

NEPA REVIEW

of

**Deer Creek Valley Natural Resources Conservation Association's (DCVNRCA)
July 17, 2017 EA Comments on Pickett West Forest Management Project Environmental
Assessment (EA) and Draft Finding of No Significant Impact (FONSI)**

by

**Mike Walker, Chair
Hugo JS&PSS Exploratory Committee
Hugo Neighborhood Association & Historical Society**

August 7, 2017

**DEER CREEK VALLEY NATURAL RESOURCES CONSERVATION
ASSOCIATION'S**

**Two Page Cover Letter on EA Comments To
Allen Bollschwiler, Field Manager
Grants Pass Resource Area, Medford District**

July 17, 2017 Cover Letter

RE: Pickett West Forest Management Project Environmental Assessment and Draft Finding of No
Significant Impact (DOI-BLM-ORWA-M070-2016-006-EA)

**Deer Creek Valley Natural Resources Conservation Association's
DCA Pickett West EA Comments (DOI-BLM-ORWA-M070-2016-006-EA)**

July 17, 2017 EA Comments

The Pickett West Environmental Assessment is not in compliance with NEPA, FLPMA, O&C
Lands Act, NWFP, 1995 RMP, 2016 RMP, ESA, and CWA.

NEPA REVIEW
DCVNRCA's July 17, 2017
EA Comments on Pickett West Forest Management Project EA and Draft FONSI

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REFERENCES

ATTACHMENTS

- Attachment 1. May 25, 2017 Letter/Email to DCVNRCA from Hugo JS&PSS Exploratory Committee, Hugo Neighborhood Association & Historical Society, On Impact Methodology Model (Appendix A).
- Attachment 2. February 15, 2001 Comments to BLM From NEPA Design Group On Evaluation of Significant Impacts and Recommended Impact Methodology (Appendix D)
- Attachment 6a. *Threshold Determinations Under the National Environmental Policy Act*. Fogleman 1987.
- Attachment 6b. Selected Information From *Threshold Determinations Under the National Environmental Policy Act*. Fogleman 1987.
- Attachment 3. May 2015. *Bill Cohen Summit Report: NEPA Summit 2 - 3 December 2014*. On December 2 and 3, 2014, the Environmental Law Institute, the Nicholas Institute for Environmental Policy Solutions at Duke University, and Perkins Coie LLP sponsored a two-day conference on the National Environmental Policy Act (NEPA). The conference was entitled the Cohen NEPA Summit.

RESEARCH

C:\Users\Mike\Documents\AAA Applications\Hugo_Neighborhood_Association\Community_Issues\JO CO Public Safety Services 2015\Proposed Study\NEPA\Consultations\EA Comments To BLM\Fm NCVNRCA 080717 FINAL OUTLINE.wpd

NEPA REVIEW
DCVNRCA's July 17, 2017
EA Comments on Pickett West Forest Management Project EA and Draft FONSI

I. REVIEW

The National Environment Policy Act (NEPA) was passed in 1969. It has changed the landscape of environmental protection in the nation, and among federal agencies there is now a cadre of men and women working to implement the grandest goals of the statute that has been called the Magna Carta of environmental law, the environmental constitution, and America's greatest hope for true sustainability. NEPA created the structure and framework to ensure the "survival of man, in a world in which decency and dignity are possible," which "is the basic reason for bringing man's impact on his environment under informed and responsible control." (Bill Cohen Summit Report. 2015, p. 2).

The Council on Environmental Quality (CEQ) estimates that about 95 percent of NEPA analyses are categorical exclusions (CEs), less than 5 percent are environmental assessments (EAs), and less than 1 percent are environmental impact statements (EISs). Out of a \$3.5 trillion federal budget, about 250 projects are subjected annually to the detailed statement called the EIS. Yet, some say the EIS is costing too much and taking too much time to complete. Others say the public is being left out of the process with too much haste to make a decision that will harm communities and the environment (Bill Cohen Summit Report. 2015, pps. 2 - 3).

A. BLM NEPA Handbook

A significant part of this NEPA review of DCVNRCA's July 17, 2017 EA comments on the Pickett West Forest Management Project (Pickett West) EA and draft FONSI address compliance with the BLM NEPA Handbook (BLM. 2008). This includes the Pickett West EA Interdisciplinary (ID) Team's analysis methodology responsibility for determining significance per the BLM NEPA Handbook. The handbook satisfies the BLM's main responsibilities to identify and develop methods and procedures (i.e., impact methodology model) for determining significant impacts (NEPA, Section 102(2)(B); 40 CFR 1507.3; 40 CFR 1502.24; 40 CFR 1502.22). The handbook's deficiencies are its lack of scoping issue methodologies' specifics in determining context and intensity (40 CFR 1508.27): relative importance, duration, timing, spatial extent, intensity, risk, and especially significance thresholds.

- **40 CFR 1507.3 Agency Procedures.** (a) . . . each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures.
- **40 CFR 1502.24. Methodology and Scientific Accuracy.** Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

- **Section 6.8.1.2 Analyzing Effects Methodology:** A NEPA document must describe the analytical methodology sufficiently so that the reader can understand how the analysis was conducted and why the particular methodology was used (40 CFR 1502.24). This explanation must include a description of any limitations inherent in the methodology. If there is substantial dispute over models, methodology, or data, you must recognize the opposing viewpoint(s) and explain the rationale for your choice of analysis (BLM, 2008, Chapter 6, Section 6.8.1.2, Analyzing Effects, p. 70).
- **40 CFR 1502.22 Incomplete or Unavailable Information** When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, **the agency shall always make clear that such information is lacking** (emphasis added).

