadian resources, and that Canadian interests were not adequately represented by other parties in the case.

In sum, based on legal and policy considerations, CEQ has determined that agencies must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States.

PRACTICAL CONSIDERATIONS

CEQ notes that many proposed federal actions will not have transboundary effects, and cautions agencies against creating boilerplate sections in NEPA analyses to address this issue.

Rather, federal agencies should use the scoping process¹⁵ to identify those actions that may have transboundary environmental effects and determine at that point their information needs, if any, for such analyses. Agencies should be particularly alert to actions that may affect migratory species, air quality, watersheds, and other components of the natural ecosystem that cross borders, as well as to interrelated social and economic effects.¹⁶ Should such potential impacts be identified, agencies may rely on available professional sources of information and should contact agencies in the affected country with relevant expertise.

Agencies have expressed concern about the availability of information that would be adequate to comply with NEPA standards that have been developed through the CEQ regulations and through judicial decisions. Agencies do have a responsibility to undertake a reasonable search for relevant, current information associated with an identified potential effect. However, the courts have adopted a “rule of reason” to judge an agency’s actions in this respect, and do not require agencies to discuss “remote and highly speculative consequences”.¹⁷ Furthermore, CEQ’s regulation at 40 CFR 1502.22 dealing with incomplete or unavailable information sets forth clear steps to evaluating effects in the context of an EIS when information is unobtainable.¹⁸ Additionally, in the context of international agreements, the parties may set forth a specific process for obtaining information from the affected country which could then be relied upon in most circumstances to satisfy agencies’ responsibility to undertake a reasonable search for information.

Agencies have also pointed out that certain federal actions that may cause transboundary effects do not, under U.S. law, require compliance with Sections 102(2)(C) and 102(2)(E) of NEPA. Such actions include actions that are statutorily exempted from NEPA, Presidential actions, and individual actions for which procedural compliance with NEPA is excused or modified by virtue of the CEQ regulations¹⁹ and various judicial doctrines interpreting NEPA²⁰. Nothing in this guidance changes the agencies’ ability to rely on those rules and doctrines.

INTERNATIONAL LAW

It has been customary law since the 1905 Trail Smelter Arbitration that no nation may undertake acts on its territory that will harm the territory of another state²¹. This rule of customary law has been recognized as binding in Principle 21 of the Stockholm Declaration on the Human Environment and Principle 2 of the 1992 Rio Declaration on Environment and Development. This concept, along with the duty to give notice to others to avoid or avert such harm, is incorporated into numerous treaty obligations undertaken by the United States. Analysis of transboundary impacts of federal agency actions that occur in the United States is an appropriate step towards implementing those principles.

CONCLUSION

NEPA requires agencies to include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States. Such effects are best identified during the scoping stage, and should be analyzed to the best of the agency's ability using reasonably available information. Such analysis should be included in the EA or EIS prepared for the proposed action.

¹ **The negotiations were authorized in Section 10.7 of the North American Agreement on Environmental Cooperation, which is a side agreement to the North American Free Trade Agreement. The guidance is also relevant to the ECE Convention on Environmental Impact Assessment in a Transboundary Context, signed in Espoo, Finland in February, 1991, but not yet in force.**

² **For example, NEPA does apply to actions undertaken by the National Science Foundation in the Antarctica. Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993).**

³ **42 USC 4321.**

⁴ **42 USC 4332(1).**

⁵ **42 USC 4331(a).**

⁶ **42 USC 4331(b)(3).**

⁷ **42 USC 4332(2)(C).**

⁸ **42 USC 4332(2)(F).**

⁹ **40 CFR 1508.8(b).**

¹⁰ **40 CFR 1508.7.**

¹¹ **See, for example, Sierra Club v. U.S. Forest Service, 46 F.3d 835 (8th Cir. 1995); Resources Ltd., Inc. v. Robertson, 35 F.3d 1300 and 8 F.3d 1394 (9th Cir. 1993); Natural Resources Defense Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988); County of Josephine v. Watt, 539 F.Supp. 696 (N.D. Cal. 1982).**

¹² See **Sierra Club v. Adams**, 578 F.2d 389 (D.C. Cir. 1978); **NORML v. Dept. of State**, 452 F.Supp. 1226 (D.D.C. 1978).

¹³ 627 F.2d 499 (D.C. Cir. 1980).

¹⁴ 463 F.2d 1261 (D.C. Cir. 1972).

¹⁵ 40 CFR 1501.7. Scoping is a process for determining the scope of the issues to be addressed and the parties that need to be involved in that process prior to writing the environmental analyses.

¹⁶ It is a well accepted rule that under NEPA, social and economic impacts by themselves do not require preparation of an EIS. 40 CFR 1508.14.

¹⁷ **Trout Unlimited v. Morton**, 509 F.2d 1276, 1283 (9th Cir. 1974). See also, **Northern Alaska Environmental Center v. Lujan**, 961 F.2d 886, 890 (9th Cir. 1992); **Idaho Conservation League v. Mumma**, 956 F.2d 1508, 1519 (9th Cir. 1992); **San Luis Obispo Mothers for Peace v. N.R.C.**, 751 F.2d 1287, 1300 (D.C. Cir. 1984); **Scientists Institute for Public Information, Inc. v. Atomic Energy Commission**, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

¹⁸ See Preamble to Amendment of 40 CFR 1502.22, deleting prior requirement for “worst case analysis” at 51 **Federal Register** 15625, April 25, 1986, for a detailed explanation of this regulation.

¹⁹ For example, agencies may contact CEQ for approval of alternative arrangements for compliance with NEPA in the case of emergencies. 40 CFR 1506.11.

²⁰ For example, courts have recognized that NEPA does not require an agency to make public information that is otherwise properly classified information for national security reasons, **Weinberger v. Catholic Action of Hawaii**, 454 U.S. 139 (1981).

²¹ **Trail Smelter Arbitration, U.S. v. Canada**, 3 UN Rep. Int’l Arbit. Awards 1911 (1941). The case involved a smelter in British Columbia that was causing environmental harm in the state of Washington. The decision held that “under principles of International Law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is described by clear and convincing injury.” *Id.* at 1965). Also see the American Law Institute’s **Restatement of the Foreign Relations Law of the United States 3d, Section 601**, (“State obligations with respect to environment of other States and the common environment”).



January 30, 2002

MEMORANDUM FOR THE HEADS OF FEDERAL AGENCIES

FROM: JAMES CONNAUGHTON, Chair

SUBJECT: COOPERATING AGENCIES IN IMPLEMENTING THE PROCEDURAL REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

The purpose of this Memorandum is to ensure that all Federal agencies are actively considering designation of Federal and non-federal cooperating agencies in the preparation of analyses and documentation required by the National Environmental Policy Act (NEPA), and to ensure that Federal agencies actively participate as cooperating agencies in other agency's NEPA processes. The CEQ regulations addressing cooperating agencies status (40 C.F.R. §§ 1501.6 & 1508.5) implement the NEPA mandate that Federal agencies responsible for preparing NEPA analyses and documentation do so "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. (42 U.S.C. §§ 4331(a), 4332(2)). Despite previous memoranda and guidance from CEQ, some agencies remain reluctant to engage other Federal and non-federal agencies as a cooperating agency. In addition, some Federal agencies remain reluctant to assume the role of a cooperating agency, resulting in an inconsistent implementation of NEPA.

Studies regarding the efficiency, effectiveness, and value of NEPA analyses conclude that stakeholder involvement is important in ensuring decisionmakers have the environmental information necessary to make informed and timely decisions efficiently. Cooperating agency status is a major component of agency stakeholder involvement that neither enlarges nor diminishes the decisionmaking authority of any agency involved in the NEPA process. This memo does not expand requirements or responsibilities beyond those found in current laws and regulations, nor does it require an agency to provide financial assistance to a cooperating agency.

The benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with other Federal, State, Tribal and local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra- and intergovernmental trust (e.g., partnerships at the community level) and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies' ability to adopt environmental documents. It is incumbent on Federal agency officials to identify as early as practicable in the environmental planning process those Federal, State, Tribal and local government agencies that have jurisdiction by law and special expertise with respect to all reasonable alternatives or significant environmental, social or economic impacts associated with a proposed action that requires NEPA analysis.

The Federal agency responsible for the NEPA analysis should determine whether such agencies are interested and appear capable of assuming the responsibilities of becoming a cooperating agency under 40 C.F.R. § 1501.6. Whenever invited Federal, State, Tribal and local agencies elect not to become cooperating agencies, they should still be considered for inclusion in interdisciplinary teams engaged in the NEPA process and on distribution lists for review and comment on the NEPA documents. Federal

agencies declining to accept cooperating agency status in whole or in part are obligated to respond to the request and provide a copy of their response to the Council. (40 C.F.R. § 1501.6(c)).

In order to assure that the NEPA process proceeds efficiently, agencies responsible for NEPA analysis are urged to set time limits, identify milestones, assign responsibilities for analysis and documentation, specify the scope and detail of the cooperating agency's contribution, and establish other appropriate ground-rules addressing issues such as availability of pre-decisional information. Agencies are encouraged in appropriate cases to consider documenting their expectations, roles and responsibilities (e.g., Memorandum of Agreement or correspondence). Establishing such a relationship neither creates a requirement nor constitutes a presumption that a lead agency provides financial assistance to a cooperating agency.

Once cooperating agency status has been extended and accepted, circumstances may arise when it is appropriate for either the lead or cooperating agency to consider ending cooperating agency status. This Memorandum provides factors to consider when deciding whether to invite, accept or end cooperating agency status. These factors are neither intended to be all-inclusive nor a rote test. Each determination should be made on a case-by-case basis considering all relevant information and factors, including requirements imposed on State, Tribal and local governments by their governing statutes and authorities. We rely upon you to ensure the reasoned use of agency discretion and to articulate and document the bases for extending, declining or ending cooperating agency status. The basis and determination should be included in the administrative record.

CEQ regulations do not explicitly discuss cooperating agencies in the context of Environmental Assessments (EAs) because of the expectation that EAs will normally be brief, concise documents that would not warrant use of formal cooperating agency status. However, agencies do at times – particularly in the context of integrating compliance with other environmental review laws – develop EAs of greater length and complexity than those required under the CEQ regulations. While we continue to be concerned about needlessly lengthy EAs (that may, at times, indicate the need to prepare an Environmental Impact Statement (EIS)), we recognize that there are times when cooperating agencies will be useful in the context of EAs. For this reason, this guidance is recommended for preparing EAs. However, this guidance does not change the basic distinction between EISs and EAs set forth in the regulations or prior guidance.

To measure our progress in addressing the issue of cooperating agency status, by October 31, 2002 agencies of the Federal government responsible for preparing NEPA analyses (e.g., the lead agency) shall provide the first bi-annual report regarding all EISs and EAs begun during the six-month period between March 1, 2002 and August 31, 2002. This is a periodic reporting requirement with the next report covering the September 2002 – February 2003 period due on April 30, 2003. For EISs, the report shall identify: the title; potential cooperating agencies; agencies invited to participate as cooperating agencies; agencies that requested cooperating agency status; agencies which accepted cooperating agency status; agencies whose cooperating agency status ended; and the current status of the EIS. A sample reporting form is at attachment 2. For EAs, the report shall provide the number of EAs and those involving cooperating agency(s) as described in attachment 2. States, Tribes, and units of local governments that have received authority by Federal law to assume the responsibilities for preparing NEPA analyses are encouraged to comply with these reporting requirements.

If you have any questions concerning this memorandum, please contact

Memorandum for the Heads of Federal Agencies

Horst G. Greczmiel, Associate Director for NEPA Oversight at 202-395-5750, Horst_Greczmiel@ceq.eop.gov, or 202-456-0753 (fax).

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EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

June 24, 2005

MEMORANDUM

FROM: JAMES L. CONNAUGHTON 
CHAIRMAN

TO: HEADS OF FEDERAL AGENCIES

RE: GUIDANCE ON THE CONSIDERATION OF PAST
ACTIONS IN CUMULATIVE EFFECTS ANALYSIS

I. Introduction

In this Memorandum, the Council on Environmental Quality (CEQ) provides guidance on the extent to which agencies of the Federal government are required to analyze the environmental effects of past actions when they describe the cumulative environmental effect of a proposed action in accordance with Section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and the CEQ Regulations for Implementing the Procedural Provisions of NEPA, 40 C.F.R. parts 1500-1508. CEQ's interpretation of NEPA is entitled to deference. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

II. Guidance

The environmental analysis required under NEPA is forward-looking, in that it focuses on the potential impacts of the proposed action that an agency is considering. Thus, review of past actions is required to the extent that this review informs agency decisionmaking regarding the proposed action. This can occur in two ways:

First, the effects of past actions may warrant consideration in the analysis of the cumulative effects of a proposal for agency action. CEQ interprets NEPA and CEQ's NEPA regulations on cumulative effects as requiring analysis and a concise description of the identifiable present effects of past actions to the extent that they are relevant and useful in analyzing whether the reasonably foreseeable effects of the agency proposal for action and its alternatives may have a continuing, additive and significant relationship to those effects. In determining what information is necessary for a cumulative effects analysis, agencies should use scoping to focus on the extent to which information is "relevant to reasonably foreseeable significant adverse impacts," is "essential to a reasoned choice among alternatives," and can be obtained without exorbitant cost. 40 CFR 1502.22. Based on scoping, agencies have discretion to determine whether, and to what extent, information about the specific nature, design, or present effects of a past action is useful for the agency's analysis of the effects of a proposal for agency action and its reasonable alternatives.

Agencies are not required to list or analyze the effects of individual past actions unless such information is necessary to describe the cumulative effect of all past actions combined. Agencies retain substantial discretion as to the extent of such inquiry and the appropriate level of explanation. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77 (1989). Generally, agencies can conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions without delving into the historical details of individual past actions.

Second, experience with and information about past direct and indirect effects of individual past actions may also be useful in illuminating or predicting the direct and indirect effects of a proposed action. However, these effects of past actions may have no cumulative relationship to the effects of the proposed action. Therefore, agencies should clearly distinguish analysis of direct and indirect effects based on information about past actions from a cumulative effects analysis of past actions.

III. Discussion

The CEQ regulations for the implementation of NEPA define cumulative effects consistent with the Supreme Court's reading of NEPA in *Kleppe v. Sierra Club*, 427 U.S. 390, 413-414 (1976). "Cumulative impact" is defined in CEQ's NEPA regulations as the "impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . ." 40 CFR 1508.7. CEQ interprets this regulation as referring only to the cumulative impact of the direct and indirect effects of the proposed action and its alternatives when added to the aggregate effects of past, present, and reasonably foreseeable future actions.

Agencies should be guided in their cumulative effects analysis by the scoping process, in which agencies identify the scope and "significant" issues to be addressed in an environmental impact statement. 40 CFR 1500.1(b), 1500.4(g), 1501.7, 1508.25. In the context of scoping, agencies typically decide the extent to which "it is reasonable to anticipate a cumulatively significant impact on the environment." 40 CFR 1508.27(b)(7). Agencies should ensure that their NEPA process produces environmental information that is useful to decisionmakers and the public by reducing the "accumulation of extraneous background data" and by "emphasiz[ing] real environmental issues and alternatives." 40 CFR 1500.2(b). Accordingly, the NEPA process requires agencies to identify "the significant environmental issues deserving study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement" at an early stage of agency planning. 40 CFR 1500.1(d). The Supreme Court has also emphasized that agencies may properly limit the scope of their cumulative effects analysis based on practical considerations. *Kleppe*, 427 U.S. at 414. The CEQ regulations provide for explicit documentation of such practical considerations when there is incomplete or unavailable information that is relevant to reasonably foreseeable significant adverse impacts. 40 CFR 1502.22. The extent and form of the information needed to analyze appropriately the cumulative effects of a proposed action and alternatives under NEPA varies widely and must be determined by the federal agency proposing the action on a case-by-case basis.

The analysis of cumulative effects begins with consideration of the direct and indirect effects on the environment that are expected or likely to result from the alternative proposals for

agency action. Agencies then look for present effects of past actions that are, in the judgment of the agency, relevant and useful because they have a significant cause-and-effect relationship with the direct and indirect effects of the proposal for agency action and its alternatives. CEQ regulations do not require the consideration of the individual effects of all past actions to determine the present effects of past actions. Once the agency has identified those present effects of past actions that warrant consideration, the agency assesses the extent that the effects of the proposal for agency action or its alternatives will add to, modify, or mitigate those effects. The final analysis documents an agency assessment of the cumulative effects of the actions considered (including past, present, and reasonably foreseeable future actions) on the affected environment.

With respect to past actions, during the scoping process and subsequent preparation of the analysis, the agency must determine what information regarding past actions is useful and relevant to the required analysis of cumulative effects. Cataloging past actions and specific information about the direct and indirect effects of their design and implementation could in some contexts be useful to predict the cumulative effects of the proposal. The CEQ regulations, however, do not require agencies to catalogue or exhaustively list and analyze all individual past actions. Simply because information about past actions may be available or obtained with reasonable effort does not mean that it is relevant and necessary to inform decisionmaking.

IV. Tools for NEPA Practitioners

a. Scoping:

It is not practical to analyze how the cumulative effects of an action interact with the universe; the analysis of environmental effects must focus on the aggregate effects of past, present and reasonably foreseeable future actions that are truly meaningful. Thus, analysts must narrow the focus of the cumulative effects analysis to effects of significance to the proposal for agency action and its alternatives, based on thorough scoping. A specific objective of scoping is to save time in the overall process by helping to ensure that draft statements adequately address the effects of the proposed action and alternatives that should be addressed. See Scoping Guidance (CEQ 1981) (<http://ceq.eh.doe.gov/nepa/regs/guidance.html>). Scoping provides the agency the opportunity to focus in on those cumulative effects that may be significant. The scope of the cumulative impact analysis is related to the magnitude of the environmental impacts of the proposed action. Proposed actions of limited scope typically do not require as comprehensive an assessment of cumulative impacts as proposed actions that have significant environmental impacts over a large area. Proposed actions that are typically finalized with a finding of no significant impact usually involve only a limited cumulative impact assessment to confirm that the effects of the proposed action do not reach a point of significant environmental impacts. Except in extraordinary circumstances, proposed actions that are categorically excluded from NEPA analysis do not involve cumulative impact analyses.

b. Incomplete and Unavailable Information:

The purpose of 40 CFR 1502.22 is to disclose the fact of incomplete or unavailable information, to acquire information if it is "relevant to reasonably foreseeable significant adverse impacts" and "essential to a reasoned choice among alternatives," and to advance decision-making

even in the absence of all information regarding reasonably foreseeable effects. The focus of this provision is, first and foremost, on "significant adverse impacts." The agency must find that the incomplete information is relevant to a "reasonably foreseeable" and "significant" impact before the agency is required to comply with 40 CFR 1502.22. If the incomplete cumulative effects information meets that threshold, the agency must consider the "overall costs" of obtaining the information. 40 CFR 1502.22(a). The term "overall costs" encompasses financial costs and other costs such as costs in terms of time (delay), program and personnel commitments. The requirement to determine if the "overall costs" of obtaining information is exorbitant should not be interpreted as a requirement to weigh the cost of obtaining the information against the severity of the effects, or to perform a cost-benefit analysis. Rather, the agency must assess overall costs in light of agency environmental program needs.

c. Programmatic Evaluations

In geographic settings where several Federal actions are likely to have effects on the same environmental resources it may be advisable for the lead Federal agencies to cooperate to provide historical or other baseline information relating to the resources. This can be done either through a programmatic NEPA analysis or can be done separately, such as through a joint inventory or planning study. The results can then be incorporated by reference into NEPA documents prepared for specific Federal actions so long as the programmatic analysis or study is reasonably available to the interested public.

d. Environmental Management Systems:

Agencies are encouraged at their discretion to consider whether programmatic coordination of cumulative effects analysis can be assisted through implementation of environmental management systems (EMS). See Executive Order 13148, 65 Fed. Reg. 24,595 (April 21, 2000); Memorandum from the Chairman of CEQ and the Director of the Office of Management and Budget to heads of all Federal agencies (<http://www.whitehouse.gov/ceq/memoranda01.html>). Pursuant to Executive Order 13148, agencies that choose to use an EMS to improve their cumulative analysis may find that the EMS can be designed and implemented to more efficiently meet NEPA requirements, improve public participation in the NEPA process, and provide a framework for cumulative effects analysis and adaptive management. By managing information collection on an ongoing basis, an EMS can provide a more systematic approach to agencies' identification and management of environmental conditions and obligations. Agencies can use an EMS to confirm assumptions, track performance, and increase confidence in their assessment of cumulative environmental effects.

d. Direct and Indirect Effects:

In some cases, based on scoping, information about the effects of past actions that were similar to the proposed action may be useful in describing the possible effects of the proposed action. In these circumstances, agencies should consider using available information about the effects of individual past actions that help illuminate or predict the direct or indirect effects of the proposed action and its alternatives. Agencies should clearly distinguish their use of past experience in direct and indirect effects analysis from their cumulative effects analysis.

**Request for Public Comment on
Bilateral Textile Consultations With the
Government of Turkey on Category
342/642**

June 5, 1987.

On May 27, 1987, the United States Government, under Article 3 of the Arrangement Regarding International Trade in Textiles and in accordance with section 204 of the Agricultural Act of 1956, requested the Government of Turkey to enter into consultations concerning exports to the United States of certain cotton and man-made fiber textile products, produced or manufactured in Turkey.

The purpose of this notice is to advise that, if no solution is agreed upon in consultations with Turkey, the Committee for the Implementation of Textile Agreements may later establish limits for the entry and withdrawal from warehouse for consumption of cotton and man-made fiber skirts in Category 342/642, produced or manufactured in Turkey and exported to the United States during the twelve-month period which began on May 27, 1987 and extends through May 26, 1988 at a level of 119,550 dozen.

A summary market statement for this category follows this notice.

Anyone wishing to comment or provide data or information regarding the treatment of this category is invited to submit such comments or information in ten copies to Mr. Ronald J. Levin, Acting Chairman, Committee for the Implementation of Textile Agreements, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230. Because the exact timing of the consultations is not yet certain, comments should be submitted promptly. Comments or information submitted in response to this notice will be available for public inspection in the Office of Textiles and Apparel, Room 3100, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC, and may be obtained upon request.

Further comment may be invited regarding particular comments or information received from the public which the Committee for the Implementation of Textile Agreements considers appropriate for further consideration.

The solicitation of comments regarding any aspect of the agreement or the implementation thereof is not a waiver in any respect of the exemption contained in 5 U.S.C. 553(a)(1) relating

to matters which constitute "a foreign affairs function of the United States."

For information contact: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, Washington, DC (202) 377-4212. For information on categories on which consultations have been requested call (202) 377-3740.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the Federal Register on December 13, 1983 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924), December 14, 1983, (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397), June 28, 1984 (49 FR 26622), July 16, 1984 (49 FR 28754), November 9, 1984 (49 FR 44782), July 14, 1986 (51 FR 25386), July 29, 1986 (51 FR 27068) and in Statistical Headnote 5, Schedule 3 of the Tariff Schedules of the United States Annotated (1987).

Arthur Garel,

*Acting Chairman, Committee for the
Implementation of Textile Agreements.*

Market Statement

*Category 342/642; Cotton and Man-Made
Fiber Skirts; Turkey, May 1987*

Summary and Conclusions

U.S. imports of Category 342/642 from Turkey were 119,550 dozen during the year ending February 1987, more than three times the 38,030 dozen imported a year earlier. During 1986, imports of Category 342/642 from Turkey reached 90,187 dozen compared to 31,350 dozen imported during 1985, a 92 percent increase.

The market for Category 342/642 has been disrupted by imports. The sharp and substantial increase in imports from Turkey has contributed to this disruption.

U.S. Production and Market Share

U.S. production of cotton and man-made fiber skirts declined five percent from 8,233 thousand dozen in 1983 to 7,805 thousand dozen in 1985. Comparison of government cuttings¹ data for 1986 and 1985 indicate that 1986 production will be down four percent. The domestic manufacturers' share of this market fell from 75 percent in 1983 to 67 percent in 1985. The U.S. market share is expected to decrease further in 1986, to around 57 percent.

U.S. Imports and Import Penetration

U.S. imports of Category 342/642 grew from 2,798 thousand dozen in 1983 to 3,794 thousand dozen in 1985, a 36 percent increase. During 1986, imports of Category 342/642 reached 5,995 thousand dozen, 58 percent above the level imported during 1985.

¹ U.S. cuttings data are for women's cotton, wool and man-made fiber skirts and include both woven and knit skirts.

The ratio of imports to domestic production increased from 34 percent in 1983 to 49 percent in 1985. The ratio is expected to reach 77 percent in 1986.

Duty Paid Value and U.S. Producer's Price

Approximately 79 percent of Category 342/642 imports from Turkey during the year ending February 1987 entered under TSUSA numbers 384.5251—women's cotton woven skirts, not of corduroy, denim or velveteen, not ornamented; 384.5146—girls' cotton woven skirts, not of corduroy, denim or velveteen, not ornamented; and 384.3444 (formerly a part of 384.3440)—women's and girls' cotton knit skirts, not ornamented. TSUSA number 384.5251 alone represents 43 percent of Category 342/642 imports from Turkey.

These skirts entered the U.S. at landed duty-paid values below the U.S. producers' prices for comparable skirts.

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**COUNCIL ON ENVIRONMENTAL
QUALITY**

**Implementation of National
Environmental Policy Act; Council
Recommendations**

AGENCY: Council on Environmental Quality, Executive Office of the President.

ACTION: Information only. Recommendations of the Council on Environmental Quality regarding the proposed amendments to the Army Corps of Engineers' Procedures Implementing the National Environmental Policy Act.

SUMMARY: The Council on Environmental Quality's (CEQ) regulations for the implementation of the National Environmental Policy Act (NEPA) includes procedures for referring to CEQ federal interagency disagreements concerning proposed major federal actions that might cause unsatisfactory environmental effects (40 CFR Part 1504).

On January 11, 1984, the U.S. Army Corps of Engineers published proposed amendments to the Army NEPA procedures. On February 25, 1985, the Environmental Protection Agency referred the proposed amended regulations to CEQ. Following interagency negotiations, the matter was re-referred to CEQ by Administrator Thomas on December 11, 1986.

After extensive study of the proposed amendments to the Army regulations, including participation from all

interested agencies and members of the public, CEQ has concluded its examination of the proposed amendments and has reached a consensus on findings and recommendations about the issues raised in the referral. To summarize those findings and recommendations:

The Army's current regulation addressing the scope of analysis can "federalize" private or state or local projects over which absent one Army permit, the federal government has neither control or responsibility. CEQ finds that Army's proposal to amend this regulation is generally within reasonable, implementing agency discretion and that policy and management considerations favor amending the regulation to provide formal and consistent guidance to Army field personnel.

However, CEQ offers comments and recommendations to improve the usefulness of the Appendix B guidance to District Commanders charged with determining the scope of analysis.

With respect to the amended regulation on purpose and need, CEQ finds that the proposed regulation is generally adequate, but recommends that additional language be inserted in the amendment to the effect that the agency must, in all cases, exercise independent judgment regarding the public purpose and need of the proposal.

When preparing an environmental assessment, there is no legal requirement to include a specific reference to "water dependent activities" under the section 404(b)(1) guidelines in the Army's NEPA procedures. However, CEQ recommends that in the spirit of consistency with the CEQ regulations and as sound management policy, specifically to reduce duplication and paperwork and to increase efficient compliance with both NEPA and the Clean Water Act, the Army's procedures retain the requirement to integrate into the environmental impact analysis the alternatives to non-water dependent activities under section 404(b)(1).

CEQ finds that the Army's proposed regulation concerning page limits to be premature in that the Army has not presented any evidence demonstrating that there has been a conscious effort to abide by the CEQ page limit recommendations. CEQ recommends that the Army attempt concerted compliance with the CEQ regulation before proposing a reduced page limit length.

Dated: June 8, 1987.

A. Alan Hill,
Chairman.

COUNCIL ON ENVIRONMENTAL QUALITY

Findings and Recommendations on Referral From U.S. Environmental Protection Agency Concerning Proposed Amendments to U.S. Army Corps of Engineers Procedures for Implementing the National Environmental Policy Act

Introduction

Section 309 of the Clean Air Act and the Council on Environmental Quality's (CEQ) regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA) direct the Administrator of the Environmental Protection Agency (EPA) to review and comment publicly on the environmental impacts of federal activities, including proposed regulations published by a department or agency. If, upon review, the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council.¹ (40 CFR 1504.1(b))

On January 11, 1984, the U.S. Army Corps of Engineers (Army) published proposed amendments to the Army NEPA procedures. On March 12, 1984, EPA submitted written comments to the Army pursuant to section 309 of the Clean Air Act. After several months of discussion between EPA and the Army, the Army transmitted draft final regulations to CEQ on January 28, 1985. The EPA determined that the proposed regulations were "unsatisfactory" and on February 25, 1985, referred the proposed amended regulations to the Council of Environmental Quality.

In his original letter referring the matter to CEQ, Administrator Lee Thomas stated that Army's proposal would have an adverse effect on EPA's program to review significant environmental impacts of proposed federal actions, and its ability to prevent unacceptable adverse effects of dredge and fill discharges under section 404 of the Clean Water Act. On April 18, 1986, after several extensions of time at the request of the Army,² the Army responded to EPA's referral, stating that its latest proposal indicated a good faith effort to reach a compromise with EPA and was well within the range of reasonable agency discretion.

At the request of Army, CEQ returned the referral on May 1, 1986, to EPA for further negotiation by the referring and

lead agencies. (40 CFR 1504.3(f)(5)).³ However, further negotiations between Army and EPA were unsuccessful, and the disagreement was resubmitted to CEQ by EPA on December 11, 1986. In that letter, Administrator Thomas stated that:

"... EPA and [Army] continued working to resolve issues in the referral. We appreciated the opportunity to negotiate on the proposed regulatory language, but regret there are remaining unresolved substantive concerns which must be addressed.

"We are at a stage in this effort where the opportunity to initiate the Council's Sunshine Act authority... would help to expedite a mutually satisfactory resolution to the outstanding issues. The potential environmental consequences of these issues are so significant as to warrant comment from interested parties from outside of the lead and referring agencies." Letter from the Honorable Lee M. Thomas, Administrator of Environmental Protection Agency to the Honorable A. Alan Hill, Chairman, Council on Environmental Quality, December 11, 1986.

CEQ commenced its consideration of this referral by announcing a series of Sunshine Act meetings to facilitate the participation of outside parties. On January 8, 1987, CEQ held a meeting, open to the public, for the purpose of being briefed by the CEQ General Counsel on the issues raised in the referral. On January 12, 1987, CEQ held a second meeting, open to the public, to hear from the representatives of the Army, EPA, and other federal agencies regarding the issues raised in the referral. At a third meeting, held on February 5, 1987, members of the public had an opportunity to present views on the issues raised in the referral to the CEQ. Finally, written comments were received by CEQ from December 23, 1986 to February 11, 1987.³ The Council sincerely appreciates receiving the diverse views of all interested parties. The Council has made copies of information presented to it available to all interested parties.

Major Issues and Standard of Review

To facilitate its review, CEQ has identified four major issues in dispute: (1) Scope of analysis, or "small federal handle" issue; (2) purpose and need; (3) analysis of alternatives in environmental assessments; and (4) page limits on environmental impact statements. These findings and recommendations will address each of these issues.

The issues raised in this referral contain elements of both law and policy. CEQ has arrived at its findings of law by considering the requirements of NEPA, the directives of Executive Order 11514,

¹ Footnotes at end of article.

as amended by Executive Order 11991 (Protection and Enhancement of Environmental Quality), and the CEQ regulations implementing the procedural provisions of NEPA. Further, CEQ has evaluated the issues in light of relevant case law and in light of the "rule of reason" as expressed in those cases.

CEQ's recommendations regarding the referral issues reflect both NEPA policy considerations and this Administration's policies towards regulatory reform, as well as CEQ's concern for efficient management of the NEPA process. CEQ is also cognizant of the directive to the Army from the Presidential Task Force on Regulatory Relief, which states that:

"The Army will also revise its own regulations to reduce substantially the time it currently takes to prepare Environmental Impact Statements and other documents required by the National Environmental Policy Act." *Administrative Reforms to the Regulatory Program Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act*, p. 3, transmitted by letter from Christopher DeMuth, Executive Director, Presidential Task Force on Regulatory Relief, to the Honorable William R. Ciancilli, Assistant Secretary of the Army (Civil Works), May 7, 1982.

There should be no confusion on the part of a federal agency as to what the goals of regulatory relief really are. It is not an exercise in relieving the Army or any other federal agency from fulfilling its procedural responsibilities under NEPA. The goal of regulatory relief is to relieve the private sector of government-induced and imposed regulatory burdens, delays, and expense that exceed what is clearly required by law.

CEQ also notes that, at this time, it is not reviewing the proposed regulations for more minor, technical changes. Such review will take place after the proposed revisions to Army's regulations are submitted to CEQ under 40 CFR 1507.3(a) of the CEQ NEPA regulations for review for conformity with NEPA and the CEQ regulations.

Findings and Recommendations

1. Scope of Analysis.

Abstract

The Army's current regulation addressing the scope of analysis can "federalize" private or state or local projects over which, absent one Army permit, the federal government has neither control or responsibility. CEQ finds that Army's proposal to amend this regulation is generally within reasonable implementing agency discretion and that policy and management considerations favor amending the regulation to provide formal and consistent guidance to Corps field personnel.

However, CEQ offers comments and recommendations to improve the usefulness of the Appendix B guidance to District

Engineers charged with determining the scope of analysis.

The issue before us is the Army's guidance to its District Commanders for determining the scope of analysis of impacts and alternatives for purposes of NEPA compliance when the proposed federal action is an Army Corps of Engineers permit. Generally speaking, the permit actions subject to this guidance are dredge and fill permits under section 404 of the Clean Water Act and section 10 permits under the Rivers and Harbors Act of 1899.

The current Army regulation, in relevant part:

"The EA [Environmental Assessment] shall be a brief document (should formally not exceed 15 pages) primarily focusing on whether or not the entire project subject to the permit requirement could have significant effects on the environment. . . . (For example, where a utility company is applying for a permit to construct an outfall pipe from a proposed power plant, the EA must assess the direct and indirect environmental effects and alternatives of the entire plant.)" 33 CFR Part 230, Appendix B, Section 8(a).

The proposed Army regulation reads:

Scope and Analysis

"(1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district commander should establish the scope of the NEPA document (e.g., the EA or EIS [Environmental Impact Statement]) to address the impacts of the specific activity requiring a Department of the Army permit and those portions of the entire project over which the district commander has sufficient control and responsibility to warrant Federal review.

"(2) The district commander is considered to have control and responsibility for portions of the project beyond the limits of [Army] Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.

"(3) For those regulated activities that comprise merely a link in a transportation or utility transmission project, the scope of analysis should address the specific activity requiring a Department of the Army permit and any other portion of the project that is within the control or responsibility of the [Army] Corps of Engineers. . . ." 33 C.F.R. Part 230, Appendix B, Section 7(b).

The Army's current regulation addressing the scope of analysis can "federalize" private or state or local projects over which, absent one Army permit, the federal government has neither control or responsibility. The

Army has regarded the current regulation as overly expansive, and, indeed, has implemented it by employing a rule of reason and common sense. The federal courts have also evaluated the proper scope of analysis by examining the facts of a particular case. Thus, in *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir.), cert. denied, 499 U.S. 836 (1990), the United States Court of Appeals for the Eighth Circuit determined that an EA prepared by the Army for a Section 10 permit under the Rivers and Harbors Act for a river-crossing portion of a proposed transmission line need not examine the impacts of and alternatives to the entire transmission line. In that case, the river-crossing portion of the line was approximately 1.25 miles out of 67 miles. Given the facts surrounding the construction of that particular transmission line (for example, no direct or indirect federal funding for the project), the court found that the Army did not have such sufficient control and responsibility over the entire project such that nonfederal segments had to be included in the environmental assessment.

In *Save the Bay, Inc. v. Corps of Engineers*, 810 F.2d 322 (5th Cir.), cert. denied, 449 U.S. 900 (1990), the United States Court of Appeals for the Fifth Circuit upheld the Army's determination that the issuance of permits for installation of an effluent pipeline in navigable waters to serve a chemical manufacturing plant was not a major federal action significantly affecting the quality of the human environment, and thus did not require an EIS, even though the factory that the pipeline was to serve would have major impacts on the surrounding counties. This case has been frequently cited as support for the Army's current proposal. However, the court noted that it was not expressing an opinion as to the proper scope of an EIS should one have been necessary; rather, its holding rested on its conclusion that the granting of the pipeline construction permit, after issuance by EPA of a National Pollutant Discharge Elimination System permit was not a "major federal action" requiring an EIS. In so deciding, the court noted that the Clean Water Act specifically exempts the issuance of such permits from NEPA review, and prohibits any other federal agency from reviewing any effluent limitations established by such a permit.

The holdings in both of these cases have been adopted by the Army in guidance to field offices, issued in August of 1990. Since that date, the Army has reduced the number of EISs

considerably* and no appellate court has overturned the Army guidance based on the above two cases.⁶ Further, the type of action which was the subject of the *Save the Bay* case is now included within the Corps' system of nationwide permits and is categorically excluded from NEPA review. It is also important to note that no decision in any court has held that implementation of the current Army regulation is improper, inappropriate, or illegal.

Given this history of the implementation of the current Army regulation, the question has been asked—why change this regulation at all? An argument can be made that the implementation—as opposed to the letter—of Army's current implementing procedures has been fair and reasonable and has not been unduly burdensome. While such an argument has some appeal, CEQ finds that the Army's proposal is generally within reasonable implementing agency discretion and that policy and management considerations favor amending the regulation to provide formal and consistent guidance to the Army's field personnel.

However, CEQ offers the following comments and recommendations to improve the usefulness of the Appendix B guidance to District Commanders charged with determining whether the scope of analysis would be confined to the direct, indirect and cumulative effects of (1) the Army's permit action only, or (2) the Army's action and additional portions of the overall project having federal involvement or, (3) the entire project. In general, this will be determined by the degree of federal control and responsibility based on the facts and circumstances of each individual case. The proposed amendment enumerates four factors to be considered in making this determination. While these factors appear to be helpful in determining the extent of those actions within the Army's control and responsibility, they do not seem to us to be as useful in determining the extent of cumulative federal involvement. Also, they appear to envision only two opposite poles of federal involvement: those portions requiring the Army's permit, and the entire project. Surely there will be cases that fall somewhere in between. It strikes us that the District Commander's determinations would be made more accurately and more consistently if a process were followed to explicitly take into account the extent of cumulative federal control and responsibility which may (depending on the facts in each case) extend beyond the Army's own control and responsibility to that of

other federal agencies involved in the project. Once that "scope of action" is determined (which could include the entire project if the cumulative federal control and responsibility is determined by the Army to be sufficiently great), then the direct, indirect, and cumulative effects of such federal action would be subject to analysis for purposes of NEPA compliance.

Specifically, CEQ offers the following comments on the specific factors proposed in the Army's Appendix B guidance:

(i) Whether the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project). CEQ finds that this factor is consistent with NEPA case law⁶ and recommends retention of this factor.

(ii) Whether there are alternatives available to the applicant that would not require an Army permit. CEQ observes that this factor is inappropriately narrow. There is no compelling reason why the existence of an alternative method of achieving a proposal without an Army permit (an alternative which the applicant, by definition, has not pursued) should weigh in favor of less comprehensive environmental review.⁷ CEQ recommends that the Army reconsider this factor, and if it believes it is useful, better articulate the logical relationship between alternatives available to the applicant and the District Commander's determination of the appropriate scope of analysis.

(iii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity. CEQ finds that this factor is consistent with NEPA and NEPA case law. For purposes of clarification, CEQ recommends adding specific examples to illustrate the application of this factor.

(iv) The extent to which the entire project will be within the Army's jurisdiction. This factor is consistent with the requirement to determine the Army's control and responsibility for a proposed action. However, it does not adequately address the extent of the cumulative federal control and responsibility for the proposed action. CEQ is particularly concerned that the process of determining the scope of analysis help insure that the NEPA analysis is not inappropriately segmented. See *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985). Therefore, CEQ recommends development of an additional factor. The following language is offered as a suggestion. In its proposed revision ultimately

reviewed by CEQ, the Army is free to adopt this language, to amend it, or to propose a substitute that addresses the determination of cumulative federal control and responsibility.

Suggested Language

(v) The extent of cumulative federal control and responsibility.

a. The district commander is further considered to have control and responsibility for portions of the project beyond the limits of Army Corps jurisdiction where the cumulative federal involvement of the Army Corps and other federal agencies is sufficient to grant legal control over such additional portions of the project. These are cases where the environmental consequences of the additional portions of the projects are essentially products of federal financing, assistance, direction, regulation, or approval (not including funding assistance solely in the form of general revenue sharing funds, with no federal agency control over the subsequent use of such funds, and not including judicial or administrative civil or criminal enforcement actions).

b. In determining whether sufficient cumulative federal involvement exists to expand the scope of federal review, the district commander should consider whether other federal agencies are required to take federal action under the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), Executive Order 11990, Protection of Wetlands, 42 U.S.C. 4321 (1977), and other environmental review laws and executive orders.

In recommending such a process, CEQ is not suggesting that the Army Corps of Engineers should be the lead agency in each of these cases. That would be determined as it is under current procedures implementing CEQ's lead agency regulations. Rather, CEQ is reiterating that the environmental review that is required for a proposed federal action which involves several federal actions should be conducted in a cohesive manner within the procedural framework of the NEPA process.

Additionally, CEQ recommends that the Army's procedures insure that the scope of analysis for analyzing impacts and alternatives in the NEPA process is the same as the scope of analysis for purposes of analyzing the benefits of a proposal. See 40 CFR 1502.23; *Sierra Club v. Sigler*, 895 F.2d 957 (5th Cir. 1983).

2. Purpose and Need

Abstract

CEQ finds that the proposed regulation is generally adequate, but recommends that additional language be inserted in the amendment to the effect that the agency must, in all cases, exercise independent judgment regarding the public purpose and need of the proposal.

The issue before us is how the purpose and need for a project is defined by the Army when preparing an EA or EIS for a federally permitted action.

The current Army procedures state that this section of the EIS:

"shall briefly recognize that every application has both an applicant's purpose and need and a public purpose and need. These may be the same when the applicant is a governmental body or agency. In most instances when an EIS is required and the applicant is not a governmental body or agency, the applicant is a member of the private sector engaged in providing a good or service for profit. At the same time, the applicant is requesting a permit to perform work which, if approved, is considered in the public interest (i.e., provides a public benefit). This public benefit shall be stated in as broad, generic terms as possible. For instance, the need for a water intake structure requiring an Army Corps permit as part of a fossil fuel power plant shall be stated as the need for energy and not be limited to the need for cooling water. In a similar way, the need for housing near canals or near marinas, etc., shall be expressed as the need for shelter and not as the need for recreation near water." 33 CFR Part 230, Appendix B, Section 11(b)(4).

The proposed Army regulation reads, in relevant part:

"If the scope of analysis for the NEPA document . . . covers only the proposed specific activity requiring a Department of the Army permit, then the underlying purpose and need for that specific activity should be stated. (For example, The purpose and need for the pipe is to obtain cooling water from the river for the electric generating plant.) If the scope of the analysis covers a more extensive project, only part of which may require an Army permit, then the underlying purpose and need for the entire project should be stated. (For example, The purpose and need for the electric generating plant is to provide increased supplies of electricity to the (named) geographic area.) Normally, the applicant should be encouraged to provide a statement of his proposed activity's purpose and need from his perspective (for example, 'to construct an electric generating plant'). However, wherever the NEPA document's scope of analysis renders it appropriate, the [Army] Corps also should consider and express that activity's underlying purpose and need from a public interest perspective (to use that same example, 'to meet the public's need for electric energy')." 33 CFR Part 230, Appendix B, section 9b(4).

The CEQ regulation reads:

1502.13 Purpose and need.

"The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."

CEQ's regulation thus makes no distinction between a private and public "purpose and need". On the one hand, the very fact that a particular project

requires the issuance of a federal permit necessarily implies a degree of federal review and responsibility from the public interest perspective. On the other hand, a reasonable evaluation of the proposed action and alternatives must include a thorough understanding of the applicant's purpose and need.

NEPA case law has interpreted this requirement to consider both public and private purpose and need. Courts have stressed the need to consider the objectives of the permit applicant. *Roosevelt Campobello International Park Comm'n. v. EPA*, 684 F.2d 1041 (1st Cir. 1982), but have also emphasized the requirement for the agency to exercise independent judgment as to the appropriate articulation of objective purpose and need. *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986), *Petition for cert. filed*, 55 U.S.L.W. 3763 (U.S. April 10, 1987) (No. 86-1627). Courts have cautioned against blindly accepting only the applicant's statement of purpose and need, both for purposes of public interest review and for formulation of alternatives in the NEPA process. *Abeema v. Fornell*, 807 F.2d 633 (7th Cir. 1986).

The proposed regulation is an effort to achieve consideration of both the applicant's and the public's purpose and need by instructing the District Commander to normally focus on the applicant's purpose and need, as articulated by the applicant, but to consider and express the activity's purpose and need from a public interest perspective "whenever the NEPA document's scope of analysis renders it appropriate." CEQ finds that the proposed regulation is generally adequate and consistent with the proposed approach to the scope of analysis. CEQ recommends that additional language be added to the proposed regulation to the effect that the agency must, in all cases, exercise independent judgment regarding the objective purpose and need of the proposal.

3. Analysis of Alternatives in Environmental Assessments.

Abstract

There is no legal requirement to include a specific reference to "water dependent activities" under the Section 404(b)(1) guidelines to the Army's NEPA procedures. However, CEQ recommends that in the spirit of consistency with the CEQ regulations and as sound management policy, specifically to reduce duplication and paperwork and to increase efficient compliance with both NEPA and the Clean Water Act, the Army's procedures retain the requirement to integrate into the environmental impact analysis the alternatives to nonwater dependent activities under Section 404(b)(1).

The issue before us is the determination of when the Army must examine alternatives in an EA.

The current Army regulation reads:

"a. Environmental Assessment (EA). The district engineer shall prepare an EA as soon as practicable after all relevant information has been made available to the district engineer (i.e., after the comment period for the public notice announcing receipt of the permit application has expired) and prior to preparation of the Findings of Fact (FOF). The EA shall include a discussion of reasonable alternatives. However, when the EA confirms that the impact of the applicant's proposal is not significant, there are no unresolved conflicts concerning alternative uses of available resources. . . . (Section 102(2)(E) of NEPA), and the proposed action is a water dependent activity, the EA need not include a discussion on alternatives to the proposal. In all other cases the EA must address all the alternatives that go before the ultimate decision maker. This discussion will include suggested means by which the environment might be protected and by which adverse impacts could be reduced by conditioning of the permit. The EA shall be a brief document (should not normally exceed 15 pages) primarily focusing on whether or not the entire project subject to the permit requirement could have significant effects on the environment but shall not be used to justify a decision. (For example, where a utility company is applying for a permit to construct an outfall pipe from a proposed power plant, the EA must assess the direct and indirect environmental effects and alternatives of the entire plant.) The EA shall conclude with a FONSI (See 40 C.F.R. 1506.13) or a determination that an EIS is required." 33 C.F.R. Part 230, Appendix B, Section 8(e).

The proposed Army regulation reads:

"EA/FONSI Document. (See 40 C.F.R. 1506.9 and 1506.13 for definitions).

"a. Environmental Assessment (EA) and Findings of No Significant Impact (FONSI). The district commander should complete an EA as soon as practicable after all relevant information is available (i.e., after the comment period for the public notice of the permit application has expired) and prior to completion of the statement of finding (SOF). The EA should normally be combined with other required documents (EA/404(b)(1)/SOF/FONSI). When the EA confirms that the impact of the applicant's proposal is not significant and there are no unresolved conflicts concerning alternative uses of available resources . . . (section 102(2)(E) of NEPA), the EA need not include a discussion of alternatives. Note: The above rule would not preclude the district commander from considering alternatives not discussed in the EA during the course of the public interest review for the permit application if that would be appropriate. In all other cases where the district commander determines that there are unresolved conflicts concerning alternative uses of available resources, the EA shall include a discussion of the

reasonable alternatives which are to be considered by the ultimate decision-maker. The decision options available to the [Army] Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with conditions, or deny the permit. Appropriate conditions may include project modifications within the scope of established permit conditioning policy (See 33 CFR 325.4). The decision option to deny the permit results in the 'no action' alternative (i.e. no construction requiring an Army Corps permit). The combined document normally should not exceed 15 pages and shall conclude with FONSI (See 40 CFR 1508.13) or a determination that an EIS is required. The district commander may delegate the signing of a combined document. Should the EA demonstrate that an EIS is necessary, the district commander shall follow the procedures outlined in paragraph 8 of this appendix. In those cases where it is obvious an EIS is required, an EA is not required."

EPA objects to the deletion, in the proposed Army regulation, of the requirement that alternatives be evaluated in an EA if the proposal is not "water dependent" within the meaning of EPA's guidelines for section 404 permits under the Clean Water Act. The Army's argument for deleting this reference in the alternatives section is that neither NEPA nor the CEQ implementing regulations include any reference to "water dependency", and therefore, the Army NEPA regulations need not include such a reference. While this is literally a true statement, it does not reach the entire issue. The requirement to analyze alternatives which are not water dependent actions remains a requirement of the section 404 permit program. Under Army's current procedural regulations, the section 404(b)(1) alternatives analysis is intertwined with the alternatives analysis in the NEPA process; in fact, the section 404(b)(1) guidelines themselves state that in most cases, NEPA documents will provide the information for the evaluation of alternatives under those guidelines. 40 CFR 230.10(4). Under those guidelines:

"(3) Where the activity associated with a discharge which is proposed for a special aquatic site . . . does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not 'water dependent'), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

"(4) For actions subject to NEPA, where the [Army] Corps of Engineers is the permitting

agency, the analysis of alternatives required for NEPA environmental documents, including supplemental [Army] Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. . . . 40 CFR 230.10(a) (3) and (4).

CEQ's NEPA regulation, "Environmental review and consultation requirements," states:

"(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders." 40 CFR 1502.25(a).

Still another CEQ NEPA regulation entitled "Combining documents" states:

"Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork." 40 CFR 1508.4.

CEQ finds that there is no legal requirement to include a specific reference to "water dependent activities" under the section 404(b)(1) guidelines in the Army's NEPA procedures. However, CEQ recommends that in the spirit of consistency with the CEQ regulations and as sound management policy, specifically to reduce duplication and paperwork and to increase efficient compliance with both NEPA and the Clean Water Act, that the Army's procedures retain the requirement to integrate into the environmental impact analysis the alternatives to non-water dependent activities under section 404(b)(1).

With respect to alternatives analysis in general, CEQ reiterates its earlier guidance that the alternatives to be analyzed must always be reasonable alternatives, "bounded by some notion of feasibility" to avoid NEPA from becoming "an exercise in frivolous boilerplate." *Guidance Regarding NEPA Regulations*, Memorandum from Chairman A. Alan Hill to Heads of Federal Agencies, 48 FR 32463 (1983), quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978).

4. Page Limits on Environmental Impact Statements

Abstract

CEQ finds that the Army's proposed regulation to be premature in that the Army has not presented any evidence demonstrating that there has been a conscious effort to abide by the CEQ page limit recommendations. CEQ recommends that the Army attempt concerted compliance

with the CEQ regulation before proposing a reduced page limit length.

The issue before us is the length of an EIS to insure adequate analysis of impacts and alternatives. The current Army regulations do not specify page limits for EIS(s).

The proposed Army regulations state that:

" . . . a 50-page text would, in most cases, be adequate to discuss succinctly the relevant NEPA issues and to meet legal and technical requirements. To the extent practicable, and consistent with producing a legally and technically adequate EIS, district commanders will make all reasonable efforts to limit the text to a concise, readable length of 50 pages." 33 CFR 230.13.

The CEQ regulations state that the text of final EISs should normally be less than 150 pages and for proposals of unusual scope or complexity, should normally be less than 300 pages. 40 CFR 1502.7.

CEQ finds the Army's proposed regulation to be premature in that the Army has not presented any evidence demonstrating that there has been a conscious effort to abide by the CEQ page limit recommendations. CEQ recommends that the Army attempt concerted compliance with the CEQ regulation before proposing a reduced page limit length.

Dated: June 8, 1987.

A. Alan Hill,
Chairman.

William L. Mills,

Member.

Jacqueline E. Schafer,

Member.

Footnotes

1. Under the CEQ referral regulations, if the lead agency requests more time and gives assurances that the matter will not go forward in the interim, the Council may grant an extension. 40 CFR 1504.3(d). Under this provision CEQ granted the Army nine extensions of time, in the period from February 25, 1985, to April 18, 1986.

2. The CEQ referral regulations provide that the Council may, (among other options), "[d]etermine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies reports to the Council that the agencies' disagreements are irreconcilable." 40 CFR 1504.3(f)(5). The referral was returned to EPA and the Army under this provision.

3. CEQ received 57 written comments during this period.

4. In 1980, the Army Corps of Engineers filed a total of 35 EISs on regulatory actions. In 1981, that number dropped to 19. Subsequent filings for regulatory EISs are 1982—27; 1983—13; 1984—20; 1985—15; 1986—20.

5. In *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985), the district court did discuss, and express disagreement with, the decision in *Save the Bay, Inc. v. Corps of Engineers and Winnebago Tribe of Nebraska v. Ray*, to the extent that it perceived that those decisions distinguished between "major federal action" and "significantly" as separate triggers under NEPA. The CED regulations, however, state that "[m]ajor reinforces but does not have a meaning independent of significantly". 40 CFR 1508.18. Neither *Save the Bay* nor *Winnebago* discussed this rule, and the Army does not challenge this rule.

In any event, the court in *Colorado River Indian Tribes* did find that an EIS was required prior to issuance of an Army permit for placement of riprap for stabilization of shore banks on the site of a proposed residential and commercial development. The court rested its holding on an agency's responsibility under NEPA to assess the direct, indirect and cumulative effects of a proposed action. In that case, the court determined that the Army had improperly limited its analysis to the direct effects of the Army permit.

The scope of analysis issue addresses the extent to which the proposed action is identified as a federal action for purposes of compliance with NEPA. Modification of the regulation addressing scope of analysis does not affect the requirement to evaluate impacts. Once the scope of analysis is determined, the agency must then assess the direct, indirect and cumulative effects of the proposed federal action. See 40 CFR 1502.16, 1506.7, and 1508.8.

6. *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir.), cert. denied, 449 U.S. 836 (1980).

7. To the extent that this factor rests on the holding in *Save the Bay v. Corps of Engineers*, it should be noted that the Court of Appeals did not hold that the subject federal action must be a condition precedent to private action in order for preparation of an EIS to be required. Rather, the court found that the overall federal involvement in the proposed action was insufficient to "federalize" the entire project.

8. See 40-CFR 1508.18 (definition of "major federal action").

[FR Doc. 87-13403 Filed 6-11-87; 8:45 am]

BILLING CODE 3125-01-M

DEPARTMENT OF DEFENSE

Office of the Secretary

Strategic Defense Initiative Advisory Committee; Meeting

ACTION: Notice of advisory Committee meetings.

SUMMARY: The Strategic Defense Initiative (SDI) Subcommittee (Ground Based Free Electron Laser Technology Integration Experiment Technical Advisory Group) will meet in closed session in Washington, DC, on June 22-24, 1987.

The mission of the Subcommittee is to provide the SDI Advisory Committee an independent analysis and assessment of the plans and approaches for the ground based free electron laser technology integration experiment. At the meeting on June 22-24, 1987 the subcommittee will discuss status of laser research and management issues.

In accordance with section 10(d) of the Federal Advisory Committee Act, Pub. L. 92-463, as amended (5 U.S.C., App II, (1982)), it has been determined that this SDI Advisory Subcommittee meeting, concerns matters listed in 5 U.S.C., 552b(c)(1) (1982), and that accordingly this meeting will be closed to the public.

Patricia H. Means,
OSD Federal Register Liaison Officer,
Department of Defense.

June 8, 1987.

[FR Doc. 87-13437 Filed 6-11-87; 8:45 am]

BILLING CODE 3010-01-M

Membership of the DoD Inspector General (IG) Performance Review Board

AGENCY: Department of Defense Inspector General (IG).

ACTION: Notice of membership of the DoD IG Performance Review Board.

SUMMARY: This notice announces the appointment of the members of the Performance Review Board (PRB) of the Inspector General. The publication of the PRB membership is required by 5 U.S.C. 4314(c)(4).

The Performance Review Board provides fair and impartial review of Senior Executive Service performance appraisals and makes recommendations regarding performance and performance awards to the Inspector General.

EFFECTIVE DATE: July 1, 1987.

FOR FURTHER INFORMATION CONTACT: Gerald R. Sandaker, Chief, Employee Management Relations and Development Branch, Personnel & Security Division, Inspector General, 400 Army Navy Drive, Arlington, VA. (202) 693-0257.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), the enclosed are names of executives who have been appointed to serve as members of the Performance Review Board. They will serve a one year renewable term effective on July 1, 1987.

Linda M. Lawson,
Alternate OSD Federal Register Liaison
Officer, Department of Defense

June 8, 1987.

Terry L. Brendlinger
Charles L. Cipolla
James H. Curry
Michael E. Eberhardt
John W. Fawcett
Daniel R. Foley
William K. Keesee
Richard D. Lieberman
Robert J. Lieberman
Jack L. Montgomery
Donald E. Reed
Richard T. Russ
William F. Thomas
Richard W. Townley
Stephen A. Trodden
Bertrand G. Truxell

[FR Doc. 87-13438 Filed 6-11-87; 8:45 am]

BILLING CODE 3010-01-M

Department of the Navy

Chief of Naval Operations, Executive Panel Advisory Committee; Closed Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (5 U.S.C. app.), notice is hereby given that the Chief of Naval Operations (CNO) Executive Panel Advisory Committee Pacific Basin Task Force will meet June 30-1 July 1987, from 9 a.m. to 5 p.m. each day, at 4401 Ford Avenue, Alexandria, Virginia. All sessions will be closed to the public.

The purpose of this meeting is to examine the broad policy issues related to maritime aspects in the Pacific. The entire agenda for the meeting will consist of discussions of key issues related to United States national security interests and naval strategies in the Pacific and related intelligence. These matters constitute classified information that is specifically authorized by Executive order to be kept secret in the interest of national defense and is, in fact, properly classified pursuant to such Executive order. Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of the meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(1) of Title 5, United States Code.

For further information concerning this meeting, contact Lieutenant Paul G. Butler, Executive Secretary of the CNO Executive Panel Advisory Committee, 4401 Ford Avenue, Room 601, Alexandria, Virginia 22302-0268. Phone (703) 756-1205.

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N.W.
WASHINGTON, DC 20006

August 11, 1980

MEMORANDUM FOR HEADS OF AGENCIES

SUBJECT: Prime and Unique Agricultural Lands and the National Environmental Policy Act (NEPA)

The accompanying memorandum on Analysis of Impacts on Prime or Unique Agricultural Lands in Implementing the National Environmental Policy Act was developed in cooperation with the Department of Agriculture. It updates and supersedes the Council's previous memorandum on this subject of August 1976.

In order to review agency progress or problems in implementing this memorandum the Council will request periodic reports from federal agencies as part of our ongoing oversight of agency implementation of NEPA and the Council's regulations. At this time we would appreciate receiving from your agency by November 1, 1980, the following information:

- identification and brief summary of existing or proposed agency policies, regulations and other directives specifically intended to preserve or mitigate the effects of agency actions on prime or unique agricultural lands, including criteria or methodology used in assessing these impacts.
- identification of specific impact statements and, to the extent possible, other documents prepared from October 1, 1979 to October 1, 1980 covering actions deemed likely to have significant direct or indirect effects on prime or unique agricultural lands.
- the name of the policy-level official responsible for agricultural land policies in your agency, and the name of the staff-level official in your agency's NEPA office who will be responsible for carrying out the actions discussed in this memorandum.



GUS SPETH
Chairman

**U.S. Department of Agriculture State Land Use
Committee Chairpersons**

Prime and Unique Agricultural Lands and the National Environmental Policy Act (NEPA)

Mr. William B. Lingle
State Conservationist
Soil Conservation Service
P.O. Box 311
Auburn, Alabama 36830

Mr. Marvin C. Meier
Director, State and Private Forestry
2221 E. Northern Lights Blvd.
Box 6606
Anchorage, Alaska 99502

Mr. Thomas C. Rockenbaugh
State Conservationist
Soil Conservation Service
Federal Bldg., Rm. 3006
230 S. First Street
Phoenix, Arizona 85025

Mr. M. J. Spears
State Conservationist
Soil Conservation Service
P.O. Box 2323
Little Rock, Arkansas 72203

Mr. James H. Hansen
State Resource Conservationist
Soil Conservation Service
2828 Chiles Road
P.O., Box 1019
Davis, California 95616

Mr. Sheldon G. Boone
State Conservationist
Soil Conservation Service
P.O. Box 17107
Denver, Colorado 80217

Ms. Maria Maiorana Russell
Assistant Director
Community Resource & Staff Dev.
Cooperative Extension Service
University of Connecticut
Storrs, Connecticut 06268

Mr. Rollin Swank
Assistant State Conservationist
Soil Conservation Service
693 Federal Bldg.
210 Walnut Street
Des Moines, Iowa 50309

Mr. John W. Tippie
State Conservationist
760 South Broadway
P.O. Box 600
Salina, Kansas 67401

Mr. Glen E. Murray
State Conservationist
Soil Conservation Service
333 Waller Avenue
Lexington, Kentucky 40504

Mr. Otis D. Fincher
State Conservationist
Soil Conservation Service
204 Trt\$adway Towers
9 East Lockerman Street
Dover, Delaware 19901

Mr. William E. Austin
State Conservationist
Soil Conservation Service
P.O. Box 1208
Gainesville, Florida 32601

Mr. Dwight Treadway
State Conservationist
Soil Conservation Service
P.O. Box 832
Athens, Georgia 30601

Nr. Jack P. Kanaiz
State Conservationist
Soil Conservation Service
P.O. Box 50004
Honolulu, Hawaii 96950

Mr. Randall Johnson
Farmers Home Administration
U.S. Department of Agriculture
304 North Eighth Street
Boise, Idaho S3702

Mr. Warren J Fitzgerald
Stare Consemationist
Soil Conservation Service
P.O. Box 678
Champaign, Illinois 61820

Mr. Robert Bollman
Assistant State Conservationist
Soil Conservation Service
5610 Crawfordsvil1e Road, Suite 2200
Indianapolis, Indiana 46224

Dr. Raleigh Barlowe
323 Natural Resources Bldg.
Michigan State University
East Lansing, Michigan 48824

Mr. Harry M. Major
State Conservationist
Soil Conservation Service
316 North Robert Street
St. Paul, Minnesota 55101

Mr. Billy C. Griffin
Deputy State Conservationist
Soil Conservation Service
P.O. Box 610
Jackson, Mississippi 39205

Prime and Unique Agricultural Lands and the National Environmental Policy Act (NEPA)

Dr. Floyd L. Corty
Ag. Econ. & Agribusiness
Louisiana State University
Baton Rouge, Louisiana 70803

Mr. Eddie L. Wood
State Conservationist
Soil Conservation Service
USDA Bldg. Univ. of Maine
Orono, Maine 04473

Mr. Gerald R. Calhoun
State Conservationist
Soil Conservation Service
Rm. 522, Hartwick Bldg.
4321 Hartwick Road
College Park, Maryland 20740

Dr. Gene McMurtry
Assoc. Dir., Coop. Ext. Service
Stockbridge Hall, Rm. 2II
University of Massachusetts
Amherst, Massachusetts 01003

Mr. Roger Leighton
James Hall
University of New Hampshire
Durham, New Hampshire 03824

Mr. Plater T. Campbell
State Conservationist
Soil Conservation Service
1370 Hamilton Street
P.O. Box 219
Somerset, New Jersey 08873

Mr. Thomas G. Schmeckpeper
Deputy Regional Forester
U.S. Forest Service
Rm. 5424, Federal Bldg.
517 Gold Avenue, S.W.
Albuquerque, N.M. 87102

Mr. Robert L. Hilliard
State Conservationist
Soil Conservation Service
U.S. Courthouse & Federal Bldg.
100 South Clinton St., Rm. 771
Syracuse, New York 13260

Mr. Mitchell E. Clary
Assistant State Conservationist
Soil Conservation Service
P.O. Box 27307
Raleigh, North Carolina 27611

Mr. Sylvester C. Ekart
Chairman
North Dakota Land Use Comm.

Mr. Kenneth G. McManus
State Conservationist
Soil Conservation Service
555 Vandiver Drive
P.O. Box 459
Columbia, Missouri 65201

Mr. Van K. Haderlie
State Conservationist
Soil Conservation Service
Federal Bldg.
P.O. Box 970
Bozeman, Montana 59715

Mr. Russell Schultz
Soil Conservation Service
Federal Bldg.
U.S. Courthouse, Rm. 345
Lincoln, Nebraska 68508

Mr. Gerald C. Thola
State Conservationist
Soil Conservation Service
P.O. Box 4850
Reno, Nevada 89505

Mr. Bobby T. Birdwell
Soil Conservation Service
Agricultural Center Office Bldg.
Farm Road & Brumley Street
Stillwater, Oklahoma 74074

Mr. Guy Nutt
State Conservationist
Soil Conservation Service
Federal Bldg., 16th Floor
1220 SW Third Avenue
Portland, Oregon 97204

Mr. Thomas B. King
Associate Director
Cooperative Extension Service
The Pennsylvania State University
323 Agricultural Admin. Bldg.
University Park, Pennsylvania 16802

Mr. Richard F. Kenyon
State Executive Director
Agricultural Stabilization and
Conservation Service
222 Quaker Lane
West Warwick, Rhode Island 02893

Mr. K.G. Smith
State Director
Farmers Home Administration
240 Stoneridge Drive
Columbia, South Carolina 29210

Mr. Wayne D. Testerman
State Executive Director
Agricultural Stabilization and

Federal Bldg.
P.O. Box 1453
Bismarck, North Dakota 58501

Mr. Robert R. Shaw
State Conservationist
Soil Conservation Service
Federal Bldg Rm. 522
200 N. High Street
Columbus, Ohio 43215

Mr. George C. Marks
State Conservationist
Soil Conservation Service
P.O. Box 648
Temple, Texas 76501

Mr. Coy Garrett
State Conservationist
Soil Conservation Service
One Burlington Square, Suite 205
Burlington, Vermont 05401

Mr. Lester N. Liebel
Ext. Rural Development Coord.
Cooperation Extension Service
Washington State University
417, Ag. Phase II
Pullman, Washington 99163

Mr. Jerome C. Hytry
State Conservationist
Soil Conservation Service
4601 Hammersley Road
Madison, Wisconsin 53711

Conservation Service
200 Fourth Street, S.W.
Federal Bldg., Rm. 210
Huron, South Dakota 57350

Dr. M. Lloyd Downen
Director, Agricultural Extension
University of Tennessee
P.O. Box 1071
Knoxville, Tennessee 37901

Mr. Reed Page
State Director of the
Farmers Home Administration
125 South State St., Rm. 5434
Salt Lake City, Utah 84138

Mr. Manly S. Wilder
State Conservationist
Soil Conservation Service
400 North Eighth Street
P.O. Box 10026
Richmond, Virginia 23240

Mr. Craig, M. Right
State Conservationist
Soil Conservation Service
P.O. Box 845
Morgantown, West Virginia 26505

Mr. Robert W. Cobb
Assistant State Conservationist
Soil Conservation Service
P.O. Box 2440
Casper, Wyoming 82601

PART 657 - PRIME AND UNIQUE FARMLANDS

Subpart A - Important Farmlands Inventory

657.5 Identification of important farmlands.

Authority: 16 U.S.C. 590a-f, q; 7 CFR 2.62 Pub. L. 95-87; 42 U.S.C. 4321 et seq.

Section 657.5 Identification of important farmlands.

a. Prime farmlands.