“Methodology” is defined by Wikipedia to be the systematic, theoretical analysis of the methods applied to a field of study (Viewed August 6, 2017. <https://en.wikipedia.org/wiki/Methodology>). It comprises the theoretical analysis of the body of methods and principles associated with a branch of knowledge. Typically, it encompasses concepts such as paradigm, theoretical model, phases and quantitative or qualitative techniques. A methodology offers the theoretical underpinning for understanding which method, set of methods, or best practices can be applied to specific case, **for example, to calculate a specific result** (emphasis added; e.g. impact results from change agents of being significant, or not, etc.). It has also been defined as follows:

- "the analysis of the principles of methods, rules, and postulates employed by a discipline".
- "the systematic study of methods that are, can be, or have been applied within a discipline".
- "the study or description of methods".

A good representation of an impact methodology is *A Systematic Interdisciplinary Language For Environmental Analysis Under NEPA* (Haug, BLM, 1982; see Section IV.B.2). For example, its “Impact Vocabulary Methodology” for the environmental impact analysis begins with the definition of an environmental consequence, impact, or effect; they are synonymous. An environmental consequence has three components:

- (1) It is a change of some indicator in the human environment, or ecosystem. This implies some baseline condition from which to perceive or measure the change, and it implies a magnitude and direction for that change.
- (2) It is linked to man’s activities through a cause, a change agent. This distinguishes an environmental impact from a change in the human environment caused by forces other than man.
- (3) It has a meaning or value separate from the change itself. Depending on the context within which a change takes place, an impact can be positive, negative, beneficial, adverse, good, bad, etc. These types of imprecise, judgmental, and qualitative evaluation are often found in environmental documents with no explanation or substantiation for the evaluation.

The above uses nine of 12 methodology vocabulary words (underlined above). The remaining three are types of indicators: structural components, functional processes, and environmental indexes. These 12 words can accommodate environmental impacts describe by virtually any BLM ID team member’s discipline. The “Impact Vocabulary Methodology” **obliges staff analysts** to organize their information in a clear, concise format so that consequences of several alternative can be compared easily. This “language” of environmental analysis allows the **disciplinary specialist** complete freedom to estimate and calculate environmental consequences according to state-of-the-art methods in that discipline, but it **forces all specialists to describe consequences in a common format based on a common understanding of what an environmental consequence is. The language thus provides a medium of communication between specialists of widely varying disciplines, between an interdisciplinary team and**

decisionmakers, and between an agency and the general public) (Haug, BLM. 1982; see Section IV.B.2).

B. DCVNRCA's July 17, 2017 EA Testimony Comments

The DCVNRCA's July 17, 2017 EA comments on BLM's Pickett West Forest Management Project EA and draft FONSI is 183 pages long, not counting numerous attachments and other documents submitted for the record. Walker's review was only of the main 183 page "comments document".

The DCVNRCA's July 17, 2017 EA comment document was outstanding in its outline structure, comprehensiveness, and attention to detail. However, an issue is that such a large review document did not have an outline, including detailed enumerators, which required considerable time going back and forth in the text trying to understand the entire document.

This type of comprehensive public comments document begs an outline toward the goal of a better and more efficient understanding of the public issues and arguments by BLM and other others. Over time the review's original recommendation that the DCVNRCA decide on a standard outline for NEPA documents when petitioning BLM evolved into other document organization issues (Chapter IV, Thoughts & Recommendations). Especially important are the following recommendations.

2. Consensus Outline for Better Understanding by BLM and Others.
3. Outline For Issues and Legal Arguments Based On BLM NEPA Handbook.
6. Hard Look and Bald Conclusions.
7. EA ID Team Members Responsible For NEPA Analysis/Significant Impact Determination Methodologies.

The organizational focus is all about others' understanding the DCVNRCA's issues/arguments toward the goal of BLM management considering a broad range of alternatives. All issues/arguments need a consistent explanation approach. The first job is to determine how to best help the BLM understand DCVNRCA's NEPA compliance issues. And, ultimately it is to assist/help BLM managers the judges easily find and reference material from DCVNRCA's documents placed before them (i.e., easily understand arguments). Make no mistake, the more difficult it is for BLM management, including ID team members, and judges to understand DCVNRCA's issues/arguments, the less satisfaction will be received, regardless of the merits.

C. Chicago Manual of Style Outline

Walker has used the Chicago Manual of Style (12th Edition) outline for an enumeration of which items are subdivided since 1969. The divisional numerals and letters for the top three levels are set off by periods and the lower levels by single or double parentheses (Figure 1).

Figure 1. Example of Outline Style Enumerations From Chicago Manual of Style

- I.
- II.
 - A.
 - 1.
 - 2.
 - B.
 - 1.
 - 2.
 - a)
 - (1)
 - (2)
 - b)
 - (a)
 - (b)
 - i)
 - ii)

However, it does not matter what outline style DCVNRCA uses; decide on one and stick with it as a DCVNRCA standard. Consider using an “eventual agreed to outline” for all DCVNRCA papers. What about DCVNRCA legal brief outlines? The following was found on the internet about briefs. It was not perfect, but it had some good ideas applicable to the purpose of writing comments on BLM environmental documents, protests, and legal briefs. Especially important is #4, the CRAC method of legal analysis: Conclusion > Rule > Application > Conclusion.

D. Amended Review

This NEPA review is open to revisions and amendments as a result of DCVNRCA’ comments on it (e.g., questions, corrections, observations, suggestions, recommendations, etc.).