1. General. Prime farmland is land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops, and is also available for these uses (the land could be cropland, pastureland, rangeland, forest land, or other land, but not urban built-up land or water). It has the soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops when treated and managed, including water management, according to acceptable farming methods. In general, prime farmlands have an adequate and dependable water supply from precipitation or irrigation, a favorable temperature and growing season, acceptable acidity or alkalinity, acceptable salt and sodium content, and few or no rocks. They are permeable to water and air. Prime farmlands are not excessively erodible or saturated with water for a long period of time, and they either do not flood frequently or are protected from flooding. Examples of soils that qualify as prime farmland are

Palouse silt loam, 0 to 7 percent slopes; Brookston silty clay loam, drained; and Tama silty clay loam, 0 to 5 percent slopes.

2. Specific criteria. Prime farmlands meet all the following criteria: Terms used in this section are defined in USDA publications: "Soil Taxonomy, Agriculture Handbook 436"; "Soil Survey Manual, Agriculture Handbook 18"; "Rainfall-Erosion Losses from Cropland, Agriculture Handbook 282"; "Wind Erosion Forces in the United States and Their Use in Predicting Soil Loss, Agriculture Handbook 346"; and "Saline and Alkali Soils, Agriculture Handbook 60,"
 - i. The soils have:
 - A. Aquic, udic, ustic, or xeric moisture regimes and sufficient available water capacity within a depth of 40 inches (1 meter), or in the root zone (root zone is the part of the soil that is penetrated or can be penetrated by plant roots) if the root zone is less than 40 inches deep, to produce the commonly grown cultivated crops (cultivated crops include, but are not limited to, grain, forage, fiber, oilseed, sugar beets, sugarcane, vegetables, tobacco, orchard, vineyard, and bush fruit crops) adapted to the region in 7 or more years out of 10; or
 - B. Xeric or aridic moisture regimes in which the available water capacity is limited, but the area has a developed irrigation water supply that is dependable (a dependable water supply is one in which enough water is available for irrigation in 8 out of 10 years for the crops commonly grown) and of adequate quality; or,
 - C. Aridic or torric moisture regimes and the area has a developed irrigation water supply that is dependable and of adequate quality; and,
 - ii. The soils have a temperature regime that is frigid, mesic, thermic, or hyperthermic (pergelic and cryic regimes are excluded). These are soils that, at a depth of 23 inches (50 cm), have a mean annual temperature higher than 32 F (0 C). In addition, the mean summer temperature at this depth in soils with an O horizon is higher than 47 F (8 C); in soils that have no O horizon, the mean summer temperature is higher than 59 F (15 C); and,
 - iii. The soils have a pH between 4.5 and 8.4 in all horizons within a depth of 40 inches (1 meter) or in the root zone if the root zone is less than 43 inches deep; and,
 - iv. The soils either have no water table or have a water table that is maintained at a sufficient depth during the cropping season to allow cultivated crops common to the area to be grown; and,
 - v. The soils can be managed so that, in all horizons within a depth of 45 inches (1 meter) or in the root zone if the root zone is less than 49 inches deep, during part of each year the conductivity of the saturation extract is less than 4 mmhos/cm and the exchangeable sodium percentage (ESP) is less than 15; and,
 - vi. The soils are not flooded frequently during the growing season (less often than once in 2 years); and,
 - vii. The product of K (erodibility factor) x percent slope is less than 2.0, and the product of I (soils erodibility) x C (climatic factor) does not exceed 60; and
 - viii. The soils have a permeability rate of at least 8.06 inch (0.15 cm) per hour in the upper 20 inches (50 cm) and the mean annual soil temperature at a depth of 20 inches (50 cm) is less than 59 F (15 C); the permeability rate is not a limiting factor if the mean annual soil temperature is 59 F (15 C) or higher; and,
 - ix. Less than 10 percent of the surface layer (upper 6 inches) in these soils consists of rock fragment: coarser than 3 inches (7.6 cm),
- b. Unique farmland.
 1. General. Unique farmland is land other than prime farmland that is used for the production of specific high value food and fiber crops. It has the special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality and/or high yields of a specific crop when treated and managed according to acceptable farming methods. Examples of such crops are citrus, tree nuts, olives, cranberries, fruit, and vegetables.
 2. Specific characteristics of unique farmland.
 - i. Is used for a specific high-value food or fiber crop.

- ii. Has a moisture supply that is adequate for the specific crop. The supply is from stored moisture, precipitation, or a developed irrigation system.
 - iii. Combines favorable factors of soil quality, growing season, temperature, humidity, air drainage, elevation, aspect, or other conditions, such as nearness to market, that favor the growth of a specific food or fiber crop.
- c. Additional farmland of statewide importance. This is land, in addition to prime and unique farmlands, that is of statewide importance for the production of food, feed, fiber, forage, and oilseed crops. Criteria for defining and delineating this land are to be determined by the appropriate State agency or agencies. Generally, additional farmlands of statewide importance include those that are nearly prime farmland and that economically produce high yields of crops when treated and managed according to acceptable farming methods. Some may produce as high a yield as prime farmlands if conditions are favorable. In some States, additional farmlands of statewide importance may include tracts of land that have been designated for agriculture by State law.
- d. Additional farmland of local importance. In some local areas there is concern for certain additional farmlands for the production of food, feed, fiber, forage, and oilseed crops, even though these lands are not identified as having national or statewide importance. Where appropriate, these lands are to be identified by the local agency or agencies concerned. In places, additional farmlands of local importance may include tracts of land that have been designated for agriculture by local ordinance.



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

November 23, 2010

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: NANCY H. SUTLEY
Chair 

SUBJECT: Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act

The Council on Environmental Quality (CEQ) is issuing this guidance for Federal departments and agencies on how to establish, apply, and revise categorical exclusions in accordance with section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and the CEQ Regulations for Implementing the Procedural Provisions of NEPA (CEQ Regulations), 40 CFR Parts 1500-1508.¹ This guidance explains the requirements of NEPA and the CEQ Regulations, describes CEQ policies, and recommends procedures for agencies to use to ensure that their use of categorical exclusions is consistent with applicable law and regulations.² The guidance is based on NEPA, the CEQ Regulations, legal precedent and agency NEPA experience and practice. It describes:

- How to establish or revise a categorical exclusion;

¹ The Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (CEQ Regulations), *available on www.nepa.gov at ceq.hss.doe.gov/ceq_regulations/regulations.html*. This guidance applies only to categorical exclusions established by Federal agencies in accordance with section 1507.3 of the CEQ Regulations, 40 CFR § 1507.3. It does not address categorical exclusion established by statute, as their use is governed by the terms of the specific legislation and subsequent interpretation by the agencies charged with the implementation of that statute and NEPA requirements. CEQ encourages agencies to apply their extraordinary circumstances to categorical exclusions established by statute when the statute is silent as to the use and application of extraordinary circumstances.

² This guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. The use of non-mandatory language such as “guidance,” “recommend,” “may,” “should,” and “can,” is intended to describe CEQ policies and recommendations. The use of mandatory terminology such as “must” and “required” is intended to describe controlling requirements under the terms of NEPA and the CEQ regulations, but this document does not establish legally binding requirements in and of itself.

- How to use public involvement and documentation to help define and substantiate a proposed categorical exclusion;
- How to apply an established categorical exclusion, and determine when to prepare documentation and involve the public;³ and
- How to conduct periodic reviews of categorical exclusions to assure their continued appropriate use and usefulness.

This guidance is designed to afford Federal agencies flexibility in developing and implementing categorical exclusions, while ensuring that categorical exclusions are administered to further the purposes of NEPA and the CEQ Regulations.⁴

I. INTRODUCTION

The CEQ Regulations provide basic requirements for establishing and using categorical exclusions. Section 1508.4 of the CEQ Regulations defines a “categorical exclusion” as

a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.⁵

Categories of actions for which exclusions are established can be limited by their terms. Furthermore, the application of a categorical exclusion can be limited by “extraordinary circumstances.” Extraordinary circumstances are factors or circumstances in which a normally excluded action may have a significant environmental effect that then requires further analysis in an environmental assessment (EA) or an environmental impact statement (EIS).⁶

Categorical exclusions are not exemptions or waivers of NEPA review; they are simply one type of NEPA review. To establish a categorical exclusion, agencies determine whether a proposed activity is one that, on the basis of past experience, normally does not require further environmental review. Once established, categorical exclusions provide an efficient tool to complete the NEPA environmental review process for proposals that normally do not require more resource-intensive EAs or EISs. The use of categorical exclusions can reduce paperwork

³ The term “public” in this guidance refers to any individuals, groups, entities or agencies external to the Federal agency analyzing the proposed categorical exclusion or proposed activity.

⁴ 40 CFR § 1507.1 (noting that CEQ Regulations intend to allow each agency flexibility in adapting its NEPA implementing procedures to requirements of other applicable laws).

⁵ *Id.* at § 1508.4.

⁶ *Id.*

and delay, so that EAs or EISs are targeted toward proposed actions that truly have the potential to cause significant environmental effects.⁷

When determining whether to use a categorical exclusion for a proposed activity, a Federal agency must carefully review the description of the proposed action to ensure that it fits within the category of actions described in the categorical exclusion. Next, the agency must consider the specific circumstances associated with the proposed activity, to rule out any extraordinary circumstances that might give rise to significant environmental effects requiring further analysis and documentation in an EA or an EIS.⁸ In other words, when evaluating whether to apply a categorical exclusion to a proposed activity, an agency must consider the specific circumstances associated with the activity and may not end its review based solely on the determination that the activity fits within the description of the categorical exclusion; rather, the agency must also consider whether there are extraordinary circumstances that would warrant further NEPA review. Even if a proposed activity fits within the definition of a categorical exclusion and does not raise extraordinary circumstances, the CEQ Regulations make clear that an agency can, at its discretion, decide “to prepare an environmental assessment . . . in order to assist agency planning and decisionmaking.”⁹

Since Federal agencies began using categorical exclusions in the late 1970s, the number and scope of categorically-excluded activities have expanded significantly. Today, categorical exclusions are the most frequently employed method of complying with NEPA, underscoring the need for this guidance on the promulgation and use of categorical exclusions.¹⁰ Appropriate reliance on categorical exclusions provides a reasonable, proportionate, and effective analysis for many proposed actions, helping agencies reduce paperwork and delay. If used inappropriately, categorical exclusions can thwart NEPA’s environmental stewardship goals, by compromising the quality and transparency of agency environmental review and decisionmaking, as well as compromising the opportunity for meaningful public participation and review.

II. ESTABLISHING AND REVISING CATEGORICAL EXCLUSIONS

A. Conditions Warranting New or Revised Categorical Exclusions

⁷ See *id.* at §§ 1500.4(p) (recommending use of categorical exclusions as a tool to reduce paperwork), 1500.5(k) (recommending categorical exclusions as a tool to reduce delay).

⁸ 40 CFR § 1508.4 (requiring Federal agencies to adopt procedures to ensure that categorical exclusions are not applied to proposed actions involving extraordinary circumstances that might have significant environmental effects).

⁹ 40 CFR § 1501.3(b).

¹⁰ See CEQ reports to Congress on the status and progress of NEPA reviews for Recovery Act funded projects and activities, *available on* www.nepa.gov/ceq.hss.doe.gov/ceq_reports/recovery_act_reports.html.

Federal agencies may establish a new or revised categorical exclusion in a variety of circumstances. For example, an agency may determine that a class of actions—such as payroll processing, data collection, conducting surveys, or installing an electronic security system in a facility—can be categorically excluded because it is not expected to have significant individual or cumulative environmental effects. As discussed further in Section III.A.1, below, agencies may also identify potential new categorical exclusions after the agencies have performed NEPA reviews of a class of proposed actions and found that, when implemented, the actions resulted in no significant environmental impacts. Other categories of actions may become appropriate for categorical exclusions as a result of mission changes. When agencies acquire new responsibilities through legislation or administrative restructuring, they should propose new categorical exclusions after they, or other agencies, gain sufficient experience with the new activities to make a reasoned determination that any resulting environmental impacts are not significant.¹¹

Agencies sometimes employ “tiering” to incorporate findings from NEPA environmental reviews that address broad programs or issues into reviews that subsequently deal with more specific and focused proposed actions.¹² Agencies may rely on tiering to make predicate findings about environmental impacts when establishing a categorical exclusion. To the extent that mitigation commitments developed during the broader review become an integral part of the basis for subsequently excluding a proposed category of actions, care must be taken to ensure that those commitments are clearly presented as required design elements in the description of the category of actions being considered for a categorical exclusion.

If actions in a proposed categorical exclusion are found to have potentially significant environmental effects, an agency can abandon the proposed categorical exclusion, or revise it to eliminate the potential for significant impacts. This can be done by: (1) limiting or removing activities included in the categorical exclusion; (2) placing additional constraints on the categorical exclusion’s applicability; or (3) revising or identifying additional applicable extraordinary circumstances. When an agency revises an extraordinary circumstance, it should make sure that the revised version clearly identifies the circumstances when further environmental evaluation in an EA or an EIS is warranted.

B. The Text of the Categorical Exclusion

In prior guidance, CEQ has generally addressed the crafting of categorical exclusions, encouraging agencies to “consider broadly defined criteria which characterize types of actions that, based on the agency’s experience, do not cause significant environmental effects,” and to “offer several examples of activities frequently performed by that agency’s personnel which

¹¹ When legislative or administrative action creates a new agency or restructures an existing agency, the agency should determine if its decisionmaking processes have changed and ensure that its NEPA implementing procedures align the NEPA review and other environmental planning processes with agency decisionmaking.

¹² 40 CFR §§ 1502.4(d), 1502.20, 1508.28.

would normally fall in these categories.”¹³ CEQ’s prior guidance also urges agencies to consider whether the cumulative effects of multiple small actions “would cause sufficient environmental impact to take the actions out of the categorically-excluded class.”¹⁴ This guidance expands on CEQ’s earlier guidance, by advising agencies that the text of a proposed new or revised categorical exclusion should clearly define the eligible category of actions, as well as any physical, temporal, or environmental factors that would constrain its use.

Some activities may be variable in their environmental effects, such that they can only be categorically excluded in certain regions, at certain times of the year, or within a certain frequency. For example, because the status and sensitivity of environmental resources varies across the nation or by time of year (e.g., in accordance with a protected species’ breeding season), it may be appropriate to limit the geographic applicability of a categorical exclusion to a specific region or environmental setting. Similarly, it may be appropriate to limit the frequency with which a categorical exclusion is used in a particular area. Categorical exclusions for activities with variable impacts must be carefully described to limit their application to ~~circumstances where the activity has been shown not to have significant individual or cumulative~~ environmental effects. Those limits may be spatial (restricting the extent of the proposed action by distance or area); temporal (restricting the proposed action during certain seasons or nesting periods in a particular setting); or numeric (limiting the number of proposed actions that can be categorically excluded in a given area or timeframe). Federal agencies that identify these constraints can better ensure that a categorical exclusion is neither too broadly nor too narrowly defined.

When developing a new or revised categorical exclusion, Federal agencies must be sure the proposed category captures the entire proposed action. Categorical exclusions should not be established or used for a segment or an interdependent part of a larger proposed action. The actions included in the category of actions described in the categorical exclusion must be stand-alone actions that have independent utility. Agencies are also encouraged to provide representative examples of the types of activities covered in the text of the categorical exclusion, especially for broad categorical exclusions. These examples will provide further clarity and transparency regarding the types of actions covered by the categorical exclusion.

C. Extraordinary Circumstances

Extraordinary circumstances are appropriately understood as those factors or circumstances that help a Federal agency identify situations or environmental settings that may require an otherwise categorically-excludable action to be further analyzed in an EA or an EIS. Often these factors are similar to those used to evaluate intensity for purposes of determining

¹³ Council on Environmental Quality, “Guidance Regarding NEPA Regulations,” 48 Fed. Reg. 34,263, 34,265 (Jul. 28, 1983), *available on* [www.nepa.gov at ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm](http://www.nepa.gov/ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm).

¹⁴ *Id.*

significance pursuant to section 1508.27(b) of the CEQ Regulations.¹⁵ For example, several agencies list as extraordinary circumstances the potential effects on protected species or habitat, or on historic properties listed or eligible for listing in the National Register of Historic Places.

When proposing new or revised categorical exclusions, Federal agencies should consider the extraordinary circumstances described in their NEPA procedures to ensure that they adequately account for those situations and settings in which a proposed categorical exclusion should not be applied. An extraordinary circumstance requires the agency to determine how to proceed with the NEPA review. For example, the presence of a factor, such as a threatened or endangered species or a historic resource, could be an extraordinary circumstance, which, depending on the structure of the agency's NEPA implementing procedures, could either cause the agency to prepare an EA or an EIS, or cause the agency to consider whether the proposed action's impacts on that factor require additional analysis in an EA or an EIS. In other situations, the extraordinary circumstance could be defined to include both the presence of the factor and the impact on that factor. Either way, agency NEPA implementing procedures should clearly describe the manner in which an agency applies extraordinary circumstances and the circumstances under which additional analysis in an EA or an EIS is warranted.

Agencies should review their existing extraordinary circumstances concurrently with the review of their categorical exclusions. If an agency's existing extraordinary circumstances do not provide sufficient parameters to limit a proposed new or revised categorical exclusion to actions that do not have the potential for significant environmental effects, the agency should identify and propose additional extraordinary circumstances or revise those that will apply to the proposed categorical exclusion. If extensive extraordinary circumstances are needed to limit a proposed categorical exclusion, the agency should also consider whether the proposed categorical exclusion itself is appropriate. Any new or revised extraordinary circumstances must be issued together with the new or revised categorical exclusion in draft form and then in final form according to the procedures described in Section IV.

III. SUBSTANTIATING A NEW OR REVISED CATEGORICAL EXCLUSION

Substantiating a new or revised categorical exclusion is basic to good decisionmaking. It serves as the agency's own administrative record of the underlying reasoning for the categorical exclusion. A key issue confronting Federal agencies is how to substantiate a determination that a proposed new or revised categorical exclusion describes a category of actions that do not individually or cumulatively have a significant effect on the human environment.¹⁶ Provided below are methods agencies can use to gather and evaluate information to substantiate proposed new or revised categorical exclusions.

A. Gathering Information to Substantiate a Categorical Exclusion

¹⁵ *Id.* at § 1508.27(b).

¹⁶ *See id.* at §§ 1508.7, 1508.8, 1508.27.

The amount of information required to substantiate a categorical exclusion depends on the type of activities included in the proposed category of actions. Actions that are reasonably expected to have little impact (for example, conducting surveys or purchasing small amounts of office supplies consistent with applicable acquisition and environmental standards) should not require extensive supporting information.¹⁷ For actions that do not obviously lack significant environmental effects, agencies must gather sufficient information to support establishing a new or revised categorical exclusion. An agency can substantiate a categorical exclusion using the sources of information described below, either alone or in combination.¹⁸

1. Previously Implemented Actions

An agency's assessment of the environmental effects of previously implemented or ongoing actions is an important source of information to substantiate a categorical exclusion. Such assessment allows the agency's experience with implementation and operating procedures to be taken into account in developing the proposed categorical exclusion.

Agencies can obtain useful substantiating information by monitoring and/or otherwise evaluating the effects of implemented actions that were analyzed in EAs that consistently supported Findings of No Significant Impact. If the evaluation of the implemented action validates the environmental effects (or lack thereof) predicted in the EA, this provides strong support for a proposed categorical exclusion. Care must be taken to ensure that any mitigation measures developed during the EA process are an integral component of the actions considered for inclusion in a proposed categorical exclusion.

Implemented actions analyzed in an EIS can also be a useful source of substantiating information if the implemented action has independent utility to the agency, separate and apart from the broader action analyzed in the EIS. The EIS must specifically address the environmental effects of the independent proposed action and determine that those effects are not

¹⁷ Agencies should still consider the environmental effects of actions that are taken on a large scale. Agency-wide procurement and personnel actions could have cumulative impacts. For example, purchasing paper with higher recycled content uses less natural resources and will have lesser environmental impacts. *See* "Federal Leadership in Environmental, Energy, and Economic Performance," Exec. Order No. 13514, 74 Fed. Reg. 52,117 (Oct. 8, 2009).

¹⁸ Agencies should be mindful of their obligations under the Information Quality Act to ensure the quality, objectivity, utility, and integrity of the information they use or disseminate as the basis of an agency decision to establish a categorical exclusion. *See* Information Quality Act, Pub. L. No. 106-554, section 515 (2000), 114 Stat. §§ 2763, 2763A-153 (codified at 44 U.S.C. § 3516 (2001)); *see also* "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Republication," 60 Fed. Reg. 8,452 (Feb. 22, 2002), *available at* www.whitehouse.gov/omb/inforeg/infopoltech.html. Additional laws and regulations that establish obligations that apply or may apply to the processes of establishing and applying categorical exclusions (such as the Federal Records Act) are beyond the scope of this guidance.

significant. For example, when a discrete, independent action is analyzed in an EIS as part of a broad management action, an evaluation of the actual effects of that discrete action may support a proposed categorical exclusion for the discrete action. As with actions previously analyzed in EAs, predicted effects (or lack thereof) should be validated through monitoring or other corroborating evidence.

Agencies can also identify or substantiate new categorical exclusions and extraordinary circumstances by using auditing and implementation data gathered in accordance with an Environmental Management System or other systems that track environmental performance and the effects of particular actions taken to attain that performance.¹⁹

Agencies should also consider appropriate monitoring or other evaluation of the environmental effects of their categorically-excluded actions, to inform periodic reviews of existing categorical exclusions, as discussed in Section VI, below.

2. Impact Demonstration Projects

When Federal agencies lack experience with a particular category of actions that is being considered for a proposed categorical exclusion, they may undertake impact demonstration projects to assess the environmental effects of those actions. As part of a demonstration project, the Federal agency should monitor the actual environmental effects of the proposed action during and after implementation. The NEPA documentation prepared for impact demonstration projects should explain how the monitoring and analysis results will be used to evaluate the merits of a proposed categorical exclusion. When designing impact demonstration projects, an agency must ensure that the action being evaluated accurately represents the scope, the operational context, and the environmental context of the entire category of actions that will be described in the proposed categorical exclusion. For example, if the proposed categorical exclusion would be used in regions or areas of the country with different environmental settings, a series of impact demonstration projects may be needed in those areas where the categorical exclusion would be used.

3. Information from Professional Staff, Expert Opinions, and Scientific Analyses

A Federal agency may rely on the expertise, experience, and judgment of its professional staff as well as outside experts to assess the potential environmental effects of applying proposed categorical exclusions, provided that the experts have knowledge, training, and experience relevant to the implementation and environmental effects of the actions described in the proposed categorical exclusion. The administrative record for the proposed categorical exclusion should document the experts' credentials (e.g., education, training, certifications, years of related

¹⁹ An EMS provides a systematic framework for a Federal agency to monitor and continually improve its environmental performance through audits, evaluation of legal and other requirements, and management reviews. The potential for EMS to support NEPA work is further described in CEQ's Guidebook, "Aligning National Environmental Policy Act Processes with Environmental Management Systems" (2007), *available on www.nepa.gov at ceq.hss.doe.gov/publications/nepa_and_ems.html*.

experience) and describe how the experts arrived at their conclusions.

Scientific analyses are another good source of information to substantiate a new or revised categorical exclusion. Because the reliability of scientific information varies according to its source and the rigor with which it was developed, the Federal agency remains responsible for determining whether the information reflects accepted knowledge, accurate findings, and experience relevant to the environmental effects of the actions that would be included in the proposed categorical exclusion. Peer-reviewed findings may be especially useful to support an agency's scientific analysis, but agencies may also consult professional opinions, reports, and research findings that have not been formally peer-reviewed. Scientific information that has not been externally peer-reviewed may require additional scrutiny and evaluation by the agency. In all cases, findings must be based on high-quality, accurate technical and scientific information.²⁰

4. Benchmarking Other Agencies' Experiences

~~A federal agency cannot rely on another agency's categorical exclusion to support a decision not to prepare an EA or an EIS for its own actions. An agency may, however, substantiate a categorical exclusion of its own based on another agency's experience with a comparable categorical exclusion and the administrative record developed when the other agency's categorical exclusion was established. Federal agencies can also substantiate categorical exclusions by benchmarking, or drawing support, from private and public entities that have experience with the actions covered in a proposed categorical exclusion, such as state and local agencies, Tribes, academic and professional institutions, and other Federal agencies.~~

When determining whether it is appropriate to rely on another entity's experience, an agency must demonstrate that the benchmarked actions are comparable to the actions in a proposed categorical exclusion. The agency can demonstrate this based on: (1) characteristics of the actions; (2) methods of implementing the actions; (3) frequency of the actions; (4) applicable standard operating procedures or implementing guidance (including extraordinary circumstances); and (5) timing and context, including the environmental settings in which the actions take place.

B. Evaluating the Information Supporting Categorical Exclusions

After gathering substantiating information and determining that the category of actions in the proposed categorical exclusion does not normally result in individually or cumulatively significant environmental effects, a Federal agency should develop findings that demonstrate how it made its determination. These findings should account for similarities and differences between the proposed categorical exclusion and the substantiating information. The findings should describe the method and criteria the agency used to assess the environmental effects of the proposed categorical exclusion. These findings, and the relevant substantiating information, should be maintained in an administrative record that will support: benchmarking by other agencies (as discussed in Section III.A.4, above); applying the categorical exclusions (as discussed in Section V.A, below); and periodically reviewing the continued viability of the

²⁰ See 40 CFR §§ 1500.1(b), 1502.24.

categorical exclusion (as discussed in Section VI, below). These finding should also be made available to the public, at least in preliminary form, as part of the process of seeking public input on the establishment of new or revised categorical exclusions, though the final findings may be revised based on new information received from the public and other sources.

IV. PROCEDURES FOR ESTABLISHING A NEW OR REVISED CATEGORICAL EXCLUSION

Pursuant to section 1507.3(a) of the CEQ Regulations, Federal agencies are required to consult with the public and with CEQ whenever they amend their NEPA procedures, including when they establish new or revised categorical exclusions. An agency can only adopt new or revised NEPA implementing procedures after the public has had notice and an opportunity to comment, and after CEQ has issued a determination that the procedures are in conformity with NEPA and the CEQ regulations. Accordingly, an agency's process for establishing a new or revised categorical exclusion should include the following steps:

- Draft the proposed categorical exclusion based on the agency's experience and substantiating information;
- Consult with CEQ on the proposed categorical exclusion;
- Consult with other Federal agencies that conduct similar activities to coordinate with their current procedures, especially for programs requesting similar information from members of the public (e.g., applicants);
- Publish a notice of the proposed categorical exclusion in the *Federal Register* for public review and comment;
- Consider public comments;
- Consult with CEQ on the public comments received and the proposed final categorical exclusion to obtain CEQ's written determination of conformity with NEPA and the CEQ Regulations;
- Publish the final categorical exclusion in the *Federal Register*;
- File the categorical exclusion with CEQ; and
- Make the categorical exclusion readily available to the public through the agency's web site and/or other means.

A. Consultation with CEQ

The CEQ Regulations require agencies to consult with CEQ prior to publishing their proposed NEPA procedures in the *Federal Register* for public comment. Agencies are encouraged to involve CEQ as early as possible in the process and to enlist CEQ's expertise and assistance with interagency coordination to make the process as efficient as possible.²¹

²¹ 40 CFR § 1507.3(a) (requiring agencies with similar programs to consult with one another and with CEQ to coordinate their procedures).

Following the public comment period, the Federal agency must consider the comments received and consult again with CEQ to discuss substantive comments and how they will be addressed. CEQ shall complete its review within thirty (30) days of receiving the final text of the agency's proposed categorical exclusion. For consultation to successfully conclude, CEQ must provide the agency with a written statement that the categorical exclusion was developed in conformity with NEPA and the CEQ Regulations. Finally, when the Federal agency publishes the final version of the categorical exclusion in the *Federal Register* and on its established agency website, the agency should notify CEQ of such publication so as to satisfy the requirements to file the final categorical exclusion with CEQ and to make the final categorical exclusion readily available to the public.²²

B. Seeking Public Involvement when Establishing or Revising A Categorical Exclusion

Engaging the public in the environmental aspects of Federal decisionmaking is a key aspect of NEPA and the CEQ Regulations.²³ At a minimum, the CEQ Regulations require Federal agencies to make any proposed amendments to their categorical exclusions available for public review and comment in the *Federal Register*,²⁴ regardless of whether the categorical exclusions are promulgated as regulations through rulemaking, or issued as departmental directives or orders.²⁵ To maximize the value of comments from interested parties, the agency's *Federal Register* notice should:

- Describe the proposed activities covered by the categorical exclusion and provide the proposed text of the categorical exclusion;

²² *Id.*

²³ National Environmental Policy Act of 1969, § 2 *et seq.*, 42 U.S.C. § 4321 *et seq.*; *see, e.g.*, 40 CFR § 1506.6(a) (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures); 40 CFR § 1507.3(a) (requiring each agency to consult with CEQ while developing its procedures and before publishing them in the *Federal Register* for comment; providing that an agency's NEPA procedures shall be adopted only after an opportunity for public review; and providing that, once in effect, the procedures must be made readily available to the public).

²⁴ *See* 40 CFR § 1507.3 (outlining procedural requirements for agencies to establish and revise their NEPA implementing regulations), 1506.6(a) (requiring agencies to involve the public in rulemaking, including public notice and an opportunity to comment).

²⁵ NEPA and the CEQ Regulations do not require agency NEPA implementing procedures, of which categorical exclusions are a key component, to be promulgated as regulations through rulemaking. Agencies should ensure they comply with all appropriate agency requirements for issuing and revising their NEPA implementing procedures.

- Summarize the information in the agency’s administrative record that was used to substantiate the categorical exclusion, including an evaluation of the information and related findings;²⁶
- Define all applicable terms;
- Describe the extraordinary circumstances that may limit the use of the categorical exclusion; and
- Describe the available means for submitting questions and comments about the proposed categorical exclusion (for example, email addresses, mailing addresses, website addresses, and names and phone numbers of agency points of contact).

When establishing or revising a categorical exclusion, agencies should also pursue additional opportunities for public involvement beyond publication in the *Federal Register* in cases where there is likely to be significant public interest and additional outreach would facilitate public input. The extent of public involvement can be tailored to the nature of the proposed categorical exclusion and the degree of expected public interest.

CEQ encourages Federal agencies to engage interested parties such as public interest groups, Federal NEPA contacts at other agencies, Tribal governments and agencies, and state and local governments and agencies. The purpose of this engagement is to share relevant data, information, and concerns. Agencies can involve the public by using the methods noted in section 1506.6 of the CEQ Regulations, as well as other public involvement techniques such as focus groups, e-mail exchanges, conference calls, and web-based forums.

CEQ also strongly encourages Federal agencies to post updates on their official websites whenever they issue *Federal Register* notices for new or revised categorical exclusions. An agency website may serve as the primary location where the public learns about agency NEPA implementing procedures and their use, and obtains efficient access to updates and supporting information. Therefore, agencies should ensure that their NEPA implementing procedures and any final revisions or amendments are easily accessed through the agency’s official website including when an agency is adding, deleting, or revising the categorical exclusions and/or the extraordinary circumstances in its NEPA implementing procedures.

V. APPLYING AN ESTABLISHED CATEGORICAL EXCLUSION

²⁶ This step is particularly beneficial when the agency determines that the public will view a potential impact as significant, as it provides the agency the opportunity to explain why it believes that impact to be presumptively insignificant. Whenever practicable, the agency should include a link to a website containing all the supporting information, evaluations, and findings. Ready access to all supporting information will likely minimize the need for members of the public to depend on Freedom of Information Act requests and enhance the NEPA goals of outreach and disclosure. Agencies should consider using their regulatory development tools to assist in maintaining access to supporting information, such as establishing an online docket using www.regulations.gov.

When applying a categorical exclusion to a proposed action, Federal agencies face two key decisions: (1) whether to prepare documentation supporting their determination to use a categorical exclusion for a proposed action; and (2) whether public engagement and disclosure may be useful to inform determinations about using categorical exclusions.

A. When to Document Categorical Exclusion Determinations

In prior guidance, CEQ has “strongly discourage[d] procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded,” based on an expectation that “sufficient information will usually be available during the course of normal project development” to determine whether an EIS or an EA is needed.²⁷ Moreover, “the agency’s administrative record (for the proposed action) will clearly document the basis for its decision.”²⁸ This guidance modifies our prior guidance to the extent that it recognizes that each Federal agency should decide—and update its NEPA implementing procedures and guidance to indicate—whether any of its categorical exclusions warrant preparation of additional documentation.

Some activities, such as routine personnel actions or purchases of small amounts of supplies, may carry little risk of significant environmental effects, such that there is no practical need for, or benefit from, preparing additional documentation when applying a categorical exclusion to those activities. For those activities, the administrative record for establishing the categorical exclusion and any normal project development documentation may be considered sufficient.

For other activities, such as decisions to allow various stages of resource development after a programmatic environmental review, documentation may be appropriate to demonstrate that the proposed action comports with any limitations identified in prior NEPA analysis and that there are no potentially significant impacts expected as a result of extraordinary circumstances. In such cases, the documentation should address proposal-specific factors and show consideration of extraordinary circumstances with regard to the potential for localized impacts. It is up to agencies to decide whether to prepare separate NEPA documentation in such cases or to include this documentation in other project-specific documents that the agency is preparing.

In some cases, courts have required documentation to demonstrate that a Federal agency has considered the environmental effects associated with extraordinary circumstances.²⁹

²⁷ “Guidance Regarding NEPA Regulations,” 48 Fed. Reg. 34,263, 34,265 (Jul. 28, 1983), available on www.nepa.gov at ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm.

²⁸ *Id.*

²⁹ See, e.g., *California v. Norton*, 311 F.3d 1162, 1175-78 (9th Cir. 2002).

Documenting the application of a categorical exclusion provides the agency the opportunity to demonstrate why its decision to use the categorical exclusion is entitled to deference.³⁰

Documentation may be necessary to comply with the requirements of other laws, regulations, and policies, such as the Endangered Species Act or the National Historic Preservation Act. When that is the case, all resource analyses and the results of any consultations or coordination should be incorporated by reference in the administrative record developed for the proposed action. Moreover, the nature and severity of the effect on resources subject to additional laws or regulations may be a reason for limiting the use of a categorical exclusion and therefore should, where appropriate, also be addressed in documentation showing how potential extraordinary circumstances were considered and addressed in the decision to use the categorical exclusion.