II. HOW TO WRITE A LEGAL BRIEF

AssociatesMind

<https://associatesmind.com/2017/01/11/how-to-write-a-legal-brief/>

A few years ago, a couple of law professors surveyed practicing lawyers and judges on the quality of legal writing from new lawyers. The results? More than 93% of the responding practicing attorneys and judges believed that the briefs and memoranda they saw were “marred by basic writing problems,” including a lack of focus (76.1%), failure to develop an overall theme or theory of the case (71.4%), and failure to be persuasive (66.4%).

That’s to say, most legal brief writing by new lawyers is awful. And this isn’t the first year law school student we’re talking about, but practicing lawyers. Most lawyers can’t write for squat. Which is unfortunate because writing is thinking. If you don’t write well, it’s likely you don’t think well. Which is a problem, because that’s essentially what clients hire you for.

A. How to Write a Legal Brief

Table of Contents

1	How To Write a Legal Brief
2	Organize and outline your arguments
3	Develop a theme for your brief
4	Use CRAC to analyze legal issues
5	Use structural writing techniques to help guide the reader
5.1	Effective Headings
5.2	Table of contents
5.3	Summaries
6	Address threshold issues before diving into the details of the case
7	Effective brief writing is an essential skill for new lawyers

2. Organize and outline your arguments Judges are busy They have voluminous amounts of documents to review at any given time. And often they will go weeks, if not months, between touching the same case twice. Any brief you put before a judge needs to: Be well organized. Provide a roadmap for the judge to follow. Prioritize strong arguments first.

3. Develop a theme for your brief You (hopefully) learned about this concept in law school. Many people refer to it as the “theory/theme of the case.” Shotgunning a dozen different ideas at a judge is almost always a surefire way for them to forget all of them. [Walker Comments: Unorganized shotgunning at the level of comments on a BLM environmental document is not a good idea. I believe that organized shotgunning comment testimony on NEPA documents is a good idea as there are no page limits and you don’t have to throw away any potentially good ideas yet. even though it can overload the BLM reviewers].

Again, conceptualize your reader: a busy, overworked judge (and clerks) who has a hundred other briefs to look at after yours. They do not have the time for deep contemplation of your brief. As such, you need a central theme which suffuses every part of your brief.

For an excellent example, see the recent amicus curiae brief (PDF) filed by the Cato Institute in *Lee v. Tam*. The question presented: DOES THE GOVERNMENT DECIDE WHAT IS A SLUR?

Simple and to-the-point, while also being incredibly evocative. The question effectively frames the matter presented before the Court in such a fashion as to be persuasive even before the brief has been read. The brief then consistently reinforces the message from the question presented.

4. Use CRAC to analyze legal issues Let's not re-invent the wheel here. This isn't the time for you to indulge in creative writing. Follow what works. Almost everyone is taught the CRAC method of legal analysis in law school. CRAC: Conclusion > Rule > Application > Conclusion. Use it.

1. Conclusion. What is the conclusion you want to judge to make after reading your brief.
2. Rule. What is the law that supports your conclusion.
3. Application. Explain how the law applies to the issues.
4. Conclusion. Restate the conclusion to the judge.

5. Use structural writing techniques to help guide the reader Structural writing techniques are the basic building blocks of organizational writing that often get short shrift from lawyers. Or lawyers use them, but are completely awful at it.

5.1 Effective Headings Headings help give the reader an idea of what is going to be addressed in a particular section. See bad example in original. That heading is absolute garbage. You didn't even bother reading after a couple of lines. Your eyes just glazed over. You think a judge is going to be different? LOL.

Let's go back to the *Lee v. Tam* brief (See original). Headings are signposts that let the reader know where you are taking them. Not journeys unto themselves.

5.2 Table of contents A good table of contents (see above) lays out the brief's logical structure. It also helps the judge easily find and reference material from your brief. A table of contents might not be applicable in shorter briefs, but they are necessary in longer ones.

5.3 Summaries Dense, technical, legal writing can be exhausting to read. Summaries help provide background, frame issues, or highlight important facts or evidence. Again, go back to the *Lee v. Tam* brief. It's 50 pages long [page limits], but they have an excellent summary of the case on pages 1 to 5. But summaries aren't just for appellate briefs.

- Going to pull a large blockquote? Judge probably won't read it. Summarize the blockquote before or after in one to two sentences. [Walker comments: Agree for legal briefs; for comment testimony on NEPA documents put as much as you can into appendices]
- Going to write a long dense paragraph? If you can't break it apart for some reason, make sure you have a topic sentence.
- Remember that section above about headings? Headings are, yep, summaries.

6. Address threshold issues before diving into the details of the case Before you start in on the merits of the case, make sure you have addressed any and all threshold issues: personal and subject matter jurisdiction, proper venue, statute of limitations, etc. The purpose for this is twofold:

- It lets the court know that the case before it is ready to be adjudicated
- You have to do your due diligence. You know your case doesn't have a fatal procedural/technical flaw before you begin to get to the merits. [Walker comments: at the comments testimony on NEPA documents with critical issues are not to be frivolous and be make sure your comments as substantive per Section of the BLM NEPA Handbook].

7. Effective brief writing is an essential skill for new lawyers The majority of advocacy undertaken by lawyers, is written advocacy. You'll spend far more time drafting legal documents than you ever will in a courtroom. Dedicating yourself to consistently improving your writing skills should be one of the fundamental aspects of your professional development. And your professional development is your responsibility, no one else's.