For those categorical exclusions for which an agency determines that documentation is appropriate, the documentation should cite the categorical exclusion being used and show that the agency determined that: (1) the proposed action fits within the category of actions described in the categorical exclusion; and (2) there are no extraordinary circumstances that would preclude the proposed action from being categorically excluded. The extent of the documentation should be tailored to the type of action involved, the potential for extraordinary circumstances and environmental effects, and any applicable requirements of other laws, regulations, and policies. If lengthy documentation is needed to address these aspects, an agency should consider whether it is appropriate to apply the categorical exclusion in that particular situation. In all circumstances, any documentation prepared for a categorical exclusion should be concise.

B. When to Seek Public Engagement and Disclosure

Most Federal agencies do not routinely notify the public when they use a categorical exclusion to meet their NEPA responsibilities. There are some circumstances, however, where the public may be able to provide an agency with valuable information, such as whether a proposal involves extraordinary circumstances or potentially significant cumulative impacts that can help the agency decide whether to apply a categorical exclusion. CEQ therefore encourages Federal agencies to determine—and specify in their NEPA implementing procedures—those circumstances in which the public should be engaged or notified before a categorical exclusion is used.

Agencies should utilize information technology to provide the public with access to information about the agency's NEPA compliance. CEQ strongly recommends that agencies post key information about their NEPA procedures and implementation on a publicly available website. The website should include:

- The text of the categorical exclusions and applicable extraordinary circumstances;

³⁰ The agency determination that an action is categorically excluded may itself be challenged under the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.*

- A synopsis of the administrative record supporting the establishment of each categorical exclusion with information on how the public can access the entire administrative record;
- Those categorical exclusions which the agency determines are and are not likely to be of interest to the public,³¹ and
- Information on agencies' use of categorical exclusions for proposed actions, particularly in those situations where there is a high level of public interest in a proposed action.

Where an agency has documented a categorical exclusion, it should also consider posting that documentation online. For example, in 2009, the Department of Energy adopted a policy to post documented categorical exclusion determinations online.³² By adopting a similar policy, other agencies can significantly increase the quality and transparency of their decisionmaking when using categorical exclusions.

VI. PERIODIC REVIEW OF ESTABLISHED CATEGORICAL EXCLUSIONS

The CEQ Regulations direct Federal agencies to “continue to review their policies and procedures and in consultation with [CEQ] to revise them as necessary to ensure full compliance with the purposes and provisions of [NEPA].”³³ Many agencies have categorical exclusions that were established many years ago. Some Federal agencies have internal procedures for identifying and revising categorical exclusions that no longer reflect current environmental circumstances, or current agency policies, procedures, programs, or mission. Where an agency's categorical exclusions have not been regularly reviewed, they should be reviewed by the agency as soon as possible.

There are several reasons why Federal agencies should periodically review their categorical exclusions. For example, a Federal agency may find that an existing categorical exclusion is not being used because the category of actions is too narrowly defined. In such cases, the agency should consider amending its NEPA implementing procedures to expand the description of the category of actions included in the categorical exclusion. An agency could also find that an existing categorical exclusion includes actions that raise the potential for significant environmental effects with some regularity. In those cases, the agency should determine whether to delete the categorical exclusion, or revise it to either limit the category of actions or expand the extraordinary circumstances that limit when the categorical exclusion can be used. Periodic review can also help agencies identify additional factors that should be included in their extraordinary circumstances and consider whether certain categorical exclusions should be documented.

³¹ Many agencies publish two lists of categorical exclusions: (1) those which typically do not raise public concerns due to the low risk of potential environmental effects, and (2) those more likely to raise public concerns.

³² See Department of Energy, “Categorical Exclusion Determinations,” *available at* www.gc.energy.gov/NEPA/categorical_exclusion_determinations.htm.

³³ 40 CFR § 1507.3.

Agencies should exercise sound judgment about the appropriateness of categorically excluding activities in light of evolving or changing conditions that might present new or different environmental impacts or risks. The assumptions underlying the nature and impact of activities encompassed by a categorical exclusion may have changed over time. Different technological capacities of permitted activities may present very different risk or impact profiles. This issue was addressed in CEQ's August 16, 2010 report reviewing the Department of the Interior's Minerals Management Service's application of NEPA to the permitting of deepwater oil and gas drilling.³⁴

Agencies should review their categorical exclusions on an established timeframe, beginning with the categorical exclusions that were established earliest and/or the categorical exclusions that may have the greatest potential for significant environmental impacts. This guidance recommends that agencies develop a process and timeline to periodically review their categorical exclusions (and extraordinary circumstances) to ensure that their categorical exclusions remain current and appropriate, and that those reviews should be conducted at least every seven years. A seven-year cycle allows the agencies to regularly review categorical exclusions to avoid the use of categorical exclusions that are outdated and no longer appropriate. If the agency believes that a different timeframe is appropriate, the agency should articulate a sound basis for that conclusion, explaining how the alternate timeframe will still allow the agency to avoid the use of categorical exclusions that are outdated and no longer appropriate. The agency should publish its process and time period, along with its articulation of a sound basis for periods over seven years, on the agency's website and notify CEQ where on the website the review procedures are posted. We recognize that due to competing priorities, resource constraints, or for other reasons, agencies may not always be able to meet these time periods. The fact that a categorical exclusion has not been evaluated within the time established does not invalidate its use for NEPA compliance, as long as such use is consistent with the defined scope of the exclusion and has properly considered any potential extraordinary circumstances.

In establishing this review process, agencies should take into account factors including changed circumstances, how frequently the categorical exclusions are used, the extent to which resources and geographic areas are potentially affected, and the expected duration of impacts. The level of scrutiny and evaluation during the review process should be commensurate with a categorically-excluded activity's potential to cause environmental impacts and the extent to which relevant circumstances have changed since it was issued or last reviewed. Some categorical exclusions, such as for routine purchases or contracting for office-related services,

³⁴ Council on Environmental Quality, "Report Regarding the Mineral Management Service's National Environmental Policy Act Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration," *available at* ceq.hss.doe.gov/current_developments/docs/CEQ_Report_Reviewing_MMS_OCS_NEPA_Implementation.pdf (Aug. 2010) at 18-20 (explaining that MMS NEPA review for the Macondo Exploratory Well relied on categorical exclusions established in the 1980s, before deepwater drilling became widespread).

may require minimal review. Other categorical exclusions may require a more thorough reassessment of scope, environmental effects, and extraordinary circumstances, such as when they are tiered to programmatic EAs or EISs that analyzed activities whose underlying circumstances have since changed.

To facilitate reviews, the Federal agency offices charged with overseeing their agency's NEPA compliance should develop and maintain sufficient capacity to periodically review their existing categorical exclusions to ensure that the agency's prediction of no significant impacts is borne out in practice.³⁵ Agencies can efficiently assess changed circumstances by utilizing a variety of methods such as those recommended in Section III, above, for substantiating new or revised categorical exclusions. These methods include benchmarking, monitoring of previously implemented actions, and consultation with professional staff. The type and extent of monitoring and other information that should be considered in periodic reviews, as well as the particular entity or entities within the agency that would be responsible for gathering this information, will vary depending upon the nature of the actions and their anticipated effects. Consequently, agencies should utilize the expertise, experience, and judgment of agency professional staff when determining the appropriate type and extent of monitoring and other information to consider. This information will help the agency determine whether its categorical exclusions are used appropriately, or whether a categorical exclusion needs to be revised. Agencies can also use this information when they engage stakeholders in developing proposed revisions to categorical exclusions and extraordinary circumstances.

Agencies can also facilitate reviews by keeping records of their experiences with certain activities in a number of ways, including tracking information provided by agency field offices.³⁶ In such cases, a Federal agency could conduct its periodic review of an established categorical exclusion by soliciting information from field offices about the observed effects of implemented actions, both from agency personnel and the public. On-the-ground monitoring to evaluate environmental effects of an agency's categorically-excluded actions, where appropriate, can also be incorporated into an agency's procedures for conducting its oversight of ongoing projects and can be included as part of regular site visits to project areas.

Agencies can also conduct periodic review of existing categorical exclusions through broader program reviews. Program reviews can occur at various levels (for example, field office, division office, headquarters office) and on various scales (for example, geographic location, project type, or areas identified in an interagency agreement). While a Federal agency may choose to initiate a program review specifically focused on categorical exclusions, it is possible that program reviews with a broader focus may yield information relevant to categorical exclusions and may thus substitute for reviews specifically focused on categorical exclusions. However, the substantial flexibility that agencies have in how they structure their review

³⁵ 40 CFR § 1507.2.

³⁶ Council on Environmental Quality, "The NEPA Task Force Report to the Council on Environmental Quality – Modernizing NEPA Implementation," p. 63 (Sept. 2003), *available on* www.nepa.gov *at* ceq.hss.doe.gov/ntf/report/index.html.

procedures underscores the importance of ensuring that the review procedures are clear and transparent.

In working with agencies on reviewing their existing categorical exclusions, CEQ will look to the actual impacts from activities that have been subject to categorical exclusions, and will consider the extent and scope of agency monitoring and/or other substantiating evidence. As part of its oversight role and responsibilities under NEPA, CEQ will contact agencies following the release of this guidance to ascertain the status of their reviews of existing categorical exclusions. CEQ will make every effort to align its oversight with reviews being conducted by the agency and will begin with those agencies that are currently reassessing their categorical exclusions, as well as with agencies that are experiencing difficulties or facing challenges to their application of categorical exclusions.

Finally, it is important to note that the rationale and supporting information for establishing or documenting experience with using a categorical exclusion may be lost if an agency has inadequate procedures for recording, retrieving, and preserving documents and administrative records. Therefore, Federal agencies will benefit from a review of their current practices for maintaining and preserving such records. Measures to ensure future availability could include greater centralization of records, use of modern storage systems and improvements in the agency's electronic and hard copy filing systems.³⁷

VII. CONCLUSION

This guidance will help to guide CEQ and the agencies when an agency seeks to propose a new or revised categorical exclusion. It should also guide the agencies when categorical exclusions are used for proposed actions, when reviewing existing categorical exclusions, or when proposing new categorical exclusions. Questions regarding this guidance should be directed to the CEQ Associate Director for NEPA Oversight.

³⁷ Agencies should be mindful of their obligations to maintain and preserve agency records under the Federal Records Act for maintaining and preserving agency records. 44 U.S.C. § 3101 *et seq.*

Environmental Justice

Guidance Under the National Environmental Policy Act



Council on Environmental Quality

Front cover photograph of John Heinz National Wildlife Refuge at Tinicum
by John and Karen Hollingsworth

Front cover photograph of school bus and children by Sam Kittner.

ENVIRONMENTAL JUSTICE

***Guidance Under the
National Environmental Policy Act***



**Council on Environmental Quality
Executive Office of the President
Old Executive Office Building, Room 360
Washington, D.C. 20502
(202)395-5750
<http://www.whitehouse.gov/CEQ/>
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I.

Introduction

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,"¹ provides that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." The Executive Order makes clear that its provisions apply fully to programs involving Native Americans.

In the memorandum to heads of departments and agencies that accompanied Executive Order 12898, the President specifically recognized the importance of procedures under the National Environmental Policy Act (NEPA)² for identifying and addressing environmental justice concerns. The memorandum states that "each Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by [NEPA]." The memorandum particularly emphasizes the importance of NEPA's public participation process, directing that "each Federal agency shall provide opportunities for community input in the NEPA process." Agencies are further directed to "identify potential effects and mitigation measures in consultation with affected communities, and improve the accessibility of meetings, crucial documents, and notices."

The Council on Environmental Quality (CEQ) has oversight of the Federal government's compliance with Executive Order 12898 and NEPA.³ CEQ, in consultation with EPA and other affected agencies, has developed this guidance to further assist Federal agencies with their NEPA procedures so that environmental justice concerns are effectively identified and addressed. To the extent practicable and permitted by law, agencies may supplement this guidance with more specific procedures tailored to particular programs or activities of an individual department, agency, or office.

¹ 59 Fed. Reg. 7629 (1994).

² 42 U.S.C. §4321 *et seq.*

³ Certain oversight functions in the Executive Order are delegated to the Deputy Assistant to the President for Environmental Policy. Following the merger of the White House Office on Environmental Policy with CEQ, the Chair of CEQ assumed those functions. The Environmental Protection Agency (EPA) has lead responsibility for implementation of the Executive Order as Chair of the Interagency Working Group (IWG) on Environmental Justice.

II.

Executive Order 12898 and the Presidential Memorandum

In addition to the general directive in Executive Order 12898 that each agency identify and address, as appropriate, "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations,"⁴ there are several provisions of the Executive Order and a number of supporting documents to which agencies should refer when identifying and addressing environmental justice concerns in the NEPA process.

First, the Executive Order itself contains particular emphasis on four issues that are pertinent to the NEPA process:

- The Executive Order requires the development of agency-specific environmental justice strategies.⁵ Thus, agencies have developed and should periodically revise their strategies providing guidance concerning the types of programs, policies, and activities that may, or historically have, raised environmental justice concerns at the particular agency. These guidances may suggest possible approaches to addressing such concerns in the agency's NEPA analyses, as appropriate.
- The Executive Order recognizes the importance of research, data collection, and analysis, particularly with respect to multiple and cumulative exposures to environmental hazards for low-income populations, minority populations, and Indian tribes.⁶ Thus, data on these exposure issues should be incorporated into NEPA analyses as appropriate.⁷
- The Executive Order provides for agencies to collect, maintain, and analyze information on patterns of subsistence consumption of fish, vegetation, or wildlife.⁸ Where an agency action may affect fish, vegetation, or wildlife, that agency action may

⁴ Executive Order No. 12898, 59 Fed. Reg. at 7630 (Section 1-101).

⁵ *Id.* at 7630 (Section 1-103).

⁶ *Id.* at 7631 (Section 3-3).

⁷ For further information on considering cumulative effects, see *Considering Cumulative Effects Under The National Environmental Policy Act* (Council on Environmental Quality, Executive Office of the President, Jan. 1997)

⁸ *Id.* at 7631 (Section 4-401).

also affect subsistence patterns of consumption and indicate the potential for disproportionately high and adverse human health or environmental effects on low-income populations, minority populations, and Indian tribes.

- The Executive Order requires agencies to work to ensure effective public participation and access to information.⁹ Thus, within its NEPA process and through other appropriate mechanisms, each Federal agency shall, "wherever practicable and appropriate, translate crucial public documents, notices and hearings, relating to human health or the environment for limited English speaking populations." In addition, each agency should work to "ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public."¹⁰

Second, the memorandum accompanying the Executive Order identifies four important ways to consider environmental justice under NEPA.

- Each Federal agency should analyze the environmental effects, including human health, economic, and social effects of Federal actions, including effects on minority populations, low-income populations, and Indian tribes, when such analysis is required by NEPA.¹¹

- Mitigation measures identified as part of an environmental assessment (EA), a finding of no significant impact (FONSI), an environmental impact statement (EIS), or a record of decision (ROD), should, whenever feasible, address significant and adverse environmental effects of proposed federal actions on minority populations, low-income populations, and Indian tribes.¹²

- Each Federal agency must provide opportunities for effective community participation in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of public meetings, crucial documents, and notices.¹³

- Review of NEPA compliance (such as EPA's review under § 309 of the Clean Air Act)

⁹ *Id.* at 7632 (Section 5-5).

¹⁰ *Id.* at 7632 (Section 5-5).

¹¹ Memorandum from the President to the Heads of Departments and Agencies. Comprehensive Presidential Documents No. 279. (Feb. 11, 1994).

¹² *Id.*

¹³ *Id.*

must ensure that the lead agency preparing NEPA analyses and documentation has appropriately analyzed environmental effects on minority populations, low-income populations, or Indian tribes, including human health, social, and economic effects.¹⁴

Third, the Interagency Working Group (IWG), established by the Executive Order to implement the order's requirements, has developed guidance on key terms in the Executive Order. The guidance, reproduced as Appendix A, reflects a general consensus based on Federal agencies' experience and understanding of the issues presented. Agencies should apply the guidance with flexibility, and may consider its terms a point of departure rather than conclusive direction in applying the terms of the Executive Order.

¹⁴ *Id.*

III.

Executive Order 12898 and NEPA

A. NEPA Generally

NEPA's fundamental policy is to "encourage productive and enjoyable harmony between man and his environment."¹⁵ In the statute, 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."¹⁶ The following goals, set forth in NEPA, make clear that attainment of environmental justice is wholly consistent with the purposes and policies of NEPA¹⁷:

- to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings"¹⁸;
- to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences",¹⁹
- to "preserve important historic, cultural, and natural aspects of our natural heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice"²⁰; and
- to "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities."²¹

These goals are promoted through the requirement that all agencies of the Federal government shall include in every recommendation or report on proposals for legislation and other

¹⁵ 42 U.S.C. § 4321.

¹⁶ 42 U.S.C. § 4331(c).

¹⁷ 42 U.S.C. § 4331(b).

¹⁸ 42 U.S.C. § 4331(b)(2).

¹⁹ 42 U.S.C. § 4331(b)(3).

²⁰ 42 U.S.C. § 4331(b)(4).

²¹ 42 U.S.C. § 4331(b)(5).

major Federal actions significantly affecting the quality of the human environment, a "detailed statement by the responsible official" on: the environmental impacts of the proposed action; adverse environmental effects that cannot be avoided should the proposal be implemented; alternatives to the proposed action; the relationship between local, short-term uses of man's environment and long-term productivity; and any irreversible or irretrievable commitments of resources involved in the proposed action itself.²²

Preparation of an EA may precede preparation of an EIS, to determine whether a proposed action may "significantly affect" the quality of the human environment. The EA either will support a finding of no significant impact (FONSI), or will document the need for an EIS. Agency procedure at each step of this process should be guided by the agency's own NEPA regulations and by the CEQ regulations found at 40 C.F.R. Parts 1500-1508.

B. Principles for Considering Environmental Justice under NEPA

Environmental justice issues may arise at any step of the NEPA process and agencies should consider these issues at each and every step of the process, as appropriate. Environmental justice issues encompass a broad range of impacts covered by NEPA, including impacts on the natural or physical environment and interrelated social, cultural and economic effects.²³ In preparing an EIS or an EA, agencies must consider both impacts on the natural or physical environment and related social, cultural, and economic impacts.²⁴ Environmental justice concerns may arise from impacts on the natural and physical environment, such as human health or ecological impacts on minority populations, low-income populations, and Indian tribes, or from related social or economic impacts.

1. General Principles

Agencies should recognize that the question of whether agency action raises environmental justice issues is highly sensitive to the history or circumstances of a particular community or population, the particular type of environmental or human health impact, and the nature of the proposed action itself. There is not a standard formula for how environmental justice issues should be identified or addressed. However, the following six principles provide general guidance.

²² 42 U.S.C. § 4332(c).

²³ The CEQ implementing regulations define "effects" or "impacts" to include "ecological...aesthetic, historic, cultural, economic, social or health, whether direct, indirect or cumulative." 40 C.F.R. 1508.8.

²⁴ 40 C.F.R. 1508.14.

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- Agencies should consider the composition of the affected area, to determine whether minority populations, low-income populations, or Indian tribes are present in the area affected by the proposed action, and if so whether there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or Indian tribes.
 - Agencies should consider relevant public health data and industry data concerning the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards, to the extent such information is reasonably available. For example, data may suggest there are disproportionately high and adverse human health or environmental effects on a minority population, low-income population, or Indian tribe from the agency action. Agencies should consider these multiple, or cumulative effects, even if certain effects are not within the control or subject to the discretion of the agency proposing the action.
 - Agencies should recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action. These factors should include the physical sensitivity of the community or population to particular impacts; the effect of any disruption on the community structure associated with the proposed action; and the nature and degree of impact on the physical and social structure of the community.
 - Agencies should develop effective public participation strategies. Agencies should, as appropriate, acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation, and should incorporate active outreach to affected groups.
 - Agencies should assure meaningful community representation in the process. Agencies should be aware of the diverse constituencies within any particular community when they seek community representation and should endeavor to have complete representation of the community as a whole. Agencies also should be aware that community participation must occur as early as possible if it is to be meaningful.
 - Agencies should seek tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally-recognized tribes, and any treaty rights.

2. Additional Considerations

The preceding principles must be applied in light of these further considerations that are

pertinent to any analysis of environmental justice under NEPA.

- The Executive Order does not change the prevailing legal thresholds and statutory interpretations under NEPA and existing case law. For example, for an EIS to be required, there must be a sufficient impact on the physical or natural environment to be "significant" within the meaning of NEPA. Agency consideration of impacts on low-income populations, minority populations, or Indian tribes may lead to the identification of disproportionately high and adverse human health or environmental effects that are significant and that otherwise would be overlooked.²⁵
- Under NEPA, the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe does not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory. Rather, the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.
- Neither the Executive Order nor this guidance prescribes any specific format for examining environmental justice, such as designating a specific chapter or section in an EIS or EA on environmental justice issues. Agencies should integrate analyses of environmental justice concerns in an appropriate manner so as to be clear, concise, and comprehensible within the general format suggested by 40 C.F.R. § 1502.10.

C. Considering Environmental Justice in Specific Phases of the NEPA Process

While appropriate consideration of environmental justice issues is highly dependent upon the particular facts and circumstances of the proposed action, the affected environment, and the affected populations, there are opportunities and strategies that are useful at particular stages of the NEPA process.

1. Scoping

During the scoping process, an agency should preliminarily determine whether

²⁵ Title VI of the Civil Rights Act of 1964, U.S.C. 2000d *et seq.*, and agency implementing regulations, prohibit recipients of federal financial assistance from taking actions that discriminate on the basis of race, sex, color, national origin, or religion. If an agency is aware that a recipient of federal funds may be taking action that is causing a racially discriminatory impact, the agency should consider using Title VI as a means to prevent or eliminate that discrimination.

an area potentially affected by a proposed agency action may include low-income populations, minority populations, or Indian tribes, and seek input accordingly. When the scoping process is used to develop an EIS or EA, an agency should seek input from low income populations, minority populations, or Indian tribes as early in the process as information becomes available.²⁶ Any such determination, as well as the basis for the determination, should be more substantively addressed in the appropriate NEPA documents and communicated as appropriate during the NEPA process.

If an agency identifies any potentially affected minority populations, low-income populations, or Indian tribes, the agency should develop a strategy for effective public involvement in the agency's determination of the scope of the NEPA analysis. Customary agency practices for notifying the public of a proposed action and subsequent scoping and public events may be enhanced through better use of local resources, community and other nongovernmental organizations, and locally targeted media.

Agencies should consider enhancing their outreach through the following means:

- Religious organizations (e.g., churches, temples, ministerial associations);
- Newspapers, radio and other media, particularly media targeted to low-income populations, minority populations, or Indian tribes;
- Civic associations;
- Minority business associations;
- Environmental and environmental justice organizations;
- Legal aid providers;
- Homeowners', tenants', and neighborhood watch groups;
- Federal, state, local, and tribal governments;
- Rural cooperatives;
- Business and trade organizations;
- Community and social service organizations;
- Universities, colleges, vocational and other schools;
- Labor organizations;
- Civil rights organizations;
- Local schools and libraries;
- Senior citizens' groups;
- Public health agencies and clinics; and
- The Internet and other electronic media .

²⁶ For more information on scoping, see Memorandum from Nicolas C. Yost, Scoping Guidance (Council on Environmental Quality, Executive Office of the President, April 30, 1981).

The participation of diverse groups in the scoping process is necessary for full consideration of the potential environmental impacts of a proposed agency action and any alternatives. By discussing and informing the public of the emerging issues related to the proposed action, agencies may reduce misunderstandings, build cooperative working relationships, educate the public and decisionmakers, and avoid potential conflicts. Agencies should recognize that the identity of the relevant "public" may evolve during the process and may include different constituencies or groups of individuals at different stages of the NEPA process. This may also be the appropriate juncture to begin government-to-government consultation with affected Indian tribes and to seek their participation as cooperating agencies. For this participation to be meaningful, the public should have access to enough information so that it is well informed and can provide constructive input.

The following information may help inform the public during the scoping process:

- A description of the proposed action;
- An outline of the anticipated schedule for completing the NEPA process, with key milestones;
- An initial list of alternatives (including alternative sites, if possible) and potential impacts;
- An initial list of other existing or proposed actions, Federal and non-Federal, that may have cumulative impacts;
- Maps, drawings, and any other appropriate material or references;
- An agency point of contact;
- Timely notice of locations where comments will be received or public meetings held;
- Any telephone number or locations where further information can be obtained;
- Examples of past public comments on similar agency actions.

Thorough scoping is the foundation for the analytical process and provides an early opportunity for the public to participate in the design of alternatives for achieving the goals and objectives of the proposed agency action.

2. Public Participation

Early and meaningful public participation in the federal agency decision making process is a paramount goal of NEPA. CEQ's regulations require agencies to make diligent efforts to involve the public throughout the NEPA process. Participation of low-income populations, minority populations, or tribal populations may require adaptive or innovative approaches to overcome linguistic, institutional, cultural, economic, historical, or other potential barriers to effective participation in the decision-making processes of Federal agencies under customary NEPA procedures. These barriers may range from agency failure to provide translation of documents to the scheduling of meetings at times and in places that are not convenient to working families.

The following steps may be considered, as appropriate, in developing an innovative strategy for effective public participation:

- Coordination with individuals, institutions, or organizations in the affected community to educate the public about potential health and environmental impacts and enhance public involvement;
- Translation of major documents (or summaries thereof), provision of translators at meetings, or other efforts as appropriate to ensure that limited-English speakers potentially affected by a proposed action have an understanding of the proposed action and its potential impacts;
- Provision of opportunities for limited-English speaking members of the affected public to provide comments throughout the NEPA process;
- Provision of opportunities for public participation through means other than written communication, such as personal interviews or use of audio or video recording devices to capture oral comments;
- Use of periodic newsletters or summaries to provide updates on the NEPA process to keep the public informed;
- Use of different meeting sizes or formats, or variation on the type and number of media used, so that communications are tailored to the particular community or population;
- Circulation or creation of specialized materials that reflect the concerns and sensitivities of particular populations such as information about risks specific to subsistence consumers of fish, vegetation, or wildlife;
- Use of locations and facilities that are local, convenient, and accessible to the disabled, low-income and minority communities, and Indian tribes; and
- Assistance to hearing-impaired or sight-impaired individuals.

3. Determining the Affected Environment

In order to determine whether a proposed action is likely to have disproportionately high and adverse human health or environmental effects on low-income populations, minority populations, or Indian tribes, agencies should identify a geographic scale for which they will obtain demographic information on the potential impact area. Agencies may use demographic data available from the Bureau of the Census (BOC) to identify the composition of the potentially affected population. Geographic distribution by race, ethnicity, and income, as well as a delineation of tribal lands and resources, should be examined. Census data are available in published formats, and on CD-ROM available through the BOC. This data also is available from a number of local, college, and university libraries, and the World Wide Web. Agencies may also find that Federal, tribal, state and local health, environmental, and economic agencies have useful demographic information and studies, such as the Landview II system, which is used by the BOC to assist in utilizing data from a geographic information system (GIS). Landview II has proven to be a low-cost, readily available means of graphically accessing environmental justice data. These approaches already should be incorporated into current NEPA compliance.

Agencies should recognize that the impacts within minority populations, low-income populations, or Indian tribes may be different from impacts on the general population due to a community's distinct cultural practices. For example, data on different patterns of living, such as subsistence fish, vegetation, or wildlife consumption and the use of well water in rural communities may be relevant to the analysis. Where a proposed agency action would not cause any adverse environmental impacts, and therefore would not cause any disproportionately high and adverse human health or environmental impacts, specific demographic analysis may not be warranted. Where environments of Indian tribes may be affected, agencies must consider pertinent treaty, statutory, or executive order rights and consult with tribal governments in a manner consistent with the government-to-government relationship.

4. Analysis

When a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe has been identified, agencies should analyze how environmental and health effects are distributed within the affected community. Displaying available data spatially, through a GIS, can provide the agency and the public with an effective visualization of the distribution of health and environmental impacts among demographic populations. This type of data should be analyzed in light of any additional qualitative or quantitative information gathered through the public participation process.

Where a potential environmental justice issue has been identified by an agency, the agency should state clearly in the EIS or EA whether, in light of all of the facts and circumstances, a disproportionately high and adverse human health or environmental impact on minority populations, low-income populations, or Indian tribe is likely to result from the proposed action and any alternatives. This statement should be supported by sufficient information for the public to understand the rationale for the conclusion. The underlying analysis should be presented as concisely as possible, using language that is understandable to the public and that minimizes use of acronyms or jargon.

5. Alternatives

Agencies should encourage the members of the communities that may suffer a disproportionately high and adverse human health or environmental effect from a proposed agency action to help develop and comment on possible alternatives to the proposed agency action as early as possible in the process.

Where an EIS is prepared, CEQ regulations require agencies to identify an environmentally preferable alternative in the record of decision (ROD).²⁷ When the agency has identified a disproportionately high and adverse human health or environmental effect on low-income populations, minority populations, or Indian tribes from either the proposed action or alternatives, the distribution as well as the magnitude of the disproportionate impacts in these communities should be a factor in determining the environmentally preferable alternative. In weighing this factor, the agency should consider the views it has received from the affected communities, and the magnitude of environmental impacts associated with alternatives that have a less disproportionate and adverse effect on low-income populations, minority populations, or Indian tribes.

6. Record of Decision

When an agency reaches a decision on an action for which an EIS was prepared, a public record of decision (ROD) must be prepared that provides information on the alternatives considered and the factors weighed in the decision-making process. Disproportionately high and adverse human health or environmental effects on a low-income population, minority population, or Indian tribe should be among those factors explicitly discussed in the ROD, and should also be addressed in any discussion of whether all practicable means to avoid or minimize environmental and other interrelated effects were adopted. Where relevant, the agency should discuss how these issues are addressed

²⁷ 40 C.F.R. § 1505.2(b)

in any monitoring and enforcement program summarized in the ROD.²⁸

Dissemination of the information in the ROD may provide an effective means to inform the public of the extent to which environmental justice concerns were considered in the decision-making process, and where appropriate, whether the agency intends to mitigate any disproportionately high and adverse human health or environmental effects within the constraints of NEPA and other existing laws. In addition to translating crucial portions of the EIS where appropriate, agencies should provide translation, where practicable and appropriate, of the ROD in non-technical, plain language for limited-English speakers. Agencies should also consider translating documents into languages other than English where appropriate and practical.

7. Mitigation

Mitigation measures include steps to avoid, mitigate, minimize, rectify, reduce, or eliminate the impact associated with a proposed agency action.²⁹ Throughout the process of public participation, agencies should elicit the views of the affected populations on measures to mitigate a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe and should carefully consider community views in developing and implementing mitigation strategies. Mitigation measures identified in an EIS or developed as part of a FONSI should reflect the needs and preferences of affected low-income populations, minority populations, or Indian tribes to the extent practicable.

D. Where no EIS or EA is prepared

There are certain circumstances in which the policies of NEPA apply, and a disproportionately high and adverse human health or environmental impact on low-income populations, minority populations, or Indian tribes may exist, but where the specific statutory requirement to prepare an EIS or EA does not apply. These circumstances may arise because of an exemption from the requirement, a categorical exclusion of specific activities by regulation, or a claim by an agency that another environmental statute establishes the “functional equivalent” of an EIS or EA. For example, neither an EIS nor an EA is prepared for certain hazardous waste facility permits.

In circumstances in which an EIS or EA will not be prepared and a disproportionately high and adverse human health or environmental impact on low-income

²⁸ See 40 C.F.R. § 1505.2(c).

²⁹ See 40 C.F.R. § 1508.20.

populations, minority populations, or Indian tribes may exist, agencies should augment their procedures as appropriate to ensure that the otherwise applicable process or procedure for a federal action addresses environmental justice concerns. Agencies should ensure that the goals for public participation outlined in this guidance are satisfied to the fullest extent possible. Agencies also should fully develop and consider alternatives to the proposed action whenever possible, as would be required by NEPA.

IV.

Regulatory Changes

Consistent with the obligation of all agencies to promote consideration of environmental justice under NEPA and in all of their programs and activities, agencies that promulgate or revise regulations, policies, and guidances under NEPA or under any other statutory scheme should consult with CEQ and EPA to ensure that the principles and approaches presented in this guidance are fully incorporated into any new or revised regulations, policies, and guidances.

V.

Effect of this Guidance

Agencies should apply, and comply with, this guidance prospectively. If an agency has made substantial investments in NEPA compliance, or public participation with respect to a particular agency action, prior to issuance of this guidance, the agency should ensure that application of this guidance does not result in additional delays or costs of compliance.

This guidance is intended to improve the internal management of the Executive Branch with respect to environmental justice under NEPA. The guidance interprets NEPA as implemented through the CEQ regulations in light of Executive Order 12898. It does not create any rights, benefits, or trust obligations, either substantive or procedural, enforceable by any person, or entity in any court against the United States, its agencies, its officers, or any other person.

APPENDIX A

GUIDANCE FOR FEDERAL AGENCIES ON KEY TERMS IN EXECUTIVE ORDER 12898

INTRODUCTION

Pursuant to Executive Order 12898 on Environmental Justice, Federal agencies are to make the achievement of environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations, low-income populations, and Indian tribes and allowing all portions of the population a meaningful opportunity to participate in the development of, compliance with, and enforcement of Federal laws, regulations, and policies affecting human health or the environment regardless of race, color, national origin, or income. To that end, set forth below is guidance for Federal agencies on key terms contained in Executive Order 12898.

This guidance is intended only to improve the internal management of the Executive Branch. It shall not be deemed to create any right, benefit, or trust obligation, either substantive or procedural, enforceable by any person, or entity in any court against the United States, its agencies, its officers, or any other person. Consequently, neither this Guidance nor the deliberative processes or products resulting from the implementation of this Guidance shall be treated as establishing standards or criteria that constitute any basis for review of the actions of the Executive Branch. Compliance with this Guidance shall not be justiciable in any proceeding for judicial review of Agency action.

TEXT OF EXECUTIVE ORDER 12898,
"FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN
MINORITY POPULATIONS AND LOW-INCOME POPULATIONS,"
ANNOTATED
WITH PROPOSED GUIDANCE ON TERMS IN THE EXECUTIVE ORDER³⁰

Section 1-1. IMPLEMENTATION.