B. Use CRAC to Analyze Legal Issues

1. Conclusion. What is the conclusion you want to judge to make after reading your brief. (CRAC #1 Conclusion)

2. Rule. What is the law that supports your conclusion. (CRAC #2 Rule/Law)

3. Application. Explain how the law applies to the issues. (CRAC #3 Application)

4. Conclusion. Restate the conclusion to the judge. (CRAC #4 Conclusion)

- CRAC Outline
- CRAC #1 Conclusion
- CRAC #1b Themes
- CRAC #1c Summaries
- CRAC #2 Rule/Law
- CRAC #3 Application
- CRAC #3b Issue/Argument]
- CRAC #4 Conclusion

C. Deer Creek Association Legal Brief Outline

DCVNRCA's (Deer Creek Association) legal brief for *Deer Creek Association v. US Bureau of Land Management, et al* (2014). US Court of Appeals For the Ninth Circuit, No. 14-35250, pretty much followed the CRAC method of legal analysis.

- *Deer Creek Association v. US Bureau of Land Management, et al* (2014) 0:14-cv-35250. US Court of Appeals For the Ninth Circuit, No. 14-35250, Appeal from the Denial of Summary Judgment in the District Court for the District of Oregon.
- *Deer Creek Valley Natural Resource Conservation Association v. U.S. Bureau of Land Management* (Feb 04, 2014) 1:12-cv-01596. Oregon District Court, Judge: Mark D. Clarke.

The following is the outline for *Deer Creek Association v. US Bureau of Land Management, et al* (2014) 0:14-cv-35250 with draft identifications of the CRAC breakdown of analyzing legal issues. The major point is that it has an outline of the issues/arguments, the law supporting the issues/arguments, and an application/analysis of the law supporting the issues/arguments.

TABLE OF CONTENTS [CRAC Outline]

TABLE OF AUTHORITIES [CRAC #2 Rule/Law]

INTRODUCTION [CRAC #1 Conclusion]

STATEMENT OF JURISDICTION

- I. DISTRICT COURT
- II. APPELLATE COURT
- III. ATTORNEYS FEES

QUESTIONS PRESENTED [CRAC #1b Themes]

STATEMENT OF THE CASE

- I. NATURE OF THE CASE
- II. LEGAL BACKGROUND [CRAC #2 Rule/Law]
 - A. The Federal Land Policy and Management Act (FLPMA) [CRAC #2 Rule/Law]
 - B. The National Environmental Policy Act (NEPA) [CRAC #2 Rule/Law]
- III. FACTUAL BACKGROUND

STANDARD OF REVIEW

- I. STANDARD OF REVIEW FOR A DENIAL OF SUMMARY JUDGMENT UNDER THE ADMINISTRATIVE PROCEDURES ACT

SUMMARY OF ARGUMENT [CRAC #1c Summaries]

ARGUMENT[S] [CRAC #3b Issue/Argument]

- I. THE BLM VIOLATED THE SURVEY AND MANAGE STANDARDS AND GUIDELINES, THE MEDFORD RESOURCE MANAGEMENT PLAN, THE NORTHWEST FOREST PLAN, AND THE FEDERAL LAND POLICY AND MANAGEMENT ACT [CRAC #3 Application; CRAC #3b Issue/Argument]
 - A. Legal Background [CRAC #2 Rule/Law]
 - B. Background on red tree voles
 - C. The BLM failed to manage all know sites for red tree voles
- II. THE BLM VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT [CRAC #3 Application]
 - A. The BLM failed to consider the Deer Creek Association’s reasonable Natural Selection Alternative [CRAC #3b Issue/Argument]
 - 1. NEPA requires rigorous evaluation of all reasonable alternatives [CRAC #3 Application]
 - 2. The Deer Creek Association’s Natural Selection Alternative [CRAC #3 Application]
 - 3. The BLM arbitrarily refused to consider the Natural Selection Alternative
 - B. The BLM failed to take a hard look at the environmental impacts to red tree voles [CRAC #3b Issue/Argument]
 - 1. NEPA requires that agencies take a hard look at the environmental impacts of its actions [CRAC #3 Application]
 - 2. The Deer North Project EA and Deer North timber sale Decision Documentation failed to take a hard look at the environmental impacts to red tree voles [CRAC #3 Application]
- III. CONCLUSION [CRAC #1 Conclusion]

III. DCVNRCA'S COMMENTS ON PICKETT WEST FOREST MANAGEMENT PROJECT EA AND DRAFT FONSI

Deer Creek Valley Natural Resources Conservation Association's
July 17, 2017 EA Comments on Pickett West Forest Management Project Environmental
Assessment and Draft Finding of No Significant Impact

The following outline does not include the subdivided items beyond the main headings.

A. Outline Issues Not In Compliance With NEPA

Outline

- A. The Rationale for the Pickett West **Purpose and Need** (emphasis added) is Based on Faulty Assumptions (EA reference, p. 3)
- B. The EA **Purpose and Need** (emphasis added) misinterprets the O&C Act, while the proposed action alternatives violate the O&C Act. (EA reference, p. 5)
- C. The EA is not in compliance with NEPA because the main objectives of the **Purpose and Need** (emphasis added) are broad, (i.e. "implementing the O&C Act... provide a sustainable supply of timber, improve stand resiliency, and enhance or maintain northern spotted owl habitat" and "reduce the long-term risk of disturbances such as catastrophic wildfire or unacceptable mortality from moisture stress, insects, and disease" (11)), while the proposed range of alternatives to meet these broad goals (i.e. assuming a "need for active management" and "a need to apply silvicultural treatments" (11) as described in Alternative 2 and 3), are unduly narrow. (EA reference, p. 12)
- D. The EA is not in compliance with NEPA because it does not provide a **range of reasonable alternatives to meet the purpose and need** (emphasis added). (EA reference, p. 14)
- E. The EA is using flawed basic assumptions, premises, and methodology to achieve the stated objectives of "**enhancing or maintaining northern spotted owl habitat**"(emphasis added). (EA reference, p. 22)
- F. The EA **proposed action alternatives** are based on flawed assumptions about historical fire regimes and ecosystem resiliency. (EA reference, p. 22)
- G. **Internal Inconsistencies related to the purpose and need and RMP transition phase** (emphasis added) (EA & FONSI references p. 39)
- H. The narrow scope of the stated need for the proposed action alternatives artificially bias the process against the full consideration of **other reasonable alternatives, such as the Natural Selection Alternative** (emphasis added). (EA reference p. 50)
- I. The BLM failed to consider the Deer Creek Association's **reasonable Natural Selection Alternative (NSA)** (emphasis added) (EA reference p. 51)

B. Determination of Significance

J. DETERMINATION OF SIGNIFICANCE (FONSI, p. 72)

A. Context: (FONSI & EA, p. 73)

B. Intensity (FONSI, p. 104)

1. **Impacts that may be both beneficial and adverse** (emphasis added) . (FONSI, p. 104)
2. The degree to which the selected alternative will affect **public health or safety** (emphasis added) (Issues not in EA, p. 123)
3. **Unique characteristic of the geographic** (emphasis added) area such as proximity to historic or cultural resources, park lands, prime farm lands, wetlands, wild and scenic rivers, or ecologically critical areas (Issues not in EA?, p. 124).
4. The degree to which the effects on the quality of the human environment are likely to be **highly controversial** (emphasis added). (Issues not in EA; Rogue Basin Cohesive Restoration Strategy, p. 125)
5. The degree to which the possible effects on the human environment are **highly uncertain or involve unique or unknown risks** (emphasis added). (EA & FONSI, p. 129)
6. The degree to which the actions may establish a **precedent for future actions** (emphasis added) with significant effects or represents a decision in principle about a future consideration. (FONSI, p. 133)
7. Whether the action is related to other actions with individually insignificant but **cumulatively significant impacts** (emphasis added). (Issues not adequately analyzed in EA, p. 133)
8. The degree to which the action may affect districts, sites, highways, structures, or other objects listed in or eligible for listing in the **National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historic resources** (emphasis added). (Issues not in EA?, p. 137)
9. The degree to which the action may adversely affect an **endangered or threatened species or its habitat** (emphasis added) that has been determined to be critical under the Endangered Species Act of 1973. (Issues not adequately analyzed in EA; failed to take a hard look, p. 138)
10. Whether the action threatens a **violation of Federal, State, or local law** (emphasis added) or requirements imposed for the protection of the environment. (EA & FONSI, Issues not adequately analyzed in EA, p. 149)

C. Outline Issues Not In Compliance With NEPA (Continued from Section III.A)

K. BLM did not **comply with NEPA Public Involvement requirements** (emphasis added): (Issues not adequately analyzed in EA, p. 159)

Attachments (p. 163)

L. (p. 164)

References (p. 177)

IV. THOUGHTS & RECOMMENDATIONS

Thoughts, including observations, and recommendations are not about the technical comments DCVNRCA submitted. I would probably would not change anything as they are outstanding. The comments have good references.

- To EA and FONSI and applicable page numbers for issues.
- In text supporting information identified in bibliography/references section.

The organizational focus is all about others' understanding the DCVNRCA's issues/arguments toward the goal of BLM management considering a broad range of alternatives (see Section I.B).

A. Thoughts & Recommendations

The following 10 thoughts and recommendations are not in any order of priority.

1. Long Term Goal of Preserving DCVNRCA NEPA Work (Thoughts). The DCVNRCA's exceptional resource protection work, including NEPA analysis is a valuable resource for future generations of public concern and activism. Not having to bootstrap themselves up from the beginning increases the probability of success. The DCVNRCA should consider how to accomplish the job of web publishing its NEPA work (e.g., all the documents that were provided Walker by DCVNRCA, etc.)

2. Consensus Outline for Better Understanding by BLM and Others (Recommendation). The purpose is ownership of issues and legal arguments by DCVNRCA NEPA analysis comments writers. The outline for BLM is just as important for DCVNRCA opposition and supporters. The goal is another demonstration of legitimacy and professionalism. Make the draft consensus outline approach a policy that can be changed.

It is noted by Walker that the first several versions of this review paper did not have an outline. As it became more complex and lengthy (i.e., 25 - 30 pages) an outline was added for ease of understanding by the reader.

3. Outline For Issues and Legal Arguments Based On BLM NEPA Handbook (Recommendation). Per a previous suggestion I make the recommendation that DCVNRCA NEPA documents be organized by the main outline topics, or sub-enumeration topics, of the BLM NEPA Handbook as applicable. This will provide the context for most legal NEPA arguments (i.e., issues/arguments).

One huge advantage of this approach is that the courts will defer to agency substantive judgments (e.g., reluctant to judge the scientific quality of environmental analysis, etc.), but will hesitate when the judgments/decisions are not based on clear procedural standards from BLM implementing NEPA regulations (i.e., 40 CFR 1507.3, Agency Procedures: BLM NEPA Handbook and USDI manuals that supplement the CEQ NEPA CFRs (see #5. Need a list of NEPA compliance standards and an explanation of how they were used). This is especially so when the agency is not in compliance with its on “shall” procedural NEPA requirements.

a) Legal Background (Thoughts)

Legal Background (Haug, BLM. 1982; see #4. Needed Elements of Document). Oddly the legal background is pretty much the same as explained by Haug, et. al. 35 years ago.