1-101. *Agency Responsibilities.* To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Marianas Islands.

Low-income population: Low-income populations in an affected area should be identified with the annual statistical poverty thresholds from the Bureau of the Census' Current Population Reports, Series P-60 on Income and Poverty. In identifying low-income populations, agencies may consider as a community either a group of individuals living in geographic proximity to one another, or a set of individuals (such as migrant workers or Native Americans), where either type of group experiences common conditions of environmental exposure or effect.

Minority: Individual(s) who are members of the following population groups: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic.

Minority population: Minority populations should be identified where either: (a) the minority population of the affected area exceeds 50 percent or (b) the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population or other appropriate unit of geographic analysis. In identifying minority communities, agencies may consider as a community either a group of individuals living in

³⁰ Executive Order provisions are in standard font. Guidance is in **bold** font.

geographic proximity to one another, or a geographically dispersed/transient set of individuals (such as migrant workers or Native American), where either type of group experiences common conditions of environmental exposure or effect. The selection of the appropriate unit of geographic analysis may be a governing body's jurisdiction, a neighborhood, census tract, or other similar unit that is to be chosen so as to not artificially dilute or inflate the affected minority population. A minority population also exists if there is more than one minority group present and the minority percentage, as calculated by aggregating all minority persons, meets one of the above-stated thresholds.

Disproportionately high and adverse human health effects: When determining whether human health effects are disproportionately high and adverse, agencies are to consider the following three factors to the extent practicable:

- (a) Whether the health effects, which may be measured in risks and rates, are significant (as employed by NEPA), or above generally accepted norms. Adverse health effects may include bodily impairment, infirmity, illness, or death; and
- (b) Whether the risk or rate of hazard exposure by a minority population, low-income population, or Indian tribe to an environmental hazard is significant (as employed by NEPA) and appreciably exceeds or is likely to appreciably exceed the risk or rate to the general population or other appropriate comparison group; and
- (c) Whether health effects occur in a minority population, low-income population, or Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards.

Disproportionately high and adverse environmental effects: When determining whether environmental effects are disproportionately high and adverse, agencies are to consider the following three factors to the extent practicable:

- (a) Whether there is or will be an impact on the natural or physical environment that significantly (as employed by NEPA) and adversely affects a minority population, low-income population, or Indian tribe. Such effects may include ecological, cultural, human health, economic, or social impacts on minority communities, low-income communities, or Indian tribes when those impacts are interrelated to impacts on the natural or physical environment; and

(b) Whether environmental effects are significant (as employed by NEPA) and are or may be having an adverse impact on minority populations, low-income populations, or Indian tribes that appreciably exceeds or is likely to appreciably exceed those on the general population or other appropriate comparison group; and

(c) Whether the environmental effects occur or would occur in a minority population, low-income population, or Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards.

1-102. Creation of an Interagency Working Group on Environmental Justice. (a) Within 3 months of the date of this order, the Administrator of the Environmental Protection Agency ("Administrator") or the Administrator's designee shall convene an interagency Federal Working Group on Environmental Justice ("Working Group"). The Working Group shall comprise the heads of the following executive agencies and offices, or their designees: (a) Department of Defense; (b) Department of Health and Human Services; (c) Department of Housing and Urban Development; (d) Department of Labor; (e) Department of Agriculture; (f) Department of Transportation; (g) Department of Justice; (h) Department of the Interior; (I) Department of Commerce; (j) Department of Energy; (k) Environmental Protection Agency; (l) Office of Management and Budget; (m) Office of Science and Technology Policy; (n) Office of the Deputy Assistant to the President for Environmental Policy; (o) Office of the Assistant to the President for Domestic Policy; (p) National Economic Council; (q) Council of Economic Advisers; and (r) such other Government officials as the President may designate. The Working Group shall report to the President through the Deputy Assistant to the President for Environmental Policy and the Assistant to the President for Domestic Policy.

(b) The Working Group shall:

(1) provide guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.

(2) coordinate with, provide guidance to, and serve as a clearinghouse for, each Federal agency as it develops an environmental justice strategy as required by section 1-103 of this order, in order to ensure that the administration, interpretation and enforcement of programs, activities and policies are undertaken in a consistent manner;

(3) assist in coordinating research by, and stimulating cooperation among, the Environmental Protection Agency, the Department of Health and Human Services, the

Department of Housing and Urban Development, and other agencies conducting research or other activities in accordance with section 3-3 of this order;

- (4) assist in coordinating data collection, required by this order;
- (5) examine existing data and studies on environmental justice;
- (6) hold public meetings as required in section 5-502(d) of this order; and
- (7) develop interagency model projects on environmental justice that evidence cooperation among Federal agencies.

1-103. *Development of Agency Strategies.*

(a) Except as provided in section 6-605 of this order, each Federal agency shall develop an agency-wide environmental justice strategy, as set forth in subsections (b)-(e) of this section that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The environmental justice strategy shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to, at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations. In addition, the environmental justice strategy shall include, where appropriate, a timetable for undertaking identified revisions and consideration of economic and social implications of the revisions.

Differential patterns of consumption of natural resources: The term "differential patterns of consumption of natural resources" relates to subsistence and differential patterns of subsistence, and means differences in rates and/or patterns of fish, water, vegetation and/or wildlife consumption among minority populations, low-income populations, or Indian tribes, as compared to the general population.

(b) Within 4 months of the date of this order, each Federal agency shall identify an internal administrative process for developing its environmental justice strategy, and shall inform this Working Group of the process.

(c) Within 6 months of the date of this order, each Federal agency shall provide the Working Group with an outline of its proposed environmental justice strategy.

(d) Within 10 months of the date of this order, each Federal agency shall provide the Working Group with its proposed environmental justice strategy.

(e) Within 12 months of the date of this order, each Federal agency shall finalize its environmental justice strategy and provide a copy and written description of its strategy to the Working Group. During the 12 month period from the date of this order, each Federal agency, as part of its environmental justice strategy, shall identify several specific projects that can be promptly undertaken to address particular concerns identified during the development of the proposed environmental justice strategy, and a schedule for implementing those projects.

(f) Within 24 months of the date of this order, each Federal agency shall report to the Working Group on its progress in implementing its agency-wide environmental justice strategy.

(g) Federal agencies shall provide additional periodic reports to the Working Group as requested by the Working Group.

1-104. *Reports to the President.* Within 14 months of the date of this order, the Working Group shall submit to the President, through the Office of the Deputy Assistant to the President for Environmental Policy and the Office of the Assistant to the President for Domestic Policy, a report that describes the implementation of this order, and includes the final environmental justice strategies described in section 1-103(e) of this order.

Sec. 2-2. FEDERAL AGENCY RESPONSIBILITIES FOR FEDERAL PROGRAMS.

Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

Sec. 3-3. RESEARCH, DATA COLLECTION, AND ANALYSIS.

3-301. *Human Health and Environmental Research and Analysis.*

(a) Environmental human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies, including segments at high risk from environmental hazards, such as minority populations, low-income populations and workers who may be exposed to substantial environmental hazards.

Environmental hazard and substantial environmental hazard: For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "environmental hazard" means a chemical, biological, physical or radiological agent, situation or source that has the potential for deleterious effects to the environment and/or human health. Among the factors that may be important in defining a substantial environmental hazard are: the likelihood, seriousness, and magnitude of the impact.

(b) Environmental human health analyses, whenever practical and appropriate, shall identify multiple and cumulative exposures.

Environmental Exposure: For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "environmental exposure" means contact with a chemical (e.g., asbestos, radon), biological (e.g., Legionella), physical (e.g., noise), or radiological agent.

Multiple Environmental Exposure: For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "multiple environmental exposure" means exposure to any combination of two or more chemical, biological, physical or radiological agents (or two or more agents from two or more of these categories) from single or multiple sources that have the potential for deleterious effects to the environment and/or human health.

Cumulative Environmental Exposure: For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "cumulative environmental exposure" means exposure to one or more chemical, biological, physical, or radiological agents across environmental media (e.g., air, water, soil) from single or multiple sources, over time in one or more locations, that have the potential for deleterious effects to the environment and/or human health.

(c) Federal agencies shall provide minority populations and low-income populations the opportunity to comment on the development and design of research strategies undertaken pursuant to this order.

3-302. *Human Health and Environmental Data Collection and Analysis.* To the extent permitted by existing law, including the Privacy Act, as amended (5 U.S.C. § 552a):

(a) each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income. To the extent practical and appropriate, Federal agencies shall use this information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(b) In connection with the development and implementation of agency strategies in section 1-103 of this order, each Federal agency, whenever practicable and appropriate, shall collect, maintain and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites expected to have a substantial environmental, human health, or economic effect on the surrounding populations, when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action. Such information shall be made available to the public unless prohibited by law; and

Federal environmental administrative or judicial action includes any administrative enforcement action, civil enforcement action, or criminal enforcement action initiated by, or permitting or licensing determination undertaken by, a Federal agency to enforce or execute a Federal law intended, in whole or in part, to protect human health or the environment.

(c) Each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding Federal facilities that are: (1) subject to the reporting requirements under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. section 11001-11050 as mandated in Executive Order No. 12856; and (2) expected to have a substantial environmental, human health, or economic effect on surrounding populations. Such information shall be made available to the public, unless prohibited by law.

(d) In carrying out the responsibilities in this section, each Federal agency, whenever practicable and appropriate, shall share information and eliminate unnecessary duplication of efforts through the use of existing data systems and cooperative agreements among Federal agencies and with State, local, and tribal governments.

Sec. 4-4. SUBSISTENCE CONSUMPTION OF FISH AND WILDLIFE.

4-401. *Consumption Patterns.* In order to assist in identifying the need for ensuring protection of populations with differential patterns of subsistence consumption of fish and wildlife, Federal agencies, whenever practicable and appropriate, shall collect, maintain, and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence. Federal agencies shall communicate to the public the risks of those consumption patterns.

Subsistence consumption of fish and wildlife: Dependence by a minority population, low-income population, Indian tribe or subgroup of such populations on indigenous fish, vegetation and/or wildlife, as the principal portion of their diet.

Differential patterns of subsistence consumption: Differences in rates and/or patterns of subsistence consumption by minority populations, low-income populations, and Indian tribes as compared to rates and patterns of consumption of the general population.

4-402. *Guidance.* Federal agencies, whenever practicable and appropriate, shall work in a coordinated manner to publish guidance reflecting the latest scientific information available concerning methods for evaluating the human health risks associated with the consumption of pollutant-bearing fish or wildlife. Agencies shall consider such guidance in developing their policies and rules.

Sec. 5-5. PUBLIC PARTICIPATION AND ACCESS TO INFORMATION.

(a) The public may submit recommendations to Federal agencies relating to the incorporation of environmental justice principles into Federal agency programs or policies. Each Federal agency shall convey such recommendations to the Working Group.

(b) Each Federal agency may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations.

(c) Each Federal agency shall work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.

(d) The Working Group shall hold public meetings, as appropriate, for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice. The Working Group shall prepare for public review a summary of the comments and recommendations discussed at the public meetings.

Sec. 6-6. GENERAL PROVISIONS.

6-601. *Responsibility for Agency Implementation.* The head of each Federal agency shall be responsible for ensuring compliance with this order. Each Federal agency shall conduct internal reviews and take such other steps as may be necessary to monitor compliance with this order.

6-602. *Executive Order No. 12250.* This Executive order is intended to supplement but not supersede Executive Order No. 12250, which requires consistent and effective implementation of various laws prohibiting discriminatory practices in programs receiving Federal financial assistance. Nothing herein shall limit the effect or mandate of Executive Order No. 12250.

6-603. *Executive Order No. 12875.* This Executive order is not intended to limit the effect or mandate of Executive Order No. 12875.

6-604. *Scope.* For purposes of this order, Federal agency means any agency on the Working Group, and such other agencies as may be designated by the President, that conducts any Federal program or activity that substantially affects human health or the environment. Independent agencies are requested to comply with the provisions of this order.

6-605. *Petitions for Exemptions.* The head of a Federal agency may petition the President for an exemption from the requirements of this order on the grounds that all or some of the petitioning agency's programs or activities should not be subject to the requirements of this order.

6-606. *Native American Programs.* Each Federal agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the Working Group, and, after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that address Federally-recognized Indian Tribes.

Native American programs: Native American programs include those Federal programs designed to serve Indian Tribes or individual Indians, recognizing that such programs are to be guided, as appropriate, by the government-to-government relationship, the Federal trust responsibility, and the role of tribes as governments within the Federal system.

6-607. *Costs.* Unless otherwise provided by law, Federal agencies shall assume the financial costs of complying with this order.

6-608. *General.* Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law.

6-609. *Judicial Review.* This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

January 14, 2011

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: NANCY H. SUTLEY 
Chair

SUBJECT: Appropriate Use of Mitigation and Monitoring and Clarifying the
Appropriate Use of Mitigated Findings of No Significant Impact

The Council on Environmental Quality (CEQ) is issuing this guidance for Federal departments and agencies on establishing, implementing, and monitoring mitigation commitments identified and analyzed in Environmental Assessments, Environmental Impact Statements, and adopted in the final decision documents. This guidance also clarifies the appropriate use of mitigated “Findings of No Significant Impact” under the National Environmental Policy Act (NEPA). This guidance is issued in accordance with NEPA, 42 U.S.C. § 4321 et seq., and the CEQ Regulations for Implementing the Procedural Provisions of NEPA (CEQ Regulations), 40 CFR Parts 1500-1508.¹ The guidance explains the requirements of NEPA and the CEQ Regulations, describes CEQ policies, and recommends procedures for agencies to use to help them comply with the requirements of NEPA and the CEQ Regulations when they establish mitigation planning and implementation procedures.²

¹ The Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (CEQ Regulations) are available on www.nepa.gov at ceq.hss.doe.gov/ceq_regulations/regulations.html.

² CEQ is issuing this guidance as an exercise of its duties and functions under section 204 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4344, and Executive Order No. 11,514, 35 Fed. Reg. 4,247 (Mar. 5, 1970), as amended by Executive Order No. 11,991, 42 Fed. Reg. 26,927 (May 24, 1977). This guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or other legally binding requirement and is not legally enforceable. The use of language such as “recommend,” “may,” “should,” and “can” is intended to describe CEQ policies and recommendations. The use of mandatory terminology such as “must” and “required” is intended to describe controlling requirements under the terms of NEPA and the CEQ Regulations, but this document does not independently establish legally binding requirements.

NEPA was enacted to promote efforts that will prevent or eliminate damage to the human environment.³ Mitigation measures can help to accomplish this goal in several ways. Many Federal agencies and applicants include mitigation measures as integral components of a proposed project's design. Agencies also consider mitigation measures as alternatives when developing Environmental Assessments (EA) and Environmental Impact Statements (EIS). In addition, agencies have increasingly considered mitigation measures in EAs to avoid or lessen potentially significant environmental effects of proposed actions that would otherwise need to be analyzed in an EIS.⁴ This use of mitigation may allow the agency to comply with NEPA's procedural requirements by issuing an EA and a Finding of No Significant Impact (FONSI), or "mitigated FONSI," based on the agency's commitment to ensure the mitigation that supports the FONSI is performed, thereby avoiding the need to prepare an EIS.

This guidance addresses mitigation that an agency has committed to implement as part of a project design and mitigation commitments informed by the NEPA review process. As discussed in detail in Section I, below, agencies may commit to mitigation measures considered as alternatives in an EA or EIS so as to achieve an environmentally preferable outcome. Agencies may also commit to mitigation measures to support a mitigated FONSI, so as to complete their review of potentially significant environmental impacts without preparing an EIS. When agencies do not document and, in important cases, monitor mitigation commitments to determine if the mitigation was implemented or effective, the use of mitigation may fail to advance NEPA's purpose of ensuring informed and transparent environmental decisionmaking. Failure to document and monitor mitigation may also undermine the integrity of the NEPA review. These concerns and the need for guidance on this subject have long been recognized.⁵ While

³ 42 U.S.C. § 4321 (stating that the purposes of NEPA include promoting efforts which will prevent or eliminate damage to the environment).

⁴ This trend was noted in CEQ's Twenty-Fifth Anniversary report on the effectiveness of NEPA implementation. *See* CEQ, "NEPA: A Study of its Effectiveness After Twenty-Five Years" 20 (1997), *available at* ceq.hss.doe.gov/nepa/nepa25fn.pdf.

⁵ *See, e.g.*, CEQ, 1987-1988 Annual Report, *available at* www.slideshare.net/whitehouse/august-1987-1988-the-eighteenth-annual-report-of-the-council-on-environmental-quality (stating that CEQ would issue guidance on the propriety of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) rather than requiring an Environmental Impact Statement (EIS) when the environmental effects of a proposal are significant but mitigation reduces those impacts to less than significant levels). In 2002, CEQ convened a Task Force on Modernizing NEPA Implementation, which recommended that CEQ issue guidance clarifying the requirements for public involvement, alternatives, and mitigation for actions that warrant longer EAs including those with mitigated FONSI. CEQ NEPA Task Force, "Modernizing NEPA Implementation" 75 (2003), *available at* ceq.hss.doe.gov/ntf/report/totaldoc.html. NEPA experts and public stakeholders have expressed broad support for this recommendation, calling for consideration of monitoring and public involvement in the use of mitigated FONSI. CEQ, "The Public and Experts'

this guidance is designed to address these concerns, CEQ also acknowledges that NEPA itself does not create a general substantive duty on Federal agencies to mitigate adverse environmental effects.⁶

Accordingly, in conjunction with the 40th Anniversary of NEPA, CEQ announced that it would issue this guidance to clarify the appropriateness of mitigated FONSI's and the importance of monitoring environmental mitigation commitments.⁷ This new guidance affirms CEQ's support for the appropriate use of mitigated FONSI's, and accordingly amends and supplements previously issued guidance.⁸ This guidance is intended to enhance the integrity and credibility of the NEPA process and the information upon which it relies.

CEQ provides several broad recommendations in Section II, below, to help improve agency consideration of mitigation in EISs and EAs. Agencies should not commit to mitigation measures considered in an EIS or EA absent the authority or expectation of resources to ensure that the mitigation is performed. In the decision documents concluding their environmental reviews, agencies should clearly identify any mitigation measures adopted as agency commitments or otherwise relied upon (to the extent consistent with agency authority or other legal authority), so as to ensure the integrity of the NEPA process and allow for greater transparency.

Review of the National Environmental Policy Act Task Force Report 'Modernizing NEPA Implementation'" 7 (2004), *available at* ceq.hss.doe.gov/ntf/CEO_Draft_Final_Roundtable_Report.pdf; *see also* CEQ, "Rocky Mountain Roundtable Report" 8 (2004), *available at* ceq.hss.doe.gov/ntf/RockyMtnRoundTableReport.pdf (noting that participants in a regional roundtable on NEPA modernization identified "developing a means to enforce agency commitments to monitoring and mitigation" as one of the top five aspects of NEPA implementation needing immediate attention); "Eastern Round Table Report" 4 (2003), *available at* ceq.hss.doe.gov/ntf/EasternRoundTableReport.pdf (reporting that, according to several panelists at a regional roundtable, "parties responsible for monitoring the effects of . . . mitigation measures are rarely identified or easily held accountable," and that a lack of monitoring impedes agencies' ability to address the cumulative effects of EA actions).

⁶ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

⁷ CEQ, "New Proposed NEPA Guidance and Steps to Modernize and Reinvigorate NEPA" (Feb. 18, 2010), *available at* www.whitehouse.gov/administration/eop/ceq/initiatives/nepa.

⁸ This previous guidance is found in CEQ, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18,026 (Mar. 23, 1981), *available at* ceq.eh.doe.gov/nepa/regs/40/40P1.htm (suggesting that the existence of mitigation measures developed during the scoping or EA stages "does not obviate the need for an EIS").

Section III emphasizes that agencies should establish implementation plans based on the importance of the project and its projected effects. Agencies should create new, or strengthen existing, monitoring to ensure that mitigation commitments are implemented. Agencies should also use effectiveness monitoring to learn if the mitigation is providing the benefits predicted. Importantly, agencies should encourage public participation and accountability through proactive disclosure of, and provision of access to, agencies' mitigation commitments as well as mitigation monitoring reports and related documents.

Although the recommendations in this guidance are broad in nature, agencies should establish, in their NEPA implementing procedures and/or guidance, specific procedures that create systematic accountability and the mechanisms to accomplish these goals.⁹ This guidance is intended to assist agencies with the development and review of their NEPA procedures, by specifically recommending:

- How to ensure that mitigation commitments are implemented;
- How to monitor the effectiveness of mitigation commitments;
- How to remedy failed mitigation; and
- How to involve the public in mitigation planning.

Finally, to assist agencies in the development of their NEPA implementing procedures, an overview of relevant portions of the Department of the Army NEPA regulations is appended to this guidance as an example for agencies to consider when incorporating the recommendations of this guidance as requirements in their NEPA programs and procedures.¹⁰

I. THE IMPORTANCE OF MITIGATION UNDER NEPA

Mitigation is an important mechanism Federal agencies can use to minimize the potential adverse environmental impacts associated with their actions. As described in the CEQ Regulations, agencies can use mitigation to reduce environmental impacts in several ways. Mitigation includes:

- Avoiding an impact by not taking a certain action or parts of an action;
- Minimizing an impact by limiting the degree or magnitude of the action and its implementation;
- Rectifying an impact by repairing, rehabilitating, or restoring the affected environment;
- Reducing or eliminating an impact over time, through preservation and maintenance operations during the life of the action; and

⁹ 40 CFR § 1507.3 (requiring agencies to issue, and continually review, policies and procedures to implement NEPA in conformity with NEPA and CEQ Regulations).

¹⁰ *See id.*; *see also id.* § 1507.2 (requiring agencies to have personnel and other resources available to implement NEPA reviews and meet their NEPA responsibilities).

- Compensating for an impact by replacing or providing substitute resources or environments.¹¹

Federal agencies typically develop mitigation as a component of a proposed action, or as a measure considered in the course of the NEPA review conducted to support agency decisionmaking processes, or both. In developing mitigation, agencies necessarily and appropriately rely upon the expertise and experience of their professional staff to assess mitigation needs, develop mitigation plans, and oversee mitigation implementation. Agencies may also rely on outside resources and experts for information about the ecosystem functions and values to be protected or restored by mitigation, to ensure that mitigation has the desired effects and to develop appropriate monitoring strategies. Any outside parties consulted should be neutral parties without a financial interest in implementing the mitigation and monitoring plans, and should have expert knowledge, training, and experience relevant to the resources potentially affected by the actions and—if possible—the potential effects from similar actions.¹² Further, when agencies delegate responsibility for preparing NEPA analyses and documentation, or when other entities (such as applicants) assume such responsibility, CEQ recommends that any experts employed to develop mitigation and monitoring should have the kind of expert knowledge, training, and experience described above.

The sections below clarify practices Federal agencies should use when they employ mitigation in three different contexts: as components of project design; as mitigation alternatives considered in an EA or an EIS and adopted in related decision documents; and as measures identified and committed to in an EA as necessary to support a mitigated FONSI. CEQ encourages agencies to commit to mitigation to achieve environmentally preferred outcomes, particularly when addressing unavoidable adverse environmental impacts. Agencies should not commit to mitigation, however, unless they have sufficient legal authorities and expect there will be necessary resources available to perform or ensure the performance of the mitigation. The agency's own underlying authority may provide the basis for its commitment to implement and monitor the mitigation. Alternatively, the authority for the mitigation may derive from legal requirements that are enforced by other Federal, state, or local government entities (e.g., air or water permits administered by local or state agencies).

A. Mitigation Incorporated into Project Design

Many Federal agencies rely on mitigation to reduce adverse environmental impacts as part of the planning process for a project, incorporating mitigation as integral components of a proposed project design before making a determination about the

¹¹ *Id.* § 1508.20 (defining mitigation to include these activities).

¹² *See id.* § 1506.5 (providing that agencies are responsible for the accuracy of environmental information submitted by applicants for use in EISs and EAs, and requiring contractors selected to prepare EISs to execute disclosure statement specifying that they have no financial or other interest in the outcome of the project).

significance of the project’s environmental impacts.¹³ Such mitigation can lead to an environmentally preferred outcome and in some cases reduce the projected impacts of agency actions to below a threshold of significance. An example of mitigation measures that are typically included as part of the proposed action are agency standardized best management practices such as those developed to prevent storm water runoff or fugitive dust emissions at a construction site.

Mitigation measures included in the project design are integral components of the proposed action, are implemented with the proposed action, and therefore should be clearly described as part of the proposed action that the agency will perform or require to be performed. Consequently, the agency can address mitigation early in the decisionmaking process and potentially conduct a less extensive level of NEPA review.

B. Mitigation Alternatives Considered in Environmental Assessments and Environmental Impact Statements

Agencies are required, under NEPA, to study, develop, and describe appropriate alternatives when preparing EAs and EISs.¹⁴ The CEQ Regulations specifically identify procedures agencies must follow when developing and considering mitigation alternatives when preparing an EIS. When an agency prepares an EIS, it must include mitigation measures (not already included in the proposed action or alternatives) among the alternatives compared in the EIS.¹⁵ Each EIS must contain a section analyzing the environmental consequences of the proposed action and its alternatives, including “[m]eans to mitigate adverse environmental impacts.”¹⁶

When a Federal agency identifies a mitigation alternative in an EA or an EIS, it may commit to implement that mitigation to achieve an environmentally-preferable outcome. Agencies should not commit to mitigation measures considered and analyzed in an EIS or EA if there are insufficient legal authorities, or it is not reasonable to foresee the availability of sufficient resources, to perform or ensure the performance of the mitigation. Furthermore, the decision document following the EA should—and a Record of Decision (ROD) must—identify those mitigation measures that the agency is adopting

¹³ CEQ NEPA Task Force, “Modernizing NEPA Implementation” at 69.

¹⁴ 42 U.S.C. § 4332(2)(C) (mandating that agencies’ detailed statements must include alternatives to the proposed action); *id.* § 4332(E) (requiring agencies to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources).

¹⁵ 40 CFR § 1502.14(f) (listing mitigation measures as one of the required components of the alternatives included in an EIS); *id.* § 1508.25(b)(3) (defining the “scope” of an EIS to include mitigation measures).

¹⁶ *Id.* § 1502.16(h).

and committing to implement, including any monitoring and enforcement program applicable to such mitigation commitments.¹⁷

C. Mitigation Commitments Analyzed in Environmental Assessments to Support a Mitigated FONSI

When preparing an EA, many agencies develop and consider committing to mitigation measures to avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts that would otherwise require full review in an EIS. CEQ recognizes the appropriateness, value, and efficacy of providing for mitigation to reduce the significance of environmental impacts. Consequently, when such mitigation measures are available and an agency commits to perform or ensure the performance of them, then these mitigation commitments can be used to support a FONSI, allowing the agency to conclude the NEPA process and proceed with its action without preparing an EIS.¹⁸ An agency should not commit to mitigation measures necessary for a mitigated FONSI if there are insufficient legal authorities, or it is not reasonable to foresee the availability of sufficient resources, to perform or ensure the performance of the mitigation.¹⁹

Mitigation commitments needed to lower the level of impacts so that they are not significant should be clearly described in the mitigated FONSI document and in any other relevant decision documents related to the proposed action. Agencies must provide for appropriate public involvement during the development of the EA and FONSI.²⁰

¹⁷ *Id.* § 1505.2(c) (providing that a record of decision must state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not; and providing that a monitoring and enforcement program must be adopted and summarized where applicable for any mitigation).

¹⁸ This guidance approves of the use of the “mitigated FONSI” when the NEPA process results in *enforceable* mitigation measures. It thereby amends and supplements previously issued CEQ guidance that suggested that the existence of mitigation measures developed during the scoping or EA stages “does not obviate the need for an EIS.” See CEQ, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” 46 Fed. Reg. 18,026 (Mar. 23, 1981), *available at* ceq.eh.doe.gov/nepa/regs/40/40P1.htm.

¹⁹ When agencies consider and decide on an alternative outside their jurisdiction (as discussed in 40 CFR § 1502.14(c)), they should identify the authority for the mitigation and consider the consequences of it not being implemented.

²⁰ 40 CFR § 1501.4(b) (requiring agencies to involve environmental agencies, applicants, and the public, to the extent practicable); *id.* § 1501.4(e)(1) (requiring agencies to make FONSI available to the affected public as specified in § 1506.6); *id.* § 1501.4(e)(2) (requiring agencies to make FONSI available for public review for thirty days before making any final determination on whether to prepare an EIS or proceed with an action when the proposed action is, or is closely similar to, one which normally requires the

Furthermore, in addition to those situations where a 30-day public review of the FONSI is required,²¹ agencies should make the EA and FONSI available to the public (e.g., by posting them on an agency website). Providing the public with clear information about agencies' mitigation commitments helps ensure the value and integrity of the NEPA process.

II. ENSURING THAT MITIGATION COMMITMENTS ARE IMPLEMENTED

Federal agencies should take steps to ensure that mitigation commitments are actually implemented. Consistent with their authority, agencies should establish internal processes to ensure that mitigation commitments made on the basis of any NEPA analysis are carefully documented and that relevant funding, permitting, or other agency approvals and decisions are made conditional on performance of mitigation commitments.

Agency NEPA implementing procedures should require clear documentation of mitigation commitments considered in EAs and EISs prepared during the NEPA process and adopted in their decision documents. Agencies should ensure that the expertise and professional judgment applied in determining the appropriate mitigation commitments are described in the EA or EIS, and that the NEPA analysis considers when and how those mitigation commitments will be implemented.

Agencies should clearly identify commitments to mitigation measures designed to achieve environmentally preferable outcomes in their decision documents. They should also identify mitigation commitments necessary to reduce impacts, where appropriate, to a level necessary for a mitigated FONSI. In both cases, mitigation commitments should be carefully specified in terms of measurable performance standards or expected results, so as to establish clear performance expectations.²² The agency should also specify the

preparation of an EIS under agency NEPA implementing procedures, or when the nature of the proposed action is one without precedent); *id.* § 1506.6 (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures).

²¹ *Id.* § 1501.4(e)(2).

²² In 2001, the Committee on Mitigating Wetland Losses, through the National Research Council (NRC), conducted a nationwide study evaluating compensatory mitigation, focusing on whether the process is achieving the overall goal of "restoring and maintaining the quality of the nation's waters." NRC Committee on Mitigating Wetland Losses, "Compensating for Wetland Losses Under the Clean Water Act" 2 (2001). The study's recommendations were incorporated into the 2008 Final Compensatory Mitigation Rule promulgated jointly by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency. *See* U.S. Army Corps of Engineers & U.S. Environmental Protection Agency, "Compensatory Mitigation for Losses of Aquatic Resources," 73 Fed. Reg. 19,594 (Apr. 10, 2008).

timeframe for the agency action and the mitigation measures in its decision documents, to ensure that the intended start date and duration of the mitigation commitment is clear. When an agency funds, permits, or otherwise approves actions, it should also exercise its available authorities to ensure implementation of any mitigation commitments by including appropriate conditions on the relevant grants, permits, or approvals.

CEQ views funding for implementation of mitigation commitments as critical to ensuring informed decisionmaking. For mitigation commitments that agencies will implement directly, CEQ recognizes that it may not be possible to identify funds from future budgets; however, a commitment to seek funding is considered essential and if it is reasonably foreseeable that funding for implementation of mitigation may be unavailable at any time during the life of the project, the agency should disclose in the EA or EIS the possible lack of funding and assess the resultant environmental effects. If the agency has disclosed and assessed the lack of funding, then unless the mitigation is essential to a mitigated FONSI or necessary to comply with another legal requirement, the action could proceed. If the agency committing to implementing mitigation has not disclosed and assessed the lack of funding, and the necessary funding later becomes unavailable, then the agency should not move forward with the proposed action until funding becomes available or the lack of funding is appropriately assessed (*see* Section III, below).

A. Establishing a Mitigation Monitoring Program

Federal agencies must consider reasonably foreseeable future impacts and conditions in a constantly evolving environment. Decisionmakers will be better able to adapt to changing circumstances by creating a sound mitigation implementation plan and through ongoing monitoring of environmental impacts and their mitigation. Monitoring can improve the quality of overall agency decisionmaking by providing feedback on the effectiveness of mitigation techniques. A comprehensive approach to mitigation planning, implementation, and monitoring will therefore help agencies realize opportunities for reducing environmental impacts through mitigation, advancing the integrity of the entire NEPA process. These approaches also serve NEPA's goals of ensuring transparency and openness by making relevant and useful environmental information available to decisionmakers and the public.²³

Adaptive management can help an agency take corrective action if mitigation commitments originally made in NEPA and decision documents fail to achieve projected environmental outcomes and there is remaining federal action. Agencies can, in their NEPA reviews, establish and analyze mitigation measures that are projected to result in the desired environmental outcomes, and can then identify those mitigation principles or measures that it would apply in the event the initial mitigation commitments are not implemented or effective. Such adaptive management techniques can be advantageous to both the environment and the agency's project goals.²⁴ Agencies can also, short of

²³ 40 CFR § 1500.1(b).

²⁴ *See* CEQ NEPA Task Force, "Modernizing NEPA Implementation" at 44.

adaptive management, analyze specific mitigation alternatives that could take the place of mitigation commitments in the event the commitment is not implemented or effective.

Monitoring is fundamental for ensuring the implementation and effectiveness of mitigation commitments, meeting legal and permitting requirements, and identifying trends and possible means for improvement. Under NEPA, a Federal agency has a continuing duty to ensure that new information about the environmental impact of its proposed actions is taken into account, and that the NEPA review is supplemented when significant new circumstances or information arise that are relevant to environmental concerns and bear on the proposed action or its impacts.²⁵ For agency decisions based on an EIS, the CEQ Regulations explicitly require that “a monitoring and enforcement program shall be adopted . . . where applicable for any mitigation.”²⁶ In addition, the CEQ Regulations state that agencies may “provide for monitoring to assure that their decisions are carried out and should do so in important cases.”²⁷ Accordingly, an agency should also commit to mitigation monitoring in important cases when relying upon an EA and mitigated FONSI. Monitoring is essential in those important cases where the mitigation is necessary to support a FONSI and thus is part of the justification for the agency’s determination not to prepare an EIS.