While environmental analysts and decisionmakers were wrestling with quality, lawyers were more concerned with proper procedure, and a body of case law began to accumulate. Many federal agencies suffered legal indignities during the 1970's because of procedural noncompliance with NEPA. However, the courts remained reluctant to judge the scientific quality of environmental analysis (Liroff 1980:4-5): “Although environmentalists have attempted to gain judicial reviews of the substantive merits of agency decisions, only a few courts have been willing to provide such reviews . . . No court is empowered to substitute its judgment for that of an agency. In practice, some courts have conducted searching substantive reviews in the guise of procedural reviews, while others seemingly engaged in substantive reviews have not really taken a hard look at the agency actions involved. In some cases, judges have expressed clearly their concern about the adverse consequences of a pending agency action, but have indicated at the same time their unwillingness to substitute their balancing of the factors involved in the decision for that balance reached by the agency. In other cases, district court judges have found reasons to enjoin agency action, only to have their decisions reversed on appeal on the ground they substituted their judgments for those of the agencies.” (Haug, BLM. 1982, pps. 2 - 3).

One Senior Circuit Judge on the District of Columbia Circuit Court of Appeals commented (Bazelon 1980:661). “I believe that the judicial responsibility is to monitor and scrutinize the administrative process. Our task is to ensure that the agency’s decisionmaking is thorough and within the bounds of reason. The agency’s decisional record must disclose the evidence heard, policies considered, and the agency’s precise reasons for resolving conflicts in the evidence. This includes the basis of selecting one scientific point of view rather than another. This permits quality checks through peer review, legislative oversight, and public attention. Only if decision-makers disclose assumption, doubts, and moral and political trade-offs can experts and citizens evaluate administrative action. Only then can professional peer review bring to light new data or challenge faulty assumptions. And only then can Congress and the people gain sufficient understanding to permit meaningful debate of the value of choices implicit in regulatory action.” (Haug, BLM. 1982, p. 3).

Judge Bazelon’s statements suggest that courts might be more willing than in the past to scrutinize the quality and substance of a decision as well as its procedural compliance. This point is supported by Coggins (1981: 489-490): “Judges are more willing to question and overturn a manager’s professional opinion. . . The expansion of judicial review is still in a formative stage, heading in uncertain directions; the better view is that the courts will honor the congressional desire for more oversight. In any event, public land management is now – perhaps irrevocably – a distinctly legal matter. A main consequence of this truism is that managers must realize that they are first public servants sworn to uphold the law, and professionals only secondarily (Haug, BLM. 1982, pps. 3 - 4).

b) Outline Topics From BLM NEPA Handbook (Observations). Appendix B of my draft May 14, 2017 Letter/Email to the DCVNRCA provided information on “NEPA’s Procedural Requirements: Significant Cumulative Impacts”. The information was from the 2008 BLM NEPA Handbook.

- U.S. *BLM National Environmental Policy Act Handbook H-1790-1*: January 30, 2008: hard copy; April 24, 2008: Federal Register Notice of Availability; CEQ reference; May 8, 2008) (Attachment 10).

I found that the July 17, 2017 DCVNRCA comments testimony letter to BLM on the Pickett West Forest Management Project EA and draft FONSI mostly covered the following topics from the BLM NEPA Handbook (Observations).

HANDBOOK USER'S GUIDE

CHAPTER 1—NEPA BASICS

1.1 INTRODUCTION TO THE NEPA

1.2 DEPARTMENTAL GUIDANCE AND THIS BLM HANDBOOK

1.3 DOCUMENTS USED TO MEET NEPA REQUIREMENTS

1.4 THE NEPA APPROACH

CHAPTER 5—USING EXISTING ENVIRONMENTAL ANALYSES

CHAPTER 6—NEPA ANALYSIS

6.1 OUTLINE OF ANALYTICAL STEPS

6.2 PURPOSE AND NEED

6.2.1 The Role of the Purpose and Need Statement

6.2.2 The Decision to be Made

6.3 SCOPING

6.4 ISSUES

6.4.1 Identifying Issues for Analysis

6.4.2 Issues Not Analyzed

6.5 PROPOSED ACTION

6.5.2 Defining the Scope of Analysis of the Proposed Action [includes private timber industry actions]

6.6 ALTERNATIVES DEVELOPMENT

6.6.1 Reasonable Alternatives

6.6.3 Alternatives Considered but Eliminated From Detailed Analysis

6.7 AFFECTED ENVIRONMENT AND USE OF RELEVANT DATA

6.7.1 Affected Environment

6.7.2 Use of Relevant Data [includes 40 CFR 1502.22, Incomplete or Unavailable Info]

6.8 ENVIRONMENTAL EFFECTS

6.8.1 Effects Analysis

6.8.1.1 Defining Environmental Effects

6.8.1.2 Analyzing Effects [includes “hard look” analysis; 40 CFR 1502.24]

6.8.2 Direct and Indirect Effects

6.8.3 Cumulative Effects

6.8.3.1 Cumulative Effects Issues

6.8.3.2 Geographic Scope of the Cumulative Effects Analysis

6.8.3.3 Timeframe of the Cumulative Effects Analysis

6.8.3.4 Past, Present, and Reasonably Foreseeable Actions

6.8.3.5 Analyzing the Cumulative Effects

6.8.4 Mitigation and Residual Effects

- 6.9 PUBLIC INVOLVEMENT AND RESPONDING TO COMMENTS
 - 6.9.1 Involving and Notifying the Public
 - 6.9.2 Comments
 - 6.9.2.1 Substantive Comments
 - 6.9.2.2 Comment Response
- CHAPTER 7 — DETERMINING WHETHER AN EA OR EIS IS APPROPRIATE
 - 7.3 SIGNIFICANCE
- CHAPTER 8—PREPARING AN ENVIRONMENTAL ASSESSMENT
 - 8.1 PREPARING TO WRITE AN ENVIRONMENTAL ASSESSMENT (EA)
 - 8.2 PUBLIC INVOLVEMENT
 - 8.3 EA FORMAT
 - 8.3.1 Introduction
 - 8.3.2 Purpose and Need for Action and Decision to be Made
 - 8.3.3 Scoping and Issues
 - 8.3.4 Proposed Action and Alternatives
 - 8.3.4.1 Description of the Proposed Action
 - 8.3.4.2 Alternatives in an EA
 - 8.3.4.2.1 Alternatives Considered but Eliminated from Detailed Analysis
 - 8.3.4.3 Conformance
 - 8.3.5 Affected Environment
 - 8.3.6 Environmental Effect
 - 8.3.7 Tribes, Individuals, Organizations, or Agencies Consulted
 - 8.3.8 List of Preparers
 - 8.4 DETERMINATION OF SIGNIFICANCE
 - 8.4.1 Significant Impacts -Transitioning from an EA to an EIS
 - 8.4.2 The Finding of No Significant Impact (FONSI)
 - 8.5 THE DECISION RECORD
 - 8.6 IMPLEMENTATION
- CHAPTER 10—MONITORING.

There are at least two major advantages of an approach for DCVNRCA to organize its NEPA documents around the BLM NEPA Handbook.

(1) NEPA Law Defined by BLM One of the most important products of the BLM NEPA Handbook is the major heads-up to BLM managers, BLM ID team members, the public, and the courts that the legal issues/arguments are about procedural NEPA law as identified by the BLM in its own implementing NEPA regulations (i.e., 40 CFR 1507.3, Agency Procedures: BLM NEPA Handbook). This is especially so when BLM is not in compliance with its on “must”/“shall” procedural requirements.

It is also important to be aware that many times there is other NEPA law not referenced in the BLM NEPA Handbook. Thoughts. What is the best way to incorporate into NEPA analysis the vast body of environmental laws and regulations that independently require minimization of many typical impacts (e.g. ground water, air pollution, T&E, etc.). Determining this may address the question of whether, and to what extent, practitioners should be analyzing issues in NEPA documents that are chiefly or entirely determined by following the law and whether these issues could be project design features (Bill Cohen Summit Report. 2015, p. 6)?

(2) NEPA Law Defined by BLM Identifies Potential Issues - Arguments - Themes

Recommendation; see #3 - Commenters should considering developing general and specific themes for their written arguments (from *How To Write a Legal Brief*).

Issue/Argument Theme. Conceptualize your target audience, the reader: a busy, overworked BLM manager and/or judge (and clerks) who have hundreds of NEPA EA/EIS projects and/or other briefs to look at after your written testimony (i.e., comments, protests, legal briefs). They do not have the time for deep contemplation of your issues/arguments. As such, you need a central theme which suffuses every part of your individual issues/arguments as well as an overall theme which might be that “BLM Violated NEPA” (*Deer Creek Valley Natural Resources Conservation Association v. BLM* (No. 14-35250 U.S. Court of Appeals, Ninth Circuit, 2014)).

The overall theme might also be outside of NEPA law, such as threatened and endangered law and regulations. This non-NEPA law example also comes from *Deer Creek Valley Natural Resources Conservation Association v. BLM*. This overall theme follows: “The BLM Violated the Survey and Manage Standards and Guidelines, the Medford Resource Management Plan, the Northwest Forest Plan, and the Federal Land Policy and Management Act.”

c) Central Theme for Individual Issues/Arguments (Recommendation). The following are a few examples of central themes for individual issues/arguments. They come from the BLM NEPA Handbook (Chapter 6, Section 6.8.1.2 “Analyzing Effects” BLM NEPA Handbook (H-1790-1) (BLM, 2008, p. 55; also see Section J. - Determination of Significance discussion which follow for full original first paragraph of Section 6.8.1.2). The examples are not as creative as the previous example in *Lee v. Tam* which was “*Does the Government Decide What Is a Shur?*” These examples simply use the legal NEPA “must”/“shall” standard and develop it into an individual issue/argument, for BLM ID Team members’ scoping issues of responsibility, by simply making the NEPA law a question.

(1) Generic EA Issue/Argument Theme Questions (Thoughts)

- Is the BLM Pickett West Forest Management Project EA in compliance with NEPA law by describing the analytical methodology for scoping issues sufficiently so that the reader can understand how the analysis was conducted and why particular methodologies were used (40 CFR 1502.24)?
- Is the BLM Pickett West Forest Management Project EA in compliance with NEPA law by having the analytical methodology sections for the scoping issues include a description of any limitations inherent in the methodologies?
- Is the BLM Pickett West Forest Management Project EA in compliance with NEPA law by having the analytical methodology sections recognizing substantial disputes over models, methodology, or data from opposing viewpoint(s) and by explaining the rationale(s) for BLM’s choice of analysis?

Did the ID team specialists’ methodologies explanations adequately describe the analytical impact methodology for each scoping issue accepted for deserving further study and/or rejected by BLM? Was any methodology described and used by the specialists (see Section I.A; Section IV.A.7; Section IV.B; especially Section IV.B.2)? Did the specialists’ use their identified methodologies to analyze the impacts from the proposed change agents (i.e., elements of EA alternatives), especially for the context and intensity of significance so that the public can understand how the analysis was conducted and why particular methodologies were used?

(2) Potential Specific EA Issues (Thoughts). The EA (not the FONSI) “must”/“shall” have written “Section 6.8.1.2 Analyzing Effects Methodology” elements for each specific scoping issue (BLM NEPA Handbook. 2008, p. 55). The respective disciplines represented by individual ID team members have the responsibility to develop and write these methodologies used to estimate environmental impacts. Were the ID team specialists’s descriptions in compliance with NEPA?