Agencies are expected to apply professional judgment and the rule of reason when identifying those cases that are important and warrant monitoring, and when determining the type and extent of monitoring they will use to check on the progress made in implementing mitigation commitments as well as their effectiveness. In cases that are less important, the agency should exercise its discretion to determine what level of monitoring, if any, is appropriate. The following are examples of factors that agencies should consider to determine importance:

- Legal requirements of statutes, regulations, or permits;
- Human health and safety;
- Protected resources (e.g., parklands, threatened or endangered species, cultural or historic sites) and the proposed action’s impacts on them;
- Degree of public interest in the resource or public debate over the effects of the proposed action and any reasonable mitigation alternatives on the resource; and
- Level of intensity of projected impacts.

Once an agency determines that it will provide for monitoring in a particular case, monitoring plans and programs should be described or incorporated by reference in the

²⁵ 40 CFR § 1502.9(c) (requiring supplementation of EISs when there are substantial changes to the proposed action, or significant new information or circumstances arise that are relevant to the environmental effects of the proposed action).

²⁶ *Id.* § 1505.2(c).

²⁷ *Id.* § 1505.3.

agency's decision documents.²⁸ Agencies have discretion, within the scope of their authority, to select an appropriate form and method for monitoring, but they should identify the monitoring area and establish the appropriate monitoring system.²⁹ The form and method of monitoring can be informed by an agency's past monitoring plans and programs that tracked impacts on similar resources, as well as plans and programs used by other agencies or entities, particularly those with an interest in the resource being monitored. For mitigation commitments that warrant rigorous oversight, an Environmental Management System (EMS), or other data or management system could serve as a useful way to integrate monitoring efforts effectively.³⁰ Other possible monitoring methods include agency-specific environmental monitoring, compliance assessment, and auditing systems. For activities involving third parties (e.g., permittees or grantees), it may be appropriate to require the third party to perform the monitoring as long as a clear accountability and oversight framework is established. The monitoring program should be implemented together with a review process and a system for reporting results.

Regardless of the method chosen, agencies should ensure that the monitoring program tracks whether mitigation commitments are being performed as described in the NEPA and related decision documents (i.e., implementation monitoring), and whether the mitigation effort is producing the expected outcomes and resulting environmental effects (i.e., effectiveness monitoring). Agencies should also ensure that their mitigation monitoring procedures appropriately provide for public involvement. These recommendations are explained in more detail below.

²⁸ The mitigation plan and program should be described to the extent possible based on available and reasonably foreseeable information in cases where the NEPA analysis and documentation are completed prior to final design of a proposed project.

²⁹ The Department of the Army regulations provide an example of this approach. *See* 32 CFR part 651 App. C. These regulations are summarized in the Appendix to this guidance.

³⁰ An EMS provides a systematic framework for a Federal agency to monitor and continually improve its environmental performance through audits, evaluations of legal and other requirements, and management reviews. The potential for EMS to support NEPA work is further addressed in CEQ, "Aligning National Environmental Policy Act Processes with Environmental Management Systems" 4 (2007) *available at* [ceq.hss.doe.gov/nepa/nepapubs/Aligning NEPA Processes with Environmental Management Systems 2007.pdf](http://ceq.hss.doe.gov/nepa/nepapubs/Aligning_NEPA_Processes_with_Environmental_Management_Systems_2007.pdf) (discussing the use of EMSs to track implementation and monitoring of mitigation). In 2001, the Department of the Army announced that it would implement a recognized environmental management standard, ISO 14001, across Army installations. ISO 14001 represents a standardized system to plan, track, and monitor environmental performance within the agency's operations. To learn more about how EMS implementation has resulted in an effective EMS for monitoring purposes at an Army installation, see the Sustainability website for the Army's Fort Lewis installation, *available at* sustainablefortlewis.army.mil.

B. Monitoring Mitigation Implementation

A successful monitoring program will track the implementation of mitigation commitments to determine whether they are being performed as described in the NEPA documents and related decision documents. The responsibility for developing an implementation monitoring program depends in large part upon who will actually perform the mitigation—the lead Federal agency or cooperating agency; the applicant, grantee, or permit holder; another responsible entity or cooperative non-Federal partner; or a combination of these. The lead agency should ensure that information about responsible parties, mitigation requirements, as well as any appropriate enforcement clauses are included in documents such as authorizations, agreements, permits, financial assistance awards, or contracts.³¹ Ultimate monitoring responsibility rests with the lead Federal agency or agencies to assure that monitoring is occurring when needed and that results are being properly considered. The project's lead agency can share monitoring responsibility with joint lead or cooperating agencies or other entities, such as applicants or grantees. The responsibility should be clearly described in the NEPA documents or associated decision documents, or related documents describing and establishing the monitoring requirements or expectations.

C. Monitoring the Effectiveness of Mitigation

Effectiveness monitoring tracks the success of a mitigation effort in achieving expected outcomes and environmental effects. Completing environmental data collection and analyses prior to project implementation provides an understanding of the baseline conditions for each potentially affected resource for reference when determining whether the predicted efficacy of mitigation commitments is being achieved. Agencies can rely on agency staff and outside experts familiar with the predicted environmental impacts to develop the means to monitor mitigation effectiveness, in the same way that they can rely on agency and outside experts to develop and evaluate the effectiveness of mitigation (*see* Section I, above).

When monitoring mitigation, agencies should consider drawing on sources of information available from the agency, from other Federal agencies, and from state, local, and tribal agencies, as well as from non-governmental sources such as local organizations, academic institutions, and non-governmental organizations. Agencies should especially consider working with agencies responsible for overseeing land management and impacts to specific resources. For example, agencies could consult with the U.S. Fish and Wildlife and National Marine Fisheries Services (for information to evaluate potential impacts to threatened and endangered species) and with State Historic Preservation Officers (for information to evaluate potential impacts to historic structures).

³¹ Such enforcement clauses, including appropriate penalty clauses, should be developed as allowable under the applicable statutory and regulatory authorities.

D. The Role of the Public

Public involvement is a key procedural requirement of the NEPA review process, and should be fully provided for in the development of mitigation and monitoring procedures.³² Agencies are also encouraged, as a matter of transparency and accountability, to consider including public involvement components in their mitigation monitoring programs. The agencies' experience and professional judgment are key to determining the appropriate level of public involvement. In addition to advancing accountability and transparency, public involvement may provide insight or perspective for improving mitigation activities and monitoring. The public may also assist with actual monitoring through public-private partnership programs.

Agencies should provide for public access to mitigation monitoring information consistent with NEPA and the Freedom of Information Act (FOIA).³³ NEPA and the CEQ Regulations incorporate the FOIA by reference to require agencies to provide public access to releasable documents related to EISs, which may include documents regarding mitigation monitoring and enforcement.³⁴ The CEQ Regulations also require agencies to involve the public in the EA preparation process to the extent practicable and in certain cases to make a FONSI available for public review before making its final determination on whether it will prepare an EIS or proceed with the action.³⁵ Consequently, agencies should involve the public when preparing EAs and mitigated FONSI.³⁶ NEPA further requires all Federal agencies to make information useful for restoring, maintaining, and

³² 40 CFR § 1506.6 (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures).

³³ 5 U.S.C. § 552.

³⁴ 42 U.S.C. § 4332(2)(C) (requiring Federal agencies to make EISs available to the public as provided by the FOIA); 40 CFR § 1506.6(f) (requiring agencies to make EISs, comments received, and any underlying documents available to the public pursuant to the provisions of the FOIA without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action).

³⁵ 40 CFR § 1501.4(b) (requiring agencies to involve environmental agencies, applicants, and the public, to the extent practicable); *id.* § 1501.4(e)(1) (requiring agencies to make FONSI available to the affected public as specified in § 1506.6); *id.* § 1501.4(e)(2) (requiring agencies to make a FONSI available for public review for thirty days before making its final determination on whether it will prepare an EIS or proceed with the action when the nature of the proposed action is, or is similar to, an action which normally requires the preparation of an EIS); *id.* § 1506.6 (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures).

³⁶ *Id.* § 1501.4.

enhancing the quality of the environment available to States, counties, municipalities, institutions, and individuals.³⁷ This requirement can include information on mitigation and mitigation monitoring.

Beyond these requirements, agencies are encouraged to make proactive, discretionary release of mitigation monitoring reports and other supporting documents, and to make responses to public inquiries regarding mitigation monitoring readily available to the public through online or print media. This recommendation is consistent with the President's Memorandum on Transparency and Open Government directing agencies to take affirmative steps to make information public without waiting for specific requests for information.³⁸ The Open Government Directive, issued by the Office of Management and Budget in accordance with the President's Memorandum, further directs agencies to use their web sites and information technology capabilities to disseminate, to the maximum extent practicable, useful information under FOIA, so as to promote transparency and accountability.³⁹

Agencies should exercise their judgment to ensure that the methods and media used to provide mitigation and monitoring information are commensurate with the importance of the action and the resources at issue, taking into account any risks of harm to affected resources. In some cases, agencies may need to balance competing privacy or confidentiality concerns (e.g., protecting confidential business information or the location of sacred sites) with the benefits of public disclosure.

III. REMEDYING INEFFECTIVE OR NON-IMPLEMENTED MITIGATION

Through careful monitoring, agencies may discover that mitigation commitments have not been implemented, or have not had the environmental results predicted in the NEPA and decision documents. Agencies, having committed to mitigation, should work to remedy such inadequacies. It is an agency's underlying authority or other legal authority that provides the basis for the commitment to implement mitigation and monitor its effectiveness. As discussed in Section I, agencies should not commit to mitigation considered in an EIS or EA unless there are sufficient legal authorities and they expect the resources to be available to perform or ensure the performance of the mitigation. In some cases, as discussed in Section II, agencies may exercise their authority to make

³⁷ 42 U.S.C. § 4332(2)(G).

³⁸ Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 21, 2009); *accord* DOJ, "Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act" (Mar. 19, 2009), *available at* www.usdoj.gov/ag/foia-memo-march2009.pdf.

³⁹ Office of Mgmt. & Budget, Executive Office of the President, "Open Government Directive" (Dec. 8, 2009), *available at* www.whitehouse.gov/open/documents/open-government-directive.

relevant funding, permitting, or other agency approvals and decisions conditional on the performance of mitigation commitments by third parties. It follows that an agency must rely on its underlying authority and available resources to take remedial steps. Agencies should consider taking remedial steps as long as there remains a pending Federal decision regarding the project or proposed action. Agencies may also exercise their legal authority to enforce conditions placed on funding, grants, permits, or other approvals.

If a mitigation commitment is simply not undertaken or fails to mitigate the environmental effects as predicted, the responsible agency should further consider whether it is necessary to prepare supplemental NEPA analysis and documentation.⁴⁰ The agency determination would be based upon its expertise and judgment regarding environmental consequences. Much will depend upon the agency's determination as to what, if any, portions of the Federal action remain and what opportunities remain to address the effects of the mitigation failure. In cases where an EIS or a supplementary EA or EIS is required, the agency must avoid actions that would have adverse environmental impacts and limit its choice of reasonable alternatives during the preparation of an EIS.⁴¹

In cases where there is no remaining agency action to be taken, and the mitigation has not been fully implemented or has not been as effective as predicted, it may not be appropriate to supplement the original NEPA analysis and documentation. However, it would be appropriate for future NEPA analyses of similar proposed actions and relevant programs to consider past experience and address the potential for environmental consequences as a result of mitigation failure. This would ensure that the assumed environmental baselines reflect true conditions, and that similar mitigation is not relied on in subsequent decisions, at least without more robust provisions for adaptive management or analysis of mitigation alternatives that can be applied in the event of mitigation failure.

IV. CONCLUSION

This guidance is intended to assist Federal agencies with the development of their NEPA procedures, guidance, and regulations; foster the appropriate use of Findings of No Significant Impact; and ensure that mitigation commitments are appropriately and effectively documented, implemented, and monitored. The guidance also provides Federal agencies with recommended actions in circumstances where mitigation is not

⁴⁰ 40 CFR § 1502.9(c) (requiring an agency to prepare supplements to draft or final EISs if the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts).

⁴¹ *Id.* § 1506.1(a) (providing that until an agency issues a Record of Decision, no action concerning the proposal may be taken that would have an adverse environmental impact or limit the choice of reasonable alternatives).

implemented or fails to have the predicted effect. Questions regarding this guidance should be directed to the CEQ Associate Director for NEPA Oversight.

APPENDIX

Case Study: Existing Agency Mitigation Regulations & Guidance

A number of agencies have already taken actions to improve their use of mitigation and their monitoring of mitigation commitments undertaken as part of their NEPA processes. For example, the Department of the Army has promulgated regulations implementing NEPA for military installations and programs that include a monitoring and implementation component.⁴² These NEPA implementing procedures are notable for their comprehensive approach to ensuring that mitigation proposed in the NEPA review process is completed and monitored for effectiveness. These procedures are described in detail below to illustrate one approach agencies can use to meet the goals of this Guidance.

a. *Mitigation Planning*

Consistent with existing CEQ guidelines, the Army's NEPA implementing regulations place significant emphasis on the planning and implementation of mitigation throughout the environmental analysis process. The first step of mitigation planning is to seek to avoid or minimize harm.⁴³ When the analysis proceeds to an EA or EIS, however, the Army regulation requires that any mitigation measures be "clearly assessed and those selected for implementation will be identified in the [FONSI] or the ROD," and that "[t]he proponent must implement those identified mitigations, because they are commitments made as part of the Army decision."⁴⁴ This is notable as this mitigation is a binding commitment documented in the agency NEPA decision. In addition, the adoption of mitigation that reduces environmental impacts below the NEPA significance threshold is similarly binding upon the agency.⁴⁵ When the mitigation results in a FONSI in a NEPA analysis, the mitigation is considered legally binding.⁴⁶ Because these regulations create a clear obligation for the agency to ensure any proposed mitigation adopted in the environmental review process is performed, there is assurance that mitigation will lead to a reduction of environmental impacts in the implementation stage and include binding mechanisms for enforcement.

Another important mechanism in the Army's regulations to assure effective mitigation results is the requirement to fully fund and implement adopted mitigation. It is acknowledged in the regulations that "unless money is actually budgeted and manpower

⁴² The Department of the Army promulgated its NEPA implementing procedures as a regulation.

⁴³ See 40 CFR § 1508.2.

⁴⁴ 32 CFR § 651.15(b).

⁴⁵ *Id.* § 651.35(g)

⁴⁶ *Id.* § 651.15(c).

assigned, the mitigation does not exist.”⁴⁷ As a result, a proposed action cannot proceed until all adopted mitigation is fully resourced or until the lack of funding is addressed in the NEPA analysis.⁴⁸ This is an important step in the planning process, as mitigation benefits are unlikely to be realized unless financial and planning resources are committed through the NEPA planning process.

b. *Mitigation Monitoring*

The Army regulations recognize that monitoring is an integral part of any mitigation system.⁴⁹ The Army regulations require monitoring plans and implementation programs to be summarized in NEPA documentation, and should consider several important factors. These factors include anticipated changes in environmental conditions or project activities, unexpected outcomes from mitigation, controversy over the selected alternative, potential impacts or adverse effects on federally or state protected resources, and statutory permitting requirements.⁵⁰ Consideration of these factors can help prioritize monitoring efforts and anticipate possible challenges.

The Army regulations distinguish between implementation monitoring and effectiveness monitoring. Implementation monitoring ensures that mitigation commitments made in NEPA documentation are implemented. To further this objective, the Army regulations specify that these conditions must be written into any contracts furthering the proposed action. In addition, the agency or unit proposing the action is ultimately responsible for the performance of the mitigation activities.⁵¹ In a helpful appendix to its regulations, the Army outlines guidelines for the creation of an implementation monitoring program to address contract performance, the role of cooperating agencies, and the responsibilities of the lead agency.⁵²

The Army’s effectiveness monitoring addresses changing conditions inherent in evolving natural systems and the potential for unexpected environmental mitigation outcomes. For this monitoring effort, the Army utilizes its Environmental Management System (EMS) based on the standardized ISO 14001 protocols.⁵³ The core of this

⁴⁷ *Id.* § 651.15(d).

⁴⁸ *Id.* § 651.15(d).

⁴⁹ *Id.* § 651.15(i).

⁵⁰ *Id.* §§ 651.15(h)(1)-(4) Appendix C to 32 CFR § 651, 67 Fed. Reg. 15,290, 15,326-28 (Mar. 29, 2002).

⁵¹ *Id.* § 651.15(i)(1).

⁵² *See* Appendix C to 32 CFR § 651, 67 Fed. Reg. 15,290, 15,326-28 (Mar. 29, 2002).

⁵³ *See also* CEQ, “Aligning NEPA Processes with Environmental Management Systems” (2007), *available at*

program is the creation of a clear and accountable system for tracking and reporting both quantitative and qualitative measures of the mitigation efforts. An action-forcing response to mitigation failure is essential to the success of any mitigation program. In the context of a mitigated FONSI, the Army regulations provide that if any “identified mitigation measures do not occur, so that significant adverse environmental effects could be reasonably expected to result, the [agency actor] must publish a [Notice of Intent] and prepare an EIS.”⁵⁴ This is an essential response measure to changed conditions in the proposed agency action. In addition, the Army regulations address potential failures in the mitigation systems indentified through monitoring. If mitigation is ineffective, the agency entity responsible should re-examine the mitigation and consider a different approach to mitigation. However, if mitigation is required to reduce environmental impacts below significance levels are found to be ineffective, the regulations contemplate the issuance of a Notice of Intent and preparation of an EIS.⁵⁵

The Army regulations also provide guidance for the challenging task of defining parameters for effectiveness monitoring. Guidelines include identifying a source of expertise, using measurable and replicable technical parameters, conducting a baseline study before mitigation is commenced, using a control to isolate mitigation effects, and, importantly, providing timely results to allow the decision-maker to take corrective action if necessary.⁵⁶ In addition, the regulations call for the preparation of an environmental monitoring report to determine the accuracy of the mitigation impact predictions made in the NEPA planning process.⁵⁷ The report is essential for agency planning and documentation and promotes public engagement in the mitigation process.

c. *Public Engagement*

The Army regulations seek to integrate robust engagement of the interested public in the mitigation monitoring program. The regulations place responsibility on the entity proposing the action to respond to inquiries from the public and other agencies regarding the status of mitigation adopted in the NEPA process.⁵⁸ In addition, the regulations find that “concerned citizens are essential to the credibility of [the] review” of mitigation

[ceq.hss.doe.gov/nepa/nepapubs/Aligning NEPA Processes with Environmental Management Systems 2007.pdf](http://ceq.hss.doe.gov/nepa/nepapubs/Aligning%20NEPA%20Processes%20with%20Environmental%20Management%20Systems%202007.pdf).

⁵⁴ 32 CFR § 651.15(c).

⁵⁵ *See id.* § 651.35(g) (describing the implementation steps, including public availability and implementation tracking, that must be taken when a FONSI requires mitigation); *id.* § 651.15(k).

⁵⁶ *See* subsections (g)(1)-(5) of Appendix C to 32 CFR § 651, 67 Fed. Reg. at 15,327.

⁵⁷ 32 CFR § 651.15(l).

⁵⁸ *Id.* § 651.15(b).

effectiveness.⁵⁹ The Army specifies that outreach with the interested public regarding mitigation efforts is to be coordinated by the installation's Environmental Office.⁶⁰ These regulations bring the public a step closer to the process by designating an agency source responsible for enabling public participation, and by acknowledging the important role the public can play to ensure the integrity and tracking of the mitigation process. The success of agency mitigation efforts will be bolstered by public access to timely information on NEPA mitigation monitoring.

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⁵⁹ *Id.* § 651.15(k).

⁶⁰ 32 CFR § 651.15(j).



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR 23 2010

PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-14

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: State and Local Agency Review of Environmental Statements

The following references apply to this memorandum and all except 511 Departmental Manual (DM) 1-8 are available as attachments in portable document format. The Internet locations for the clearinghouse offices and the DM remain at the Universal Resource Locators (URL) noted below. The clearinghouse URL should be consulted regularly for updated information.

Executive Order 12372 (as amended by EO 12416); Intergovernmental Review of Federal Programs.

Intergovernmental Review of the Department of the Interior Programs and Activities; 43 CFR 9, as amended.

Directory of State and Areawide Clearinghouses; Office of Management and Budget, pursuant to EO 12372. Available at:
<http://www.whitehouse.gov/OMB/grants/spoc.html>.

Departmental Manual, Part 511, Chapters 1-8. Available at: <http://elips.doi.gov>.

Bureaus and offices are requested to utilize State Clearinghouses in order to secure State agency review of environmental statements. In addition, where bureaus deem it appropriate, they may circulate statements directly to State agencies with a clear indication that the statement has also been sent to the State Clearinghouse or to the Governor's designated alternative if there is one.

Bureaus and offices are requested to utilize Areawide Clearinghouses in order to secure local agency review of environmental statements. Where Areawide Clearinghouses do not exist, environmental statements will be circulated directly to appropriate local governmental agencies.

Clearinghouses or designated alternatives must receive sufficient copies of statements for multi-agency review. Accordingly, it is generally recommended that at least ten (10) copies be

transmitted. If copies are sent to individual State or local agencies, it is generally recommended that at least two (2) copies be transmitted. Bureau field installations should develop their own lists of State and Areawide Clearinghouses and the number of copies needed by each. Periodic connection to the OMB Internet site is recommended to update the clearinghouse list.

Please refer to ESM 10-3.

This memorandum replaces ESM 04-14.

Attachments



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

APR 23 2010

PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-15

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director 
Office of Environmental Policy and Compliance

Subject: Publication and Distribution of Department of the Interior National Environmental Policy Act Compliance Documents via Electronic Methods¹

I. General

- A. This policy guidance is offered in order to maintain consistency throughout the Department when publishing and distributing National Environmental Policy Act (NEPA) compliance documents² electronically. The guidance will be reviewed and revised from time to time as more experience is gained in the use of electronic formats for publication and distribution of a wide variety of Departmental documents. To date no standard format for electronic distribution of all Departmental documents has been adopted.
- B. NEPA compliance documents are appearing with greater frequency in electronic format on the Internet and on CD-ROM from various agencies.
1. It is the Department's intention to promote electronic distribution of its

¹Electronic methods refers to and includes the computer- and Internet- based systems for publishing or posting information for easier public access. This ESM guides the use of such systems for publication of NEPA compliance documents. Therefore, the user is cautioned not to become too focused on the terminology that is used casually and interchangeably. No particular type of electronic method is being promoted. However, the most common electronic distribution of NEPA documents is currently on Compact Disk-Read Only Memory (CD-ROM) and the Internet. This guidance is generally based on these two types of distribution but recognizes that future electronic methods may appear and replace or modify earlier types.

²NEPA compliance documents include notices of intent (NOI), environmental assessments (EA), findings of no significant impact (FONSI), categorical exclusions (CX), draft (DEIS), final (FEIS), and supplemental environmental impact statements. Where necessary in this ESM, the text will specify particular documents when further clarity is required. Otherwise, NEPA compliance document, NEPA document, compliance document, etc. should be considered interchangeable. It is acknowledged that in most cases this ESM is dealing with publication and distribution of environmental impact statements (EISs), but the more general terms are used so that the ESM can apply to unforeseen situations where the document may not be an EIS.

2. NEPA compliance documents to benefit the public review and disclosure process. Electronic publication and distribution has the potential to aid in reaching a broader public and facilitating review of documents that can seem overwhelming in paper form.
 3. Nonetheless, because not all potentially-interested agencies, organizations, and individuals have such capability, publication in electronic format is a supplement to--not a replacement for--publication and distribution of paper copies.
- C. Paper copies must always be available for and distributed to those requesting them to permit their review within established time frames.
- D. This gradual conversion to a greater use of electronic formats is in compliance with the Electronic Freedom of Information Act Amendments of 1996.

II. Formats

- A. Current experience indicates that most CD-ROM distributions of environmental documents utilize the Portable Document Format (PDF).
1. This format is currently recommended for CD-ROM distribution.
 2. If this format is used, documents shall include the latest edition of *Adobe Acrobat Reader* for the recipient's immediate use.
- B. Documents placed on an Internet web site shall be made available for download in PDF, text, or hypertext markup language (html).
1. When PDF is used, bureaus shall include a link for downloading *Adobe Acrobat Reader*.
 2. It is recommended that a "text" version be offered as an optional download when offering either PDF or html.
- C. Formats should consider and make every effort to meet the requirements of Section 508 of the Americans with Disabilities Act. To that extent bureaus using *Adobe* are referred to: <http://access.adobe.com/tools.html> [or current universal resource locator (URL)] for assistance in making PDF documents accessible to Americans with disabilities.

III. Department and Environmental Protection Agency (EPA) Processing Requirements

A. Department

1. The three copies of an EIS needed by the Office of Environmental Policy and Compliance (OEPC) shall include one paper copy and two CDs. If only an Internet distribution is made (no CD-ROM), then OEPC will need the exact URL and three paper copies. If a combined distribution is made, then please supply one paper copy, two CDs, and the URL.
2. The two copies of an EIS needed by the Natural Resources Library shall be in paper format.
3. Refer to ESM 10-12 (particularly Attachment 4) and ESM 10-13 for Departmental processing procedures.

B. EPA

1. The five copies needed for filing with EPA shall be in paper format.
2. A draft, final, or supplemental environmental impact statement is not officially filed until publication of the EPA notice of availability in the Federal Register.
 - a. This publication generally occurs each Friday and contains EISs received for filing during the past week and starts the comment period.
 - b. Publication on the Internet does not start the NEPA comment period.
 - c. This is an important matter that all bureau NEPA personnel should remember so that filings are not later found to be procedurally flawed.

IV. Bureau/office Processing

- A. Bureau and office NEPA distribution lists must be continually updated to recognize which document recipients can use Internet, CD-ROM, and/or paper and in what quantities.

1. Remember to update State clearinghouse needs and other Interior bureau needs in this process.
 2. Bureaus and offices may want to periodically send a questionnaire to customer agencies and individuals to update their lists.
 3. An option to keeping special lists is to allow the public to sign up for electronic notification of all documents issued by a particular bureau or office. Once signed up, the public can access and comment on those items of interest.
 4. Another option is to send advance return postage paid mailers to everyone on the mailing list. The mailer would describe the formats available and allow the recipient to order the desired format.
- B. Notices of availability shall give all necessary information to the public about how to obtain both paper and electronic copies. This information shall include traditional contact names with street addresses and voice and fax telephone numbers as well as exact URLs and e-mail addresses for downloading documents and contacting personnel over the Internet.
- C. Electronic versions of NEPA documents must be complete and match the official paper copy page by page.
1. Commenters identifying specific pages, paragraphs, and sentences must have the assurance that they are identifying the same location in either the electronic or paper versions. The PDF format serves this need well.
 2. Electronic versions must include the complete text as well as viewable reproductions of all maps, tables, appendices, and other graphics that appear in the paper version. If this is not possible, then the electronic format must explain to the user what items are not available electronically and where and how to get paper copies of the electronically unavailable items.
- D. Distribution to Federal and State agencies with jurisdiction by law or special expertise and Indian Tribes shall also be in paper format unless a bureau has received a written request from that agency or Tribe for the document in electronic format or a mixture of paper and electronic formats.

This memorandum replaces ESM 04-15.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR 23 2010

PEP – ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-17

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Procedures for Implementing Tiered and Transference of Analyses

The requirements in this Environmental Statement Memorandum (ESM) are being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, and by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department's compliance with the National Environmental Policy (NEPA), the Council on Environmental Quality (CEQ) regulations, and 516 DM 1.21, which authorizes OEPC to provide further guidance concerning NEPA.

1. Purpose and Scope

The purpose and scope of this memorandum is to provide guidance to bureaus and offices on implementing the tiering and transferring of analyses under NEPA.

2. Tiered and Transferred Analyses (see 43 CFR 46.140 and 516 DM 1.18)

A NEPA document that tiers to another broader NEPA document in accordance with 40 CFR 1508.28 must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions.

(a) Where the impacts of the narrower action are identified and analyzed in the broader NEPA document, no further analysis is necessary, and the previously prepared document can be used for purposes of the pending action.

(b) To the extent that any relevant analysis in the broader NEPA document is not sufficiently comprehensive or adequate to support further decisions, the tiered NEPA document must explain this and provide any necessary analysis.

(c) An environmental assessment prepared in support of an individual proposed action can be tiered to a programmatic or other broader-scope environmental impact statement. An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects. Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. A finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered may also be called a “finding of no *new* significant impact.”

Transferred analysis is where environmental impact information learned in one circumstance can be used in the analysis of a similar project or circumstance, thus avoiding duplication of effort. Transferred analysis can be assisted by the exchange of existing information that is often stored in agency libraries and databases.

3. Procedures

- a. Bureaus and offices should establish a network of communication with Interior and other agencies to share environmental information particularly in the same geographic area.
- b. Bureaus and offices should establish, when possible, common databases of environmental information so that bodies of similar information can be re-used in future environmental impact work.
- c. The types of information bureaus and offices should store and share with other bureaus and offices and agencies are: examples of good and bad documents, sources with contact information, procedures for tiered and transferred analyses, and limits on use of certain information.
- d. Bureaus and offices should seek training for tiered and transferred analyses or provide it to their personnel.
- e. Bureaus and offices should work toward establishing interdisciplinary teams which can provide quick assistance to offices needing help in identifying where tiered and transferred analyses would be appropriate.

f. When appropriate, bureaus and offices should determine the sufficiency of existing environmental analyses. If an existing analyses is found to be sufficient, that document may be cited in the record of decision without doing additional and duplicate analysis.

This memorandum replaces ESM 03-3.



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APR 23 2010

PEP – ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-18

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director *Willie R. Taylor*
Office of Environmental Policy and Compliance

Subject: Procedures for Implementing Public Participation and Community-Based Training

The requirements in this Environmental Statement Memorandum (ESM) are being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, and by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department's compliance with NEPA, the CEQ regulations, and 516 DM 1.21, which authorizes OEPC to provide further guidance concerning NEPA.

1. Purpose and Scope

The purpose of this memorandum is to provide guidance to bureaus and offices and offices on implementing public participation and community-based training as part of NEPA analyses.

2. Public Participation

Public participation is the involvement, as early as possible, in the NEPA process of persons and organizations having an interest in any Departmental activity which must meet the requirements of NEPA. Public participation also includes the pro-active efforts of Departmental personnel to locate and involve the public.

3. Community-Based Training (see 43 CFR 46.30)

Community-based training in the NEPA context is the training of local participants together with Federal participants in the workings of the environmental planning effort as it relates to the local community(ies).

4. Procedures

- a. Bureaus and offices shall build public participation into their NEPA procedures so that the process of involving the public is part of the first actions taken when beginning NEPA compliance.
- b. Public participation should be conducted often and prior to development of draft alternatives and other early project documents.
- c. Use local partnerships, facilitated meetings, collaborative workgroups, and other mechanisms to provide a timely exchange of information with the public so that the scoping process and follow-up activities continue to reflect the public's input. The public should be included as soon as possible to obtain their ideas and comments. Bureaus and offices should share their public participation methods with each other to develop and improve the process.
- d. Bureaus and offices shall develop training methods and courses for community-based planning and the use of the NEPA process.
- e. This training must be available for both bureau staff and the key segments of the involved public. It is recognized that not all interested publics will want or need this training. However, those planning on following the project's development to completion will certainly benefit from training.
- f. Bureaus and offices shall inventory existing training programs so as not to duplicate something already available and shall review existing and proposed training programs to assure unity and consistency in their conduct.
- g. Training programs will need to reach out to communities to foster high levels of participation, identify the appropriate role of contractors or other third parties, and consider when to offer such training (e.g., only with high profile cases).

5. Management Training

- a. Any DOI employee holding a public meeting for the purpose of addressing NEPA compliance must have received training as shown in b. below.
- b. Training must be in use of the collaborative approach, meeting facilitation, fostering partnerships, negotiation, and alternative dispute resolution.

- c. The subjects in b. above may be found in separate or combined courses. Employees must be able to show by course documentation that the completed training covers these topics whether they are contained in one or several courses.

This memorandum replaces ESM 03-4.



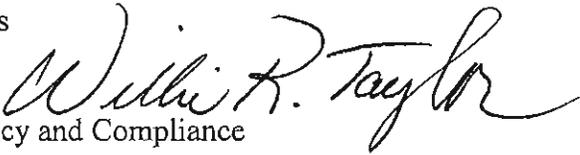
United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR 23 2010

PEP – ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-19

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director 
Office of Environmental Policy and Compliance

Subject: Procedures for Implementing Integrated Analyses in the National Environmental Policy Act (NEPA) Process

The requirements in this Environmental Statement Memorandum (ESM) are being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department's compliance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) regulations, and by 516 DM 1.21, which authorizes OEPC to provide further guidance concerning NEPA.

1. Purpose and Scope

The purpose of this memorandum is to provide guidance to bureaus and offices on implementing integrated analyses under NEPA.

2. Integrated Analyses

Integrating analyses uses a single NEPA process to enable several agencies to satisfy multiple environmental requirements by conducting concurrent rather than consecutive analyses. The need for integrated analyses may occur whenever agency actions and activities require compliance with other permitting and regulatory requirements within the Department and among outside Departments with overlapping authority. For example, Departmental bureaus and offices must comply with requirements of the Endangered Species Act, the Clean Water and Clean Air Acts, and cultural resource protection. Integrating analyses may facilitate and streamline compliance.

3. Procedures

- a. Bureaus and offices should develop memoranda of understanding (MOU) with relevant regulatory agencies to incorporate their regulatory and permitting requirements in the NEPA process. The MOUs should detail the process by which regulatory and permitting procedures will be integrated into the bureau's and office's NEPA processes including ways to streamline analysis and the setting of bench marks for when analyses will be completed.
- b. Bureaus and offices should establish core NEPA evaluation and documentation teams that include contact individuals from relevant regulatory and permitting agencies to coordinate the regulatory requirements of all agencies involved in a particular NEPA activity. Including regulatory and permitting agencies in the action agency's NEPA process enhances accountability for regulatory requirements and fosters inter-agency cooperation.
- c. Bureaus and offices should arrange the sequencing of permits with other bureaus, offices, and governmental agencies to avoid unnecessary delays in agency planning, preparation and implementation.
- d. Bureaus and offices should notify applicants when other permitting and regulatory requirements exist and provide them with the points of contact in the appropriate agencies to identify any additional information needed.

This memorandum replaces ESM 03-5.



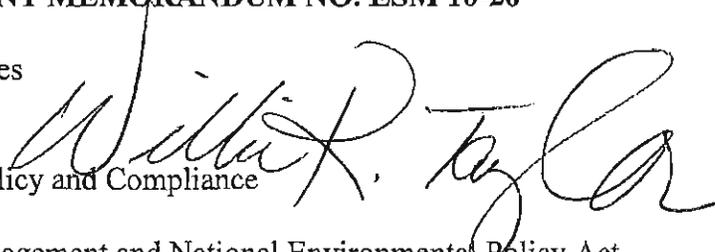
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Washington, D.C. 20240

APR 23 2010

PEP – ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-20

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance 

Subject: Coordinating Adaptive Management and National Environmental Policy Act Processes

This Environmental Statement Memorandum (ESM) is being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, and by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department of the Interior on matters pertaining to environmental quality and for overseeing and coordinating the Department's compliance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality and departmental regulations, which authorize OEPC to provide further guidance concerning NEPA.¹

Guidance regarding Adaptive Management (AM) is provided in departmental NEPA regulation 43 CFR Part 46 and 522 DM 1 (Adaptive Management Implementation Policy). More detailed information about the use and implementation of AM is given in *Adaptive Management: The U.S. Department of the Interior Technical Guide (2007)*.

1. Purpose and Scope

The purpose of this memorandum is to provide guidance to bureaus and offices on the use of AM and the relationship between AM practices and NEPA processes. As an approach to management of resources, any use of AM is subject to compliance with NEPA's statutory and regulatory requirements for Federal activities affecting the environment.

¹ This ESM is internal Department of the Interior guidance directed toward its bureaus and offices, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

2. What is Adaptive Management?

Adaptive Management is a system of management practices based on clearly identified outcomes and monitoring to determine whether management actions are meeting desired outcomes; and, if not, facilitating management changes that will best ensure that outcomes are met or re-evaluated. Adaptive management recognizes that knowledge about natural resource systems is sometimes uncertain. (43 CFR 46.30).

The Department technical guide emphasizes structured decision making and employs an iterative learning process that acknowledges uncertainty and that values reducing that uncertainty thus producing improved understanding and improved management over time as follows:

“Adaptive management [is a decision process that] promotes flexible decision making that can be adjusted in the face of uncertainties as outcomes from management actions and other events become better understood. Careful monitoring of these outcomes both advances scientific understanding and helps adjust policies or operations as part of an iterative learning process. Adaptive management also recognizes the importance of natural variability in contributing to ecological resilience and productivity. It is not a ‘trial and error’ process, but rather emphasizes learning while doing. Adaptive management does not represent an end in itself, but rather a means to more effective decisions and enhanced benefits. Its true measure is in how well it helps meet environmental, social, and economic goals, increases scientific knowledge, and reduces tensions among stakeholders.” (*Adaptive Management: The U.S. Department of the Interior Technical Guide (2007)*).

Adaptive Management emphasizes transparency, shared decision making, and the importance of cooperative engagement of stakeholders. The objective of using an AM strategy is to reach a particular desired outcome or to achieve a specific goal while formulating decisions in an operational setting characterized by uncertainty. Thus, AM should not be the strategy of choice whenever it is unclear as to desired outcomes and specific goals. Use of an AM strategy also may be inappropriate in situations where there is little to no chance for changing the decision or where the decision space is very limited. Adaptive Management is a technique to be employed for charting a decision making course along an uncertain path whose goal is to obtain an expected and desirable situation. An effective and necessary monitoring program can provide the needed navigational framework for successfully meeting the challenges of adaptively managing the path.

3. What is the Relationship between Adaptive Management and the NEPA Process?

Compliance with NEPA is a statutory and regulatory requirement for Federal activities affecting the environment. Adaptive Management is a discretionary management

approach to structured decision making that may be used in conjunction with the NEPA process. Adaptive Management is not a substitute for NEPA compliance for agency decisions. Because AM provides a mechanism for addressing uncertainties and data gaps that may be identified through the NEPA process, it is a management tool that is consistent with NEPA's goal of informed decision making.

It must be clearly understood that NEPA compliance is a statutory requirement, the implementation of which is governed by regulations that set forth the obligations and the procedural provisions embodied in the statute. National Environmental Policy Act compliance is required for all Federal actions affecting the environment. AM is a discretionary learning-based management process having no statutory or regulatory requirements.

Adaptive Management and NEPA are similar in that each emphasizes collaboration principles and working with stakeholders. The responsible official should consider and make an effort to meet the separate but related needs for stakeholder involvement in the AM and NEPA processes. These distinctive needs, the NEPA requirement for public involvement on the one hand, and the emphasis of AM on the ongoing relationship between the agency and other persons interested in the decisions to be made, on the other, must be clearly articulated. There may be some overlap, but NEPA requirements and the role of AM, in the context of stakeholder involvement, need to be explicitly understood.

Adaptive Management and NEPA are also similar in that each emphasizes learning. To provide an adequate framework for an AM approach to decision making, it is important to openly acknowledge uncertainty and the need to learn during the AM process. Learning and adjusting are part of the ongoing AM process. In AM, the need to learn is best expressed as one or more key questions with regard to uncertainty about the consequences of management actions. If such uncertainty motivates the use of an AM approach to a given management situation, it is important to acknowledge the existence of this uncertainty in the NEPA process. This acknowledgement informs the public involvement and shapes the analysis of environmental effects that is required for compliance with NEPA. When using an AM approach for a proposed agency action, the need to supplement or prepare additional NEPA documents in the future may be reduced or eliminated if management adaptations, which could occur in light of new information that is predicted to emerge, are fully documented and analyzed through the NEPA process.

4. Criteria for Considering Whether to Use AM

The Department supports the use of AM under appropriate circumstances, recognizing that not all decisions can or should use an AM approach. The conditions for using AM are discussed in detail in the DOI technical guide. These conditions include clear objectives, uncertainty about management impacts, and monitoring to guide decision making and evaluating management effectiveness. These conditions are listed here:

- A real management choice is to be made;
- There is an opportunity to apply learning;
- Clear and measurable management objectives can be identified;
- The value of information for decision making is high;
- Uncertainty exists and decision-making is ongoing;
- Uncertainty can be expressed as a set of testable models;
- A monitoring system can be established to reduce uncertainty; and
- There is an ability to analyze the effects of the AM actions in the NEPA document.

Conditions where AM may not be appropriate include the following:

- Resource management decisions cannot be revisited and modified over time;
- Monitoring cannot provide useful information for decision making;
- Irresolvable conflicts in defining explicit and measurable management objectives or alternatives exist;
- The agency has limited discretion over resource systems and outcomes; and
- Risks associated with learning-based decision making are too high.

5. Coordinating Adaptive Management and the NEPA Process

In general, when an AM approach to decision making is considered to be appropriate, the NEPA compliance associated with that decision may be structured to potentially allow changes to management decisions without the need to initiate further NEPA analysis. The conditions in which NEPA compliance can be structured to allow for the iterative, learning-based decision making characteristic of AM include:

- a. the management actions under consideration in the AM approach are identified in the NEPA analysis;
- b. the criteria for management adjustments are clearly articulated in the NEPA analysis; and
- c. the AM process produces outcomes within the range analyzed in the NEPA analysis.

However, it is important that monitoring be designed in the context of AM to promote learning, track progress in achieving objectives, and facilitate decision making through time. There needs to be assurance that monitoring will occur and that appropriate adjustments in project activities will be made in response to the information provided by that monitoring. Monitoring protocols need to be integrated into the project and considered in the NEPA analysis. Monitoring should be used to evaluate the adequacy of the original action and to determine whether management adjustments need to be undertaken to meet the identified goals/outcomes. If monitoring indicates that the management options analyzed during the NEPA process are inadequate to achieve the

expected outcomes or that outcomes can be achieved more effectively or efficiently via other management actions, agencies may need to re-initiate the NEPA process in order to ensure that any restructured management decision framework complies with NEPA. Above all, commitments and mechanisms need to be in place to ensure bureaus and offices adjust their decisions based on the results of such monitoring and evaluation.

6. How to Conduct NEPA Analyses for Proposed Actions That Include an AM Approach

Adaptive Management prescribes the integration of decision making, monitoring, and assessment into an iterative process of learning - and performance-based management. If and when an agency chooses to use an AM approach to a decision or project, that AM process needs to be spelled out in the NEPA document analyzing the proposed action. Since AM is an approach to management over time, not itself a statutorily required analysis of the environmental consequences of certain actions, the AM effort is likely to continue after the NEPA process has been completed. Therefore, the parameters of the AM process need to be included in the NEPA analysis and the subsequent decision and its implementation should follow the parameters outlined in the NEPA analysis.

An AM approach may be included in, or even shape in large part, the proposed action and/or in one or more alternatives to the proposed action. An AM proposal or alternative must clearly identify the adjustment(s) that may be made when monitoring during project implementation indicates that the action is not achieving its intended result, or is causing unintended and undesirable effects. The environmental document prepared pursuant to NEPA must disclose not only the effects of the proposed action or alternative but also the anticipated effect of the adjustments that may be made. Such a proposal or alternative must also describe the monitoring that would take place to inform the responsible official whether the action is achieving its desired outcome. Specifically, the proposed action or alternative employing an AM approach must describe, and the supporting NEPA document must analyze:

- The proposed AM approach;
- Identification of uncertainties to be addressed through management and monitoring;
- One or more specific questions that can be answered in the course of managing and identifying monitoring protocols which follow from the question(s);
- How the AM approach is reflected in the alternatives being considered;
- The environmental effects of the proposed AM approach and each of the alternatives;
- The monitoring protocol including a reasonable mechanism to assure that monitoring will occur;
- The desired outcome;
- The performance measures that will determine whether the desired outcome is being achieved or whether a mid-course corrective action is needed;
- The factors for determining whether additional NEPA review will be needed in the future;

- The thresholds or triggers requiring adaptive or remedial action and the specific management options that may be used;
- Clear timeframes for long-term goals and short-term evaluations;
- A description of the AM oversight team composition and processes, with provisions for conflict resolution; and
- Provisions for data management, documentation, and reporting.

The following table identifies the AM steps documented in the technical guide and corresponding NEPA components. The AM steps may be coordinated with one or more of the procedural requirements for complying with NEPA and are part of an iterative process advancing the understanding of the environment and improving management decisions. Stakeholder involvement is a continuous part of both of the AM approach and the NEPA process from scoping, preparation and review of environmental documents and effectiveness monitoring with respect to implementation of the decision.

NEPA Components	AM Step	Comments
Proposed Action	<p>Identify a set of potential AM management actions for decision making.</p> <p>Adaptive Management may be an integral and major feature of the proposed action and/or the alternatives.</p>	<p>Evaluate the role of AM in the development of this proposal; fully describe the proposed AM actions to be implemented.</p> <p>In carrying out initial public participation in the NEPA evaluation process, bureaus and offices should strive to ensure that stakeholders and public understand the principles and implications of AM and have reasonable opportunity to provide input.</p>
Purpose and Need	<p>Identify clear, measurable, and agreed-upon management objectives to guide decision making and evaluate management effectiveness over time.</p> <p>Develop a monitoring protocol including a reasonable mechanism to assure that monitoring will occur.</p>	<p>NEPA documents for projects that invoke AM should explain how monitoring and interpretation will be used to answer one or more key questions that could be answered in the course of managing and to demonstrate that learning has occurred.</p>
Scoping	<p>Ensure stakeholder commitment to an adaptive management approach for the enterprise for its duration.</p> <p>Incorporate the views from scoping into a reasonable range of approaches that could be tried and compared within the project.</p>	<p>In carrying out initial public participation in the NEPA evaluation process, bureaus and offices should strive to ensure that stakeholders and the public understand AM principles and its implications and have reasonable opportunity to provide input.</p>
Alternatives	<p>Identify a set of potential AM management actions for decision making.</p> <p>In some cases, Adaptive Management may be more narrowly focused, only involving and requiring discussion with respect to one or</p>	<p>Develop performance metrics relating to the management objectives</p> <p>Design and implement a monitoring plan to track resource status and</p>

	<p>more of the alternatives or focused on a specific issue or a single resource or narrow range of resources. Its use, in some cases, may not be a major factor in the proposed action, but rather a minor component.</p>	<p>other key resource attributes.</p> <p>Describe how the monitoring plan supports learning through the testing of alternative models and measuring progress towards objectives.</p>
Describe Affected Environment	<p>Identify models that characterize different ideas (hypotheses) about how the system may work.</p>	<p>Identify whether the ecological/resource processes that drive resource dynamics are understood and the uncertainties in that understanding.</p>
Effects Analysis (direct, indirect, & cumulative)	<p>Assess management alternatives as to their resource consequences and contributions toward achieving objectives.</p>	<p>The EIS (or EA) must disclose not only the effects of the proposed action or alternative but also the effect of the adjustment.</p>
Decision	<p>Select management actions based on management objectives, resource conditions, and understanding.</p> <p>Identify how future decisions will be made.</p>	
Implementation	<p>Use monitoring to track system responses to management actions.</p> <p>Improve understanding of resource dynamics by, among other things, comparing predicted and observed changes in resource status.</p> <p>Review and refine management actions throughout the life of the project.</p>	<p>If the revised management action is analyzed in the NEPA document, then no new NEPA analysis is necessary if and when the revised action is eventually taken. If evaluation or monitoring indicates that the management options analyzed during the NEPA process are not achieving the performance goals, agencies may need to re-initiate the NEPA process.</p> <p>Bureaus and Offices should maintain open channels of information to the public and affected regulatory and permitting agencies during the application of AM, including transparency of the monitoring process that precedes AM and the decision-making process that implements it. This involves: (a) identifying indicators of change, (b) assessing monitoring activities for accuracy and usefulness, and (c) making changes in management activities and/or strategies.</p>

This memorandum replaces ESM 03-6.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR 23 2010

PEP – ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-21

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director 
Office of Environmental Policy and Compliance

Subject: Procedures for Incorporating Consensus-Based Management in Agency Planning and Operations

The requirements in this Environmental Statement Memorandum (ESM) are being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, and by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department's compliance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) regulations, and 516 DM 1.21, which authorizes OEPC to provide further guidance concerning NEPA.

1. Purpose and Scope

The purpose of this memorandum is to provide guidance to bureaus and offices on incorporating consensus-based management into NEPA analyses.

2. Incorporating Consensus-Based Management in Agency Planning and Operations (see 43 CFR 46.110)

Consensus-based management incorporates direct community involvement in consideration of bureau activities subject to NEPA analyses, from initial scoping to implementation of the bureau decision. It seeks to achieve agreement from diverse interests on the goals of, purposes of, and needs for bureau plans and activities, as well as the methods anticipated to carry out those plans and activities. For the purposes of this Part, consensus-based management involves outreach to persons, organizations or communities who may be interested in or affected by a proposed action with an assurance that their input will be given consideration by the Responsible Official in selecting a course of action.

3. Procedures

a. Bureaus should establish a network of communication with the diverse interest groups that represent the community¹ affected by a proposed project. Community-based training that precedes the NEPA process is useful in developing the network of communication. Training will also allow participants the opportunity to understand the NEPA process and their roles. This also provides a focal point for assembling the diverse interest groups that make-up the relevant participating persons, organizations or communities.

b. Bureaus should initiate the scoping process with full and direct involvement by the participating persons, organizations or communities, identifying and evaluating issues and impacts of concern relating to the project or activity. This applies to any NEPA compliance document.

c. When feasible and practicable, one alternative evaluated in the NEPA analysis should be the consensus-based alternative if one exists.

d. In incorporating consensus-based management in the NEPA process, bureaus should consider any consensus-based alternative(s) put forth by those participating persons, organizations or communities who may be interested in or affected by the proposed action. While there is no guarantee that any particular consensus-based alternative will be considered to be a reasonable alternative or be identified as the bureau's preferred alternative, bureaus must be able to show that the reasonable consensus-based alternative, if any, is reflected in the evaluation of the proposed action and discussed in the final decision. To be selected for implementation, a consensus-based alternative must be fully consistent with NEPA, the CEQ regulations, and all applicable statutory and regulatory provisions, as well as Departmental and bureau written policies and guidance.

e. Bureaus should use various dispute resolution processes as necessary.

4. Compliance with the Federal Advisory Committee Act (FACA)

a. The FACA, 5 U.S.C.A App. 2, was enacted to reduce narrow special-interest group influence on decision makers, to foster equal access to the decision-making process for the general public, and to control costs by preventing the establishment of unnecessary advisory committees.

¹Community, for this purpose, means those who are directly affected by or whose interests are affected by a bureau-proposed action and are represented by elected officials as well as locally-established or commonly recognized groups within the proposed action's reasonable area of impact.

b. The FACA applies whenever a statute or an agency official establishes or utilizes a committee, board, commission or similar group for the purpose of obtaining advice or recommendations on issues or policies within the agency official's responsibility.

c. The Department's managers and staff must understand the provisions of FACA when they are gathering public input for the decision-making processes and when working in collaborative efforts. To ensure that the Department's collaborative efforts comply with FACA, any time the Department establishes or uses a group for consultation or recommendations, that official should verify whether FACA applies and, if so, ensure that the FACA requirements are followed.

d. As a general rule, collaborative groups that are not initiated by the Department can avoid application of FACA and can continue to have active participation in Departmental activities by maintaining their independence from the DOI's management or control. Further, NEPA collaborative groups composed entirely of government representatives would not be subject to FACA. However, in making the determination as to whether FACA will apply, the official should consult with the Office of the Solicitor.

e. If FACA applies, bureaus should consult their Group Federal Officer (GFO) under FACA for assistance in document preparation.

This memorandum replaces ESM 03-7.



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240



FEB 22 2011

PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 11-2

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance 

Subject: Procedures for Approving and Filing Environmental Impact Statements

1. Purpose and Scope

This memorandum prescribes procedures for filing environmental impact statements (EISs) with the Environmental Protection Agency (EPA). It pertains to both draft and final EISs and both delegated and non-delegated EISs. This memorandum is issued pursuant to 43 CFR 46.415, and supplements 516 DM 3.3.

2. Delegated EISs

A delegated EIS is one for which the decision authority on the proposed action is delegated to a single Assistant Secretary or a subordinate officer.

3. Non-Delegated EISs

A non-delegated EIS is one for which the decision authority on the proposed action requires the approval of more than one Assistant Secretary (or bureaus under more than one Assistant Secretary), OR is an EIS reserved or elevated to the Secretary (or Office of the Secretary) by expressed interest of the Secretary, Deputy Secretary, the Chief of Staff, the Solicitor or the Assistant Secretary for Policy, Management and Budget, OR is of a highly controversial nature or one in which the Secretary has taken a prominent public position in a highly controversial issue, OR faces a high probability of judicial challenge to the Secretary.

4. Notification

a. As early as possible in the NEPA compliance process for all proposed departmental programs and projects, a bureau or office will notify the Office of Environmental Policy and Compliance (OEPC) of its determination under sections 2 and 3 above. Bureaus will also notify OEPC when EISs are required for proposals where the determination of delegated vs. non-delegated is unclear.

b. The responsible bureau or office decides whether a particular EIS is delegated or non-delegated. OEPC may advise the bureau or office and the Assistant Secretary/Policy, Management and Budget (AS/PMB) on the bureau or office decision.

c. If OEPC does not concur with the determination, OEPC will advise the bureau or office in writing setting forth its reasons for the non-concurrence. When the determination is unclear, OEPC will advise the bureau or office in an effort to assist them in making the determination.

d. Bureaus and offices will make this determination no later than the filing of a Notice of Intent (NOI) and/or the conducting of scoping meetings.

5. Procedures for Delegated EISs

a. Assistant Secretaries, bureaus or offices, upon approval of a delegated EIS, but before its release to EPA and the public, are to contact OEPC by telephone and inform it of the title of the EIS, the date of its transmittal, and the URL for the project site. OEPC will assign the document a Department of the Interior (DOI) control number and log it, as well as place it in the OEPC on-line environmental review database at:

<http://www.doi.gov/oepec/review.html>. Control numbers will only be given to authorized bureau personnel involved with the processing of the EIS. Control numbers will not be given to unauthorized persons such as contractors, joint lead agencies, or cooperating agencies. Control numbers should be secured as late as practicable, but prior to filing with EPA. Control numbers shall be stamped or written in ink on the outside cover of all copies transmitted to EPA and Interior bureaus and offices, and included in any electronically-published versions of the document.

b. Before calling for a DOI control number, a bureau or office should determine the exact status of the printing job. If the documents are printed and mailed, or waiting to be mailed from the printer, the bureau or office should request a number. If the documents are printed and in transit back to the bureau or office for mailing, the bureau or office should wait until the documents are ready for mailing to request a control number. If the document has not yet been given to the printer, a control number should not be reequested.

c. At the time of transmittal to EPA, Assistant Secretaries, bureaus, and offices will file delegated EISs directly with EPA and publish separate bureau notices of availability in the Federal Register for all draft, final and supplemental EISs. The time period for review in the bureau or office notice must be consistent with the time period for review in EPA's notice of availability. Four (4) copies of the EIS are required by EPA (one paper copy, three electronic). The EPA will not accept the EIS without the DOI control number.

- d. Concurrent with the filing of an EIS with EPA, bureaus and offices are to distribute the document to Federal agencies with jurisdiction by law or special expertise and to State and local agencies, including Indian Tribes, which are authorized to set and enforce related environmental standards, and to make it available to the public. Upon transmittal, the responsible official will promptly provide two (2) copies to the Department's Natural Resources Library (U.S. Department of the Interior Library, (Mail Stop: 1151), 1849 C Street NW, Washington, DC 20240, and three (3) copies (one (1) paper and two (2) CDs)) to OEPC. In addition, OEPC will be furnished a copy of the transmittal letter to EPA and the bureau or office Federal Register notice.
 - e. Circulation to Interior bureaus and offices will take place in accordance with ESM 11-3.
 - f. Circulation to other Federal and State agencies is guided by ESM 10-3 and ESM 10-14.
6. Procedures for Non-Delegated EISs
- a. Non-delegated EISs must be approved and filed with EPA by the AS/PMB. The AS/PMB has assigned this responsibility to OEPC.
 - b. Bureaus and offices are encouraged to consult early with OEPC in scheduling and preparing these documents to avoid delays in their approval. The OEPC is available for providing or interpreting guidance and reviewing preliminary drafts (or portions of drafts) at headquarters and, subject to the availability of resources, at OEPC's or bureau field offices. This advance consultation and coordination with OEPC will facilitate granting clearances to print documents with a minimum of formal correspondence and associated processing and mailing delays.
 - c. A clearance to print is OEPC's substantive approval of non-delegated EISs. It generally takes the form of a memorandum from the bureau or office to the Director, OEPC requesting a clearance to print. A concurrence line is provided at the bottom for the Director's signature. Once signed, OEPC will provide a fax transmission of the document so printing may commence. An example is shown in Attachment 1.
 - d. Where adequate and early consultation and coordination is not achieved with OEPC, bureaus and offices will transmit proposed EISs to OEPC for review and approval. This should be done concurrently with any bureau or office headquarters review. Bureaus and offices should allow at least 2 weeks for OEPC's review, comment, and approval. In such cases, bureaus and offices will also provide in their preparation schedules sufficient time to accommodate comments by OEPC.

- e. In order to file non-delegated EISs with EPA, bureaus and offices will forward, through their Assistant Secretary to OEPC:

- a transmittal letter (Attachment 2)
- a notice of availability (Attachment 3)
- a draft press release (if required by any Interior process), and
- four (4) copies of the EIS (one paper copy, three electronic).

The transmittal letter, upon signature by the Director of OEPC, is the official document signifying AS/PMB approval. After signature, a bureau or office may hand carry it and four (4) copies of the EIS to EPA and the notice of availability to the Federal Register if it so chooses; otherwise OEPC will mail them. The notice of availability must be in the form of three originals with the OEPC original signature and date on each.

- f. A DOI control number will also be obtained by the same method outlined in Part 5.a. and b. above.

g. Concurrent with the filing of an EIS with EPA, bureaus and offices are to distribute the document to Federal agencies with jurisdiction by law or special expertise and to State and local agencies, including Indian Tribes, which are authorized to set and enforce related environmental standards, and to make it available to the public. In addition, bureaus will provide two (2) copies to the Department's Natural Resources Library and three (3) copies (one (1) paper and two (2) CDs) to OEPC for its distribution and files.

h. Circulation to Interior bureaus and offices will take place in accordance with ESM 11-3.

i. Circulation to other Federal and State agencies is guided by ESM 10-3 and ESM 10-14.

7. Numbers and Formats of EIS Copies

Please refer to Attachment 4 for a discussion of the numbers and formats of EIS copies that are needed by various recipients.

This memorandum replaces ESM 10-12.

Attachments

cc: DAS/P&IA

ATTACHMENT 1 TO ESM 11-2

To: Director, Office of Environmental Policy and Compliance
Department of the Interior, MS 2462 MIB

From: *(Authorizing Officer for the EIS)*

Subject: Request for Approval to Print the Draft *(or Final)* Environmental Impact Statement for the ...

In accordance with Environmental Statement Memorandum ESM 11-2, we request clearance to print the subject draft *(or final)* environmental impact statement. Please document this approval by signing the “concur” line below and returning the signed memorandum to this office.

(Any additional information may be given here.)

The draft *(or final)* environmental impact statement for the ... is approved for printing.

Concur: _____ Date: _____
Director, Office of Environmental
Policy and Compliance

Notes:

1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 5, 2011.

ATTACHMENT 2 TO ESM 11-2

U.S. Environmental Protection Agency
Office of Federal Activities
EIS Filing Section
Mail Code 2252-A
Ariel Rios Building (South Oval Lobby)
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Dear Sir or Madam:

In compliance with Section 102(2)(C) of the National Environmental Policy Act of 1969 and in accordance with 40 CFR 1506.9, we are enclosing four (4) copies of a (*draft/final*) environmental impact statement (EIS) for (*title of proposal*). This statement was prepared by the (*bureau/office*).

This EIS has been transmitted to all appropriate agencies, special interest groups, and the general public. The official responsible for the distribution of the EIS and knowledgeable of its content is (*name and phone number*).

Sincerely,

Willie R. Taylor
Director, Office of Environmental
Policy and Compliance

Enclosures

Notes:

1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 5, 2011.
3. Please note that the address above may change and that hand deliveries may use a different address.
4. Refer to ESM 10-10 for instructions and the EPA web site to verify the current address.

ATTACHMENT 3 TO ESM 11-2

DEPARTMENT OF THE INTERIOR
(BUREAU)

Notice of Availability of (*Draft/Final*) Environmental Impact Statement

AGENCY: (*Bureau/Office*), Department of the Interior

ACTION: Notice of availability of a (*draft/final*) environmental impact statement (EIS) for the proposed (*title*)

SUMMARY: (Cite the authority that authorizes your agency to issue your notice)

*DATES: Comments will be accepted until (*date*)

*ADDRESSES: If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to (*office name and address*). You may also comment via the Internet to (*office Internet address*). Finally, you may hand-deliver comments to (*office street address*). See supplementary information section for information on submitting comments via the internet and the public disclosure of commenter's names and addresses.

FOR FURTHER INFORMATION CONTACT: (*office contact, address, phone number, e-mail*)

SUPPLEMENTAL INFORMATION: A limited number of individual copies of the EIS may be obtained from (*the above contact or wherever*). Copies are also available for inspection at the following locations:

** A public (*hearing/meeting*) will be held on the proposal on (*dates and locations*).

(*Include any other pertinent information which will assist the public, including web sites.*)

**Submitting Internet Comments

Please submit Internet comments (format such as, plain text file, MS Word, PDF, etc.) avoiding the use of special characters and any form of encryption. Please also include "Attn: (*any identifying names or codes*)" and your name and return address in your Internet message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at (*office contact and phone number*).

Public Disclosure of Names and Addresses:

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment including your personal identifying information may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Willie R. Taylor
Director, Office of Environmental Policy
and Compliance

Date

- * Include only for a draft EIS
- ** Include if appropriate to this notice

Notes:

1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 5, 2011.

ATTACHMENT 4 TO ESM 11-2

1. EPA filings will consist of four (4) copies (one paper and three electronic).
 2. Format of OEPC's three (3) copies.
 - A. If the EIS is published in paper only, OEPC must receive three (3) paper copies.
 - B. If the EIS is published in paper and CD-ROM only, OEPC must receive one (1) paper copy and two (2) CDs.
 - C. If the EIS is published in paper and Internet only, OEPC must receive three (3) paper copies and the exact Universal Resource Locator (URL) for the Internet site.
 - D. If the EIS is published in paper, CD-ROM, and Internet, OEPC must receive one (1) paper copy, two (2) CDs, and the exact URL.
 3. Disposition of OEPC's three (3) copies.
 - A. One (1) paper copy will remain in the official OEPC EIS file for ultimate storage in the National Archives. While in OEPC this copy may be checked out by Regional Environmental Officers and authorized bureau personnel and must be returned to OEPC.
 - B. If additional paper copies are available, one will remain in OEPC headquarters and one will be sent to the REO. Again, authorized bureau personnel may check out these copies for review and return to OEPC.
 - C. If two (2) CDs are available, one will remain in OEPC headquarters and one will be sent to the REO. These CDs may be checked out by REOs and authorized bureau personnel. However, the preferred action is to copy a new CD which can be forwarded to the REO or bureau with no return necessary.
 - D. If only paper and URL are available, OEPC's additional paper copies may be borrowed as noted above, but it is preferred that the user download the EIS from the URL and produce their own electronic or paper copy if needed.
 4. The Natural Resources Library's copies will consist of two (2) paper copies.
-

Notes:

1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 5, 2011.



United States Department of the Interior

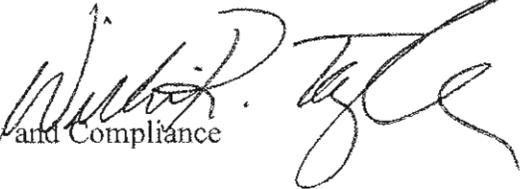
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240



~~FEB 22 2011~~

PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 11-3

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance 

Subject: Procedures for Intra-Departmental Review of National Environmental Policy Act (NEPA) Compliance Documents Prepared by Bureaus and Offices

This memorandum describes procedures for the intra-Departmental distribution and review of NEPA Compliance Documents prepared by bureaus and offices and filed at the Environmental Protection Agency (EPA) and supplements 43 CFR 46.155 and the Departmental Manual (516 DM 1.20). The following definitions are included for clarity:

Preparing office--Departmental bureaus, offices, or other entities which prepare and circulate NEPA Compliance Documents for review.

Reviewing office--Heads of other bureaus, offices, or other entities from which comments are sought on NEPA Compliance Documents.

Preparing offices shall first obtain a Department of the Interior (DOI) control number (see ESM 11-2) from the Office of Environmental Policy and Compliance (OEPC) and then direct their requests for review to the reviewing offices. This request should be sent to the bureau environmental contacts as listed on Attachment 1 to this memorandum. Information copies may be sent to field elements of reviewing offices, but the transmittal must clearly indicate that the official review will only be accepted from the headquarters level.

Copies of environmental documents shall be made available to the reviewing bureaus and offices as shown in Attachment 1 to facilitate simultaneous review by different organizational units or field offices of the bureau. Bureaus and offices may wish to advise other bureaus/offices of any special mailing requirements for these copies. Information copies shall be sent to the Department's Regional Environmental Officers (REOs) for activities within their geographic areas. Please refer to Attachment 2 for a list of REOs.

Preparing offices are encouraged to make their compliance documents available by electronic means such as CDs. Preparing offices should also make compliance documents available on bureau and office web sites and inform the reviewing bureaus and offices, the REOs and this office of the project URL.

Preparing offices may consult with reviewing offices to determine whether a particular reviewing office has an interest in reviewing a specific environmental document. If the reviewing office agrees, a preparing office may delete that reviewing office from its distribution list for that environmental document.

For tracking purposes, the reviewing bureaus shall use the DOI control number assigned by OEPC. This number shall be stamped or written in ink on the outside cover of all copies. If any copies are not numbered, the preparing office's environmental contact can furnish this information. For draft statements, the statement control number takes the form: DES (year)-(sequential number). For final statements: FES (year)-(sequential number).

Reviewing bureaus may delegate their response within their bureau; however, the response shall be directed to the specific office of the preparing bureau that made the original review request. A copy of the review comments shall be sent to the Natural Resources Management Team, OEPC and to the appropriate REO.

Reviewing bureaus shall not independently release to the public their comments on environmental statements prepared by other bureaus or offices. Preparing bureaus are responsible for making comments received available to the public as part of the final environmental statement in accordance with 40 CFR 1503.4(b). Further, preparing bureaus are responsible for making comments received available to the public pursuant to provisions of the Freedom of Information Act (FOIA) [40 CFR 1506.6(f)]. See Departmental regulations at 43 CFR 2 which implements the FOIA.

Occasionally bureaus will participate as joint lead agency along with other Federal or State agencies to prepare an environmental impact statement. It is important to understand that only one of the joint leads can file the Federal EIS and receive comments. This decision must be made as early as possible in the process by the interagency team developing the EIS. Joint lead environmental statements prepared in coordination with other Federal or State agencies will be treated as Interior statements if Interior files them with EPA. Such statements will be treated as non-Interior statements if they are filed by a non-Interior joint lead agency.

In cases where Interior files the EIS with EPA, the provisions of this memorandum apply and the bureau will be the recipient of comments from other Interior bureaus, will consider them individually, and will publish these individual comments and responses in the final EIS. This is the same process as the one followed when Interior bureaus have no joint lead responsibilities. In cases where another non-Interior joint lead agency files the EIS with EPA, this memorandum does not apply, and the statement will be circulated for review under 516 DM 4. This circulation will result in a consolidation of bureau comments and recommendations into a single Interior response to the filing agency.

This memorandum replaces ESM 10-13.

Attachments

cc: DAS/P&IA

ATTACHMENT 1 TO ESM 11-3

BUREAU ENVIRONMENTAL CONTACTS

BUREAU	CONTACT	ADDRESS	PHONE	FAX	NUMBER OF COPIES **
FWS	Patricia Carter Pat_carter@fws.gov Stephanie Nash* Stephanie_nash@fws.gov	4401 N. Fairfax Drive MS 400 Arlington, VA 22203	703-358-1764 703-358-1896	703-358-1869	1
NPS	Patrick Walsh Patrick_Walsh@nps.gov Dale Morlock* Dale_Morlock@nps.gov	1849 C Street, NW NPS-2310 MS 2242 Washington, DC 20240	303-969-2073 202-208-4258	303-969-2997 202-208-4191	5
GS	Gary LeCain Gary_LeCain@usgs.gov Brenda Johnson* Brenda_Johnson@usgs.gov	12201 Sunrise Valley Dr. MS 423 Reston, VA 20192	303-236-5050 703-648-6832	703-648-5644	4
BLM	Shannon Stewart Shannon_Stewart@blm.gov Elizabeth Meyer* Elizabeth_Meyer@blm.gov	1620 L Street, NW MS 1075 Washington, DC 20036	202-912-7219 202-912-7201	202-557-3599	1
BR	Catherine Cunningham ccunningham@usbr.gov Theresa Taylor* TTaylor@usbr.gov	Sixth & Kipling Bldg 67 Denver, Colorado 80225	303-445-2807 303-445-2806	303-445-6465	1
BIA	Judith Wilson Judith_Wilson@bia.gov Marvin Keller* Marvin_Keller@bia.gov	2051 Mercator Drive MS 228R Reston, VA 20191	703-390-6470 703-390-6470	703-390-6325	1
MMS	James Bennett James_Bennett2@mms.gov Winston deMonsabert* Winston.deMonsabart@mms.gov	381 Elden Street MS 4042 Herndon, VA 20070	703-787-1660	703-787-1026	1
OSM	Li-Tai Bilbao ltilbao@osmre.gov Steve Sheffield* ssheffield@osmre.gov	1951 Constitution Avenue, NW MS 202 Washington, DC 20240	202-208-2895 202-208-2883	202-219-3276 202-219-0253	1

*Environmental Documents Distribution

**Reviewing bureaus may request additional copies in specific EIS cases. Preparing Bureaus should keep enough copies on hand to serve this need.

Notes:

1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 10, 2011.
3. Information in this attachment is routinely updated and available at:
<http://www.doi.gov/oepc/nepacontacts.html>

ATTACHMENT 2 TO ESM 11-3

REGIONAL ENVIRONMENTAL OFFICERS

NAME	STATES COVERED	ADDRESS	PHONE
Andrew L. Raddant Andrew_Raddant@ios.doi.gov	CT,MA,ME,NH, NJ,NY,RI,VT	408 Atlantic Avenue Room 142 Boston, MA 02210-3334	617-223-8565
Michael T. Chezik Michael_Chezik@ios.doi.gov	DC,DE,IL,IN, MD,MI,MN,OH, PA,VA,WI,WV	Custom House, Room 244 200 Chestnut Street Philadelphia, PA 19106	215-597-5378
Gregory Hogue Gregory_Hogue@ios.doi.gov	AL,FL,GA,KY, MS,NC,PR,TN, SC,VI	Russell Federal Building Suite 1144 75 Spring Street, S.W. Atlanta, GA 30303	404-331-4524
Stephen Spencer Stephen_Spencer@ios.doi.gov	AR,LA,NM,OK, TX	P.O. Box 26567, (MC-9) Albuquerque, NM 87125-6567 <i>When street address is needed, use:</i> 1001 Indian School NW Suite 348 Albuquerque, NM 87104	505-563-3572
Robert F. Stewart Robert_F_Stewart@ios.doi.gov	CO,IA,KS,MO, MT,NE,ND,SD, UT,WY	P.O. Box 25007 (D-108) Denver Federal Center Denver, Colorado 80225-0007 <i>When street address is needed, use:</i> Building 56, Room 1003 6th and Kipling Denver, Colorado 80225-0007	303-445-2500
Patricia S. Port Patricia_Port@ios.doi.gov	AS,AZ,CA,CM, GU,HI,NV	Jackson Center One 1111 Jackson Street Suite 520 Oakland, CA 94607	510-817-1477
Trisha Allison O'Brien (Acting) Allison_O'Brien@ios.doi.gov	ID,OR,WA	500 NE Multnomah Street Suite 356 Portland, OR 97232-2036	503-231-6157
Pamela A. Bergmann Pamela_Bergmann@ios.doi.gov	AK	1689 C Street, Room 119 Anchorage, AK 99501-5126	907-271-5011

Notes:

1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 10, 2011.
3. Information in this attachment is routinely updated and available at:
<http://www.doi.gov/oepc/reo.html>



United States Department of the Interior

BUREAU OF RECLAMATION
PO Box 25007
Denver, Colorado 80225-0007

IN REPLY REFER TO:

D-5500
ENV-1.10

SEP 21 2004

MEMORANDUM

To: Regional Directors
Attn: PN-1000, MP-100, LC-1000, UC-100, GP-1000

From: Roseann Gonzales 
Director, Office of Program and Policy Services

Subject: Guidance on Use of Consensus-Based Management in the National Environmental Policy Act (NEPA) Process

On March 8, 2004, the Department of the Interior published in the Federal Register a notice containing the revised Interior policies and procedures for complying with NEPA. These revisions have now been incorporated into Part 516, Chapters 1-6, of the Departmental Manual (DM). Among the new features is a directive to use consensus-based management in all NEPA compliance activities to the extent possible. Refer to: Part 516, DM, 1.3 D (5), 1.5 A (1), and 2.2 D. The Office of Environmental Policy and Compliance also provided guidance on consensus-based management in Environmental Statement Memorandum (ESM) 03-7, dated July 2, 2003. The following guidance clarifies some key provisions of this new requirement and how it is to be incorporated into the Bureau of Reclamation's NEPA review procedures.

What is consensus?

DM Part 516 and ESM 03-7 do not define "consensus" but address it more in terms of a process. It is usually thought of in the context of reaching general agreement on a course of action or having a majority of opinion on which direction to proceed. The DM and ESM indicate that in order to reach a consensus in the NEPA context, it is not necessary to have a unanimous agreement on an issue. Consensus may be achieved if the resolution of an issue or proposed action has the broad support of a cross section of interests within a community, and/or no commonly recognized or established group within a community opposes it. If a majority of diverse interests represented in a community support a particular course of action then consensus exists. If an affected area includes several communities with divergent and competing interests, consensus exists if there is general agreement among a majority of the communities.

What is consensus-based management?

Consensus-based management is defined in the DM as "... the inclusion of interested parties with assurance for the participants that the results of their work will be given consideration by the decision maker in selecting a course of action." It is a means of providing greater public participation in agency activities from planning to implementation. It is different from other public participation efforts in that consensus-based management seeks to achieve agreement, where possible and appropriate, among a majority of diverse community interests in the goals, purposes, and needs of bureau proposals and mechanisms for implementation. Consensus-based management is to be utilized in the NEPA process, where feasible and appropriate. However, bureaus have flexibility regarding when and how it is to be carried out. There may be statutory, regulatory, or policy requirements for certain Reclamation programs that would restrict or eliminate its use. Also, it is important to note that Reclamation, as with other bureaus, is still responsible for making the final decision on an action, regardless of whether consensus has been achieved among community interests on an alternative. This needs to be made clear to participants early-on in the NEPA process.

Who participates?

Consensus-based management focuses on community involvement. The ESM defines a community as "those who are directly affected by or whose interests¹ are affected by a bureau-proposed action and are represented by elected officials as well as locally-established or commonly recognized groups within the proposed action's reasonable area of impact." Another way of defining 'community' is "a group of people residing in the same locality under the same government" (Webster's II New Riverside University Dictionary). For proposed actions encompassing large geographical areas, there could be more than one community affected, therefore community is addressed in the collective sense. Representatives may include state, as well as, locally elected officials and individuals representing various organized groups among the communities.

Getting the community informed and involved

To apply consensus-based management, the Reclamation NEPA team needs to identify the communities which would be affected by a proposed Reclamation action and then inform those communities, including local officials and organized interest groups, about the proposed action and pending NEPA process. Information should be provided on how to participate, regardless of whether an environmental assessment (EA) or environmental impact statement (EIS) is being prepared. The degree of Reclamation effort that is expended on this should be guided by the proposed action and potential for significant impacts upon a community, the level of community interest, and extent of community concern and/or controversy. Information about a proposed

¹ "Interests" may be viewed as things of personal value that could be diminished or enhanced by an action, such as businesses, recreational activities, natural resource conservation efforts, cultural or religious practices. "Interests" would not include feelings or attitudes about something.

action and the NEPA process could be communicated at public meetings, through newspapers, and via the Internet. More intense NEPA training (workshops) would be appropriate in the preparation of EISs and EAs on complex and/or multi-project proposals, and could be conducted as part of scoping. This level of NEPA training and scoping is not necessary on EAs pertaining to routine projects.

Applying consensus-based management to the NEPA Process

Consensus-based management is to be utilized wherever possible and appropriate in carrying out NEPA compliance activities. Common sense should be used to determine how and when it can be applied. For routine, singular types of actions involving preparation of EAs, it may not be needed. In addition, for particularly large and complex projects where there are many communities and numerous diverse and competing interests and issues, it may not be practicable or feasible to attempt consensus-based management. The goal is to bring individuals representing various parties within the community together (elected officials, organized groups) where it is workable. Reclamation is a facilitator in this process. This does not mean that all parties must come to a unanimous agreement at every step in the process and on all issues. Nor does this nullify Reclamation's compliance responsibility as the lead Federal agency for the NEPA process. Regardless of whether consensus exists, Reclamation retains the responsibility to continue the NEPA process in a timely manner while continuing to involve and inform the public throughout the process.

In the selection and analysis of alternatives, Reclamation should include a community alternative if one exists. There may be more than one community alternative. A community alternative exists if it has the majority of support from a cross section of community interests and/or there are no objections from any groups within the community that would undermine implementation of the alternative. To be selected for analysis, Reclamation must determine that the community alternative(s) meets the purpose and need for action and be feasible and practicable.

In evaluating alternatives, Reclamation should consider designating a community alternative as the preferred alternative, if it meets the purpose and need for action and does not conflict with Reclamation's statutory and regulatory authorities, contractual obligations, and policies. If Reclamation decides not to designate a community alternative as the preferred alternative, this determination should be communicated to community representatives and discussed in the NEPA document.

Making the decision

Reclamation is responsible for making the final decision on a proposed Reclamation action. In making a decision, the Reclamation decision maker should give serious consideration to the outcome of public involvement in the NEPA process, particularly any alternatives, mitigation measures, and follow-up monitoring activities where consensus among diverse interests in the impacted area has been achieved, as long as it does not violate any laws, regulations or Reclamation policy. If consensus-based management is utilized, the Record of Decision (ROD) should explain how the analyses/recommendations of the participants entered into making the decision. For example, if a community alternative was designated as the preferred alternative

and a decision was made to go forward with another alternative, the ROD should discuss the legal and substantive considerations that contributed to the decision. Additionally, the ROD should discuss what mitigation measures were adopted, including the ones that were and were not adopted where consensus had been achieved, and why agreed-upon mitigation measures may not have been adopted. The ROD should also discuss what follow-up monitoring will be undertaken, and how activities relate to any consensus reached on this topic.

A Finding of No Significant Impact should briefly discuss how consensus-based management, if utilized, contributed in making the determination, particularly the outcome of any alternative or mitigation measures which had the consensus of the community.

Applicability of the Federal Advisory Committee Act (FACA)

In implementing consensus-based management, Reclamation staff and managers need to be aware of the requirements of FACA and how it may apply to this process. As a rule, Reclamation should avoid having to establish FACA advisory committees. The applicability of FACA will depend on how consensus-based management is carried out and who the participants are. Formation of FACA advisory committees is not required if the community representatives are all elected officials, if they constitute a local civic group rendering a public service, or if the collaborative group maintains its independence from Reclamation's management or control. Additionally, meetings and workshops should be open to all members of the public and broad public input should continue to be sought throughout the process. If FACA is a concern, the project manager should consult with the Solicitor's office to be clear on how to proceed.

D-5500
ADM-1.10

June 14, 2004

MEMORANDUM

To: Regional Directors
Attn: PN-1000, MP-100, LC-1000, UC-100, GP-1000

From: Roseann Gonzales /s/
Director, Office of Program and Policy Services

Subject: Guidance on Complying with the National Environmental Policy Act (NEPA) and
Other Environmental Laws for Water 2025 Challenge Grant Proposals

As the Water 2025 Challenge Grant program is being implemented, we want to ensure that the Bureau of Reclamation appropriately complies with NEPA and other environmental laws. The following guidance has been prepared to clarify some environmental issues associated with the program.

The Water 2025 Challenge Grant program is a competitive 50-50 cost-share program involving irrigation districts and water districts, Reclamation, and possibly other Federal agencies. The projects funded this year will primarily include physical improvements to water conveyance systems, aimed at increasing water conservation and efficiency, or facilitating the use of water markets. The Federal action in this program is the funding of the project through the issuance of a cooperative agreement. The Department of the Interior aims to finalize the cooperative agreements and award the grants by August 1, 2004.

Environmental Issues

When should compliance with NEPA and other environmental laws be initiated?

The Department will announce which proposals have been selected for detailed analysis in mid-June. In order to facilitate meeting the August 1, 2004, deadline for awards, compliance with NEPA and other environmental laws should be initiated soon after the Department's announcement. Reclamation should meet with the applicants to inform them about the data, analyses, and costs needed for compliance with NEPA and other environmental laws. The proposal may require the involvement of other governmental agencies if permits or other approvals are needed to conduct some project activities. Reclamation and the applicant will need to identify any other governmental and tribal parties that should be invited to participate in the NEPA process.

In general, compliance with NEPA and other environmental laws should be fulfilled before any cooperative agreement is signed. However, some exceptions to this requirement may be considered, so long as environmental compliance is fulfilled before funds are transferred to the applicant. Such exceptions should be evaluated on a case-by-case basis and should be documented in the terms and conditions of the cooperative agreement.

What should be the role of Reclamation and the applicant in carrying out compliance with NEPA and other environmental laws?

In most cases, Reclamation will be the lead Federal agency for compliance with NEPA and, as such, responsible for assuring that all NEPA compliance is adequate and meets the requirements of the law, regulations, and Reclamation policy for each proposal under the Water 2025 Challenge Grant program. Each proposal will have to be individually reviewed at the regional or area office level to determine the appropriate level of NEPA documentation and public involvement. The regional or area office will make the determination as to whether a proposal meets the criteria for a categorical exclusion (CE), and whether preparation of a categorical exclusion checklist (CEC), environmental assessment (EA), or environmental impact statement (EIS) is warranted. Reclamation may utilize CEs listed in its NEPA procedures in 516 DM 6 Appendix 9, where applicable, as long as there are no extraordinary circumstances (as listed in 516 DM 2 Appendix 2) which would disqualify its use.

Applicants should be encouraged to undertake the preparation of draft environmental documents under Reclamation's guidance, using a contractor, if needed. In carrying out compliance with the Endangered Species Act (ESA), grant applicants should be afforded the status of applicants under the ESA, as described in the Fish and Wildlife Service and National Marine Fisheries Service regulations in 50 CFR Part 402.08 and their joint ESA handbook.

In preparing environmental documents, coordination between Reclamation and the applicant is a necessity to ensure that the documents are adequate and meet both Reclamation and the applicant's needs for compliance. This will also help in avoiding delays that could occur later on in the compliance process. In preparing an EA or EIS, the purpose and need statement would address the applicant's objective for the project. This objective should be consistent with achieving the stated outcomes of the Water 2025 Challenge Grant program. Mitigation measures that can be implemented by the applicant should be identified and evaluated, and on a case-by-case basis, can be included in the cooperative agreement terms and conditions.

How should costs associated with compliance with NEPA and other environmental laws be allocated?

The cost of complying with NEPA and other environmental laws may be considered to be a project cost and may be cost-shared by Reclamation and the applicant. The portion of the cost which each party will pay will be determined on a case-by-case basis in the development of the cooperative agreement.

If you have any questions regarding the guidance or other NEPA issues relative to the Water 2025 Water Challenge Grant program, please feel free to contact Jennifer Gimbel, D-5500, at 303-445-3010, or Judy Troast, W-5500, at 202-513-0605.

cc: W-1500 (Limbaugh), W-1512 (Salenik), W-6000 (Rinne)
D-2000 (Gabaldon), D-5000, D-5500 (Gimbel, Treasure, Troast, Morgan)
PN- 6403 (Lute), PN-6510 (Lechefsky)
MP-152 (Michny), MP-700 (Milligan)
LC-2600 (Green), LC-7015 (Grinstead)
UC-400 (Trueman), UC-725 (Coulam)
GP-1100 (Beek), GP-4200 (Epperly)

Area Managers: (see attached list)

WBR:AMorgan:klockhart:6/3/04:303-445-3070:ENV-1.10

Revised:6/8/04:AMorgan

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D-5000

DISTRIBUTED BY E-MAIL JULY 30, 1997

Memorandum

To: Commissioner, Attention: W-1000
Manager, Washington Administration and Performance
Review Initiatives, Attention: W-1100 (Maymi)
Director, Policy and External Affairs, Attention: W-1500
Director, Operations, Attention: W-6000
Regional Directors, PN, MP, LC, UC, GP
Attention: 100 and 1000
Title Transfer Regional Coordinators
Title Transfer Management Team

From: J. Austin Burke /s/ *Austin Burke*
Director, Program Analysis Office

Subject Title Transfer Cost Sharing for NEPA and Other Transaction Costs

In January 1997, Commissioner Martinez requested the Program Analysis Office to review the existing policy and to prepare some additional guidance concerning the payment of costs associated with compliance with the National Environmental Policy Act (NEPA). Our policy at the time -- that the potential transferees should bear all the costs of NEPA -- was based on both legal and practical constraints which have not disappeared. However, we have come to recognize that since the title transfer will not only benefit the transferees, but the Federal Government as well, the costs for compliance with NEPA should be shared in an equitable fashion. Attached is additional guidance on cost-sharing NEPA activities.

In addition to the issue of cost-sharing NEPA, there has been some recent confusion about how to handle the transaction costs associated with the transfer. On June 10, 1997, Commissioner Martinez testified before the Senate Energy and Natural Resources Subcommittee on Water and Power about three proposals to transfer title to specific Bureau of Reclamation facilities. Included in the testimony on S. 538, legislation to convey certain features of the Minidoka Project to the Burley Irrigation District, was a sentence that requires some clarification: "We recommend that Congress . . . require the transferees to cost share all the transaction costs, including, but not limited to those associated with NEPA and real estate boundary surveys."

July 30, 1997

TITLE TRANSFER: ADDITIONAL GUIDANCE CONCERNING THE PAYMENT OF NEPA COSTS INCURRED AS PART OF A TITLE TRANSFER

The Bureau of Reclamation (Bureau) may pay up to 50% of the costs, not to exceed base value, of complying with the requirements of the National Environmental Policy Act (NEPA) incurred as a direct result of executing a title transfer agreement, consistent with the "Framework for the Transfer of Title, Bureau of Reclamation Projects, August 7, 1995" (Framework), between the Bureau and the transferee. The policy originally set forth in the Framework recognized the legal requirement that the potential transferee was responsible for 100% of the costs of NEPA compliance.

The Bureau's proposal to share in the costs of the NEPA compliance associated with a title transfer represents a shift from its previous policy of requiring the potential transferee to pay all of the NEPA costs. This revision in policy is being made to reflect the fact that title transfer will not only benefit the transferee but the Federal Government as well. The Bureau presently is required to recover costs for NEPA activities. A departure from this requirement to permit cost-sharing these costs will require legislation. Only those projects that meet the criteria set forth in the Framework document will be eligible to cost-share the NEPA compliance costs.

The transferee will be expected to finance the full amount of the NEPA compliance costs up-front. The transferees' portion of the cost-share will be made as an adjustment to the base-value of the project. (The base value will be determined pursuant to the Valuation Policy attached to the August 7, 1995, Framework document as modified by the Supplement to Project Valuation Policy dated December 6, 1996). The transferee will receive a deduction in the base-value of the project equal to its agreed-upon share of the NEPA compliance costs. In no case will the allowed credits exceed the base value of the project.

NOTE: As a general rule, the Bureau is required to recover costs for NEPA activities where the major federal action contemplated is requested by individuals or entities for their benefit, and where the Bureau is not undertaking the action, for the benefit of the public, generally. Since title transfers are voluntary actions initiated by the potential transferee, the Bureau's ability to pay any of the NEPA costs depends upon the enactment of legislation authorizing title transfer and the payment of the NEPA costs. Language to authorize the Bureau to pay a portion of the NEPA costs for the transfer of title of a particular project should, therefore, be included in the draft legislation for the transfer of that project. This means that the potential transferee bears a financial risk if the transfer is not consummated, and/or if Congress does not approve the cost-share. It is important that this situation be fully explained to the potential transferee.

The Bureau will provide the potential transferee with an estimate of the total costs associated with NEPA compliance by the time the Bureau and the potential transferee reach an agreement to proceed with title transfer negotiations. The Bureau will provide an "early warning" to potential transferees whenever the Bureau expects the costs of the NEPA compliance might exceed the estimate. Should the potential transferee decide against the further pursuit of transfer activities because of such increased costs, the Bureau will stop work, and thus not exceed the estimate. It is the Bureau's intention to provide potential transferees with the best possible information, made available in a timely manner, concerning the transferee's financial exposure and risks associated with the title transfer transaction.

Major Issues Raised:

Does the Bureau have the authority to cost-share the NEPA compliance costs? No. The Bureau may advise the transferee that it will support language in the title transfer legislation authorizing a cost-sharing arrangement. The transferee must pay for 100% of the NEPA compliance costs up-front and bear the risk that Congress will approve the transfer and the cost-share.

Does the cost-share include cultural, hazard material and similar surveys? Yes, if these costs are incurred as a result of complying with the NEPA actions triggered by the title transfer process. If these are costs for activities the Bureau was planning to undertake anyway on its own behalf, the Bureau will pay such costs.

What happens if a potential transferee cost-shares, changes it mind and the transfer does not go through? The transferee is obligated to pay for the NEPA compliance costs already incurred by the Bureau. The Bureau will return funds not already obligated for the NEPA costs to the transferee. The forgoing will be included as a provision in the NEPA cost-share agreement.

When a project is paid out or the base value is so low that the NEPA costs exceed the base value, any deduction of those costs from the base value will result in a negative number. **How do we handle this situation?** Once the transfer price reaches zero, all remaining costs will be borne by the transferee.

What are the NEPA costs covered by this guidance? The costs include surveys, title searches, coordination activities which the Bureau undertakes in order to comply with the NEPA requirements triggered because of the proposed title transfer.

The guidance refers to projects eligible for transfer pursuant to the Framework document, i.e., uncomplicated projects. **What about projects which don't fit under the Framework document and/or are complicated?** Only those projects which fit under the Framework guidance are eligible to cost-share NEPA costs.

D-5500
ENV-1.10

MEMORANDUM

To: Regional Directors
Attn: PN-1000, MP-100, LC-1000, UC-100, GP-1000

From: Roseann Gonzales
Director, Office of Program and Policy Services

Subject: Guidance on Appropriate National Environmental Policy Act (NEPA) Compliance for Water-Related Contracting Activities

Current Bureau of Reclamation Policy (WTR P01) defines the costs of water-related contract activities that are reimbursable. During the June 2003 Reclamation Leadership Team meeting, it was decided that a review would be performed concerning the costs associated with the renewal of water contracts and other water-related contract activities. Accordingly, a team comprised of regional and Office of Program and Policy Services staff was formed and performed the review.

The team concluded that the scope and level of NEPA compliance can represent a significant contribution to costs. The appropriate determination of scope of analysis and level of NEPA compliance were identified as issues. This is the subject of this memorandum.

Reclamation is responsible for determining the scope of analysis and the level of NEPA compliance for water-related contracting activities, both for new contracts and modification or renewal of existing contracts. Experience has indicated that limitations on Reclamation's discretion under both State water law and Reclamation law often reduce the potential for significant impacts. This is especially true where the action is the modification or renewal of an existing contract. Experience also indicates that costs increase as alternatives not focused upon the contracting action are included in the analysis.

Therefore, the scope of NEPA analysis for water-related contracts should be sharply focused upon the contracting action under consideration. Additionally, the initial level of NEPA compliance to consider should typically be an Environmental Assessment. Specific contracting actions may appropriately use a Categorical Exclusion (existing categorical exclusions D.3. and D.4. may be applicable, as well as others). Only rarely in our experience has an Environmental Impact Statement (EIS) been the appropriate level of NEPA compliance for water-related contracting activities, although specific circumstances may make an EIS appropriate.

The appropriate scope of analysis and level of NEPA compliance should be determined by the potential for a specific proposed action to affect the environment. Therefore, the final determination should always reflect consideration of the project specific circumstances, both to ensure appropriate NEPA compliance and to ensure that the costs passed on to the contractors reflect the appropriate level of analysis.

Please feel free to contact Jennifer Gimbel at 303-445-3010, or Don Treasure at 303-445-2807 with any questions.

cc: W-1500, W-6000
D-2000, D-5500 (Gimbel), D-5600 (Simons)
PN-3300 (Patterson), PN-6510 (Lechefskey)
MP-152 (Michny), MP-440 (Stevenson)
LC-2600 (Green)
UC-446 (Loring), UC-725 (Coulam)
GP-3100 (L. Smith), GP-4200 (Epperly)
BCOO-4400 (Hvinden)
Area Managers
(see attached list)

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D-5500
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MEMORANDUM

To: Regional Directors
Attn: PN-1000, MP-100, LC-1000, UC-100, GP-1000

From: Roseann Gonzales
Director, Office of Program and Policy Services

Larry L. Todd
Director, Security, Safety and Law Enforcement

Subject: Guidance on Compliance with the National Environmental Policy Act (NEPA) for
Emergency Road Closures or Restriction of Public Access at the Bureau of Reclamation
Facilities for Security Purposes

The Commissioner's memorandum dated January 6, 2005, established an interim policy under which Reclamation will take immediate emergency action when security concerns necessitate closing roads or restricting public access at our facilities to protect public health and safety. In such instances, Reclamation's obligation to comply with NEPA will be addressed after the emergency action is taken, and the focus will be on evaluating the effects of the action and not the purpose and need for the action. This memorandum provides guidance on how to accomplish compliance.

When assessing the vulnerability of a Reclamation facility to potential threats from terrorists or other adversaries, a determination may be made that an unacceptable risk level exists. This determination will be made by Reclamation's Director of Security, Safety and Law Enforcement (SSLE) in concert with the appropriate area manager and regional director. The first priority is to take whatever emergency actions are necessary to immediately secure the facility and reduce risks to public health, safety, and important resources.

Emergency actions may include closing roads and restricting public access to, from, and across Reclamation lands and facilities, including visitor centers. Emergency road closure or restriction of public access may be of short term (days), longer term (weeks to several months), or indefinite duration. In some situations, these actions could result in significant effects; e.g., when a road is a major public thoroughfare, alternative routing is limited or not available, and the road will be closed indefinitely. The Director of SSLE, area manager, and regional director will determine what actions will be taken to secure the facility. A preliminary determination of whether the

action will result in any significant effects may be made at this time. If possible, as the action is being taken, measures should be implemented to reduce or eliminate any significant effects.

Alternative NEPA Procedures

The Council on Environmental Quality (CEQ) NEPA Regulations in 40 CFR 1506.11, and the Department of the Interior NEPA Procedures in the Departmental Manual, 516 DM 5.8, provide for situations where emergency circumstances make it necessary to take actions that could result in significant impacts without following the usual NEPA procedures (see attachment).

If the emergency action could result in significant effects upon the environment, the regional director should inform the Director of Operations, the Commissioner, and the Assistant Secretary for Water and Science (ASWS) of the situation. Before the action is taken or immediately thereafter, either the regional director or Director of Operations should notify the Solicitor's Office and Office of Environmental Policy and Compliance (OEPC) in Washington D.C. about the emergency action and potential for significant effects. OEPC will immediately notify CEQ. As soon as possible, the regional director and OEPC should begin consulting with CEQ regarding alternative arrangements for complying with NEPA.

The term "alternative arrangements," as used in the CEQ NEPA Regulations cited above, refers to procedures that an agency uses in place of the normal NEPA procedures for preparing an environmental impact statement (EIS). With emergency road closures or restriction of public access in response to security concerns, there may be little or no time to notify and involve the public and coordinate with other governmental entities in the usual manner prior to the event; i.e., publication of a Notice of Intent (NOI) and holding public scoping meetings.

Under alternative arrangements, notification and coordination with governmental officials, stakeholders, and the public regarding preparation of the NEPA document may be deferred until after the emergency action has been taken. Reclamation's plans for NEPA compliance may be included with the information Reclamation supplies to the public about the emergency action. Communication directories developed as part of Reclamation's Emergency Action Plans and Standing Operating Procedures should be utilized in identifying agencies to be notified regarding NEPA compliance. Communications with the public may include phone calls and e-mails to local officials and stakeholders. Local and statewide notices and public meetings may also be utilized to inform the public of the actions being taken, identify further actions needed and possible alternatives, determine local effects and ways to alleviate any on-going effects. In the consultations that take place with OEPC and CEQ, the regional director should discuss the proposed arrangements for public involvement in the NEPA process.

Emergency Actions Without Significant Effects - Use of Categorical Exclusions

Many emergency actions involving temporary road closures or restriction of public access for security purposes may be so limited in duration and extent that the physical and biological effects would not be significant. Reclamation does not presently have a categorical exclusion (CE) for these types of actions. Until a CE is developed, there is a Departmental CE that may be utilized, where appropriate. This Departmental CE is found in 516 DM Chapter 2, Appendix 1,

and reads as follows: *“1.6 Routine and continuing government business, including such things as supervision, administration, operations, maintenance, renovations and replacement activities, having limited context and intensity (e.g., limited size and magnitude or short-term effects.)*

Note that the area manager will still need to determine whether any extraordinary circumstances exist that would prevent use of this CE. It is recommended that as soon as possible after the emergency action is taken, staff in the affected area office complete a categorical exclusion checklist (CEC) to document the finding. If the finding supports the use of the CE, then compliance with NEPA is completed. If the CE does not apply, then further NEPA analysis will have to be performed either through preparation of an environmental assessment (EA) or an environmental impact study (EIS). See discussion below.

Emergency Actions Where Effects Are Uncertain or Long-Term-Preparation of an EA

There may be situations where the duration of the response action and extent or level of effects is uncertain; extraordinary circumstances exist; or effects may continue in the long term, as in cases where closure of a public road may continue indefinitely. These situations may not meet the qualifications of the CE described above; i.e., actions having limited context and intensity. Each action will have to be evaluated on a case-by-case basis to determine whether a CE or preparation of an EA is appropriate.

Preparation of an EA for emergency security actions will be different than the usual EA for project-related actions. “No action” is not a feasible alternative since action in response to the emergency has already been taken. The range of alternatives may also be limited. The challenges that Reclamation may encounter will be similar to those associated with the preparation of an EIS under alternative arrangements. (See further discussion in the following section on EIS preparation.)

The CEQ regulations cited above do not address procedures for emergency actions which would not have significant effects. However, 516 DM 5.8 requires bureaus to consult with OEPC on emergency actions that do not have significant effects. Before contacting OEPC, the regional director should notify the Director of Operations, the Commissioner, and the ASWS of the region’s plans to prepare an EA and to consult with OEPC. OEPC may choose to alert CEQ of the situation, and Reclamation may also seek advice from the Solicitor’s Office, if needed.

Copies of EAs and a finding of no significant impact (FONSI) should be made available to the public. Public meetings may be held and a comment period on draft EAs and FONSI provided, as appropriate. If an EA results in a FONSI, no further NEPA documentation is required. Otherwise, alternative arrangements would be warranted and further consultation with OEPC and CEQ would be required, as described above.

Emergency Actions Having Potentially Significant Effects – Preparation of an EIS

Some emergency road closures could have significant impacts, as with closure of a public road carrying a high level of traffic. The rerouting of traffic could cause increases in noise and air pollution along the new route. Depending on the routing and types of traffic, there could be public health and safety issues, ecological concerns if traffic was rerouted through an

environmentally sensitive area, and environmental justice issues. There could also be cultural issues if access to certain cultural sites was cut off because of the road closure. If the potential for significant effects exists, then Reclamation should prepare an EIS under the alternative arrangement approach addressed in the CEQ regulations. Note that for most emergency road closures and restriction of public access, the primary effect will be socio-economic. If this is the only potentially significant effect, then in accordance with the CEQ's NEPA regulations in 40 CFR 1508.14, Reclamation would not be required to prepare an EIS.

Under alternative arrangements, NEPA documentation will be required but will differ from EIS preparation under normal circumstances. The content of the NEPA document may be substantially scaled down from the usual EIS. Details on the purpose and need for the emergency action may not be fully disclosed because of security concerns. There may be additional confidential information that cannot be made public in the analysis of effects because it could expose the vulnerability of the Reclamation facility. The range of alternatives may be very limited. Alternatives normally considered reasonable (economically and technically feasible), according to the definition in CEQ regulations and guidance, may not be reasonable because of security issues. The public should be engaged in the development of alternatives and mitigation measures to the extent possible, but use of consensus-based management and selection of a community alternative may not be practicable in all circumstances. Copies of the document should be made available to the public but the normal public comment period for EISs may be reduced. Consultations with OEPC, CEQ, and the Solicitor's Office should address the content of the NEPA document and time for public comment.

The analysis of effects would acknowledge the existing condition(s) attributable to the initial implementation of the emergency action, and then focus on the long-term effects of continuing the emergency action. The proposed action would be defined as continuation of the ongoing emergency action. "No action" would be defined as "not continuing" or "ending" the emergency action. Other alternatives may be considered, so long as they meet the purpose and need for the action (i.e., the security and safety needs at the facility). Mitigation would address what, if any, measures have been put in place to control the initial impacts of the emergency, and what additional measures may be undertaken.

Should you have any questions about this process, please contact Don Treasure at 303-445-2807.

Attachment

cc: W-6000
D-2000, D-5500 (Harris, Treasure)
(w/att to each)

bc: D-1400, D-5000
(w/att to each)

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