The following scoping issue significant impacts statements are from the draft FONSI for the BLM Pickett West Forest Management Project EA. (Observation).

- **40 CFR 1508.27(b)(1)**. Impacts that may be both beneficial and adverse. The most noteworthy predicated environmental effects of the Action Alternatives include:
 - a) Vegetation.
 - b) Fire and Fuels.
 - c) Soil Compaction and Productivity.
 - d) Soil Sedimentation and Erosion.
 - e) Hydrology.
 - f) Northern Spotted Owl. See #9 below.
 - g) Botany
- **40 CFR 1508.27(b)(2)**. The degree to which the selected alternative will affect public health or safety.
- **40 CFR 1508.27(b)(3)**. Unique characteristic of the geographic area such as proximity to historic or cultural resources, park lands, prime farm lands, wetlands, wild and scenic rivers, or ecologically critical areas.
- **40 CFR 1508.27(b)(4)**. The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- **40 CFR 1508.27(b)(5)**. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risk.
- **40 CFR 1508.27(b)(6)**. The degree to which the actions may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- **40 CFR 1508.27(b)(7)**. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.
- **40 CFR 1508.27(b)(8)**. The degree to which the action may affect districts, sites, highways, structures, or other objects listed in or eligible for listing in the Nation Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historic resources.
- **40 CFR 1508.27(b)(9)**. The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
 - a) Fish.
 - b) Plants.
 - c) Northern Spotted Owl.
- **40 CFR 1508.27(b)(10)**. Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

(3) Specific EA Issue/Argument Theme Questions (Thoughts). All of the above potential specific EA issues could become issue arguments for DCVNRCA and/or other citizens if they are not in compliance with NEPA law. Other issues identified by the public but rejected by BLM could also become issue arguments for comments, protests, and/or appeal. The following are examples for vegetation and fire and fuels issues identified by BLM in the draft FONSI for 40 CFR 1508.27(b)(1). These examples simply turn the legal NEPA “shall” standard into an individual issue/argument for BLM ID Team members scoping issues of responsibility by simply making the NEPA law a question.

- Is the BLM Pickett West Forest Management Project EA in compliance with NEPA law because the responsible ID team member described the analytical methodology for the vegetation scoping issue sufficiently so that the public reader can understand how the analysis was conducted and why particular methodologies were used (40 CFR 1502.24)?
- Is the BLM Pickett West Forest Management Project EA in compliance with NEPA law because the responsible ID team member's vegetation analytical methodology section for the vegetation scoping issue included a description of any limitations inherent in the methodology?
- Is the BLM Pickett West Forest Management Project EA in compliance with NEPA law because the responsible ID team member's vegetation analytical methodology section recognized substantial disputes over models, methodology, or data from opposing viewpoint(s) and by explaining the rationale(s) for the member's choice of analysis?

The review of the BLM NEPA Handbook also concludes that most NEPA requirements apply to both EAs and EISs (Chapters 1 - 6, including sections of significance in Chapters 7 & 8).

The purpose of this Bureau of Land Management (BLM) Manual Handbook (H-1790-1) is to help us comply with the National Environmental Policy Act (NEPA), the Council on Environmental Quality's (CEQ) NEPA regulations (40 CFR Parts 1500–1508) and the Department of the Interior NEPA manual (BLM. 2008, p. ix).

Following the introductory material in Chapter 1, Chapters 2 through 5 address the procedural determinations of whether a NEPA analysis is necessary and, if so, the degree to which it may be already covered in an existing NEPA document. Chapter 6 identifies the essential analytical elements that are common to NEPA analysis, regardless of whether you are preparing an Environmental Assessment or an Environmental Impact Statement. Chapters 7 through 9 help you identify whether an Environmental Assessment or Environmental Impact Statement is needed, and describe the various sections of these documents. The remaining Chapters 11 through 15 address monitoring, cooperating agencies, working with advisory committees, administrative procedures, and adaptive management (BLM. 2008, p. ix).

4. Needed Elements of Document (Recommendation for comments on NEPA documents, protests, legal briefs, etc.).

- For each DCVNRCA issue/argument, use the CRAC method of legal analysis: Conclusion > Rule > Application > Conclusion.
- Need Executive Summaries of issues/arguments at start of document.
- Need list of Acronyms.
- Need list of Appendices and/or Attachments as applicable.
- Need list of References designed for use in text of document. If not in comments already, it is recommended that the following be included in the references section.

1970. National Environmental Policy Act (NEPA) was enacted on January 1, 1970 (NEPA).
1978. Council on Environmental Quality (CEQ) regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Parts 1500-1508). Reprint 40 CFR Parts 1500-1508 (CEQ. 2005).
1982. P.T. Haug, R.W. Burwell, G. Yeager, A. Stein, and B.L. Bandurski. 1982, Preliminary Draft Not For Distribution. *A Systematic Interdisciplinary Language For Environmental Analysis Under NEPA*. BLM, USDI. Washington, DC (Haug, BLM. 1982).
1984. P.T. Haug, R.W. Burwell, A. Stein, and B.L. Bandurski. 1984. *Determining Significance of Environmental Issues Under NEPA*. Journal of Environmental Management. Vol. 18: 15 - 24 (Haug, BLM. 1984).
1984. P.T. Haug, R.W. Burwell, G. Yeager, A. Stein, and B.L. Bandurski. 1984. *A Systematic Interdisciplinary Language For Environmental Analysis Under the National Environmental Policy Act*. Journal of Environmental Management. Vol. 18: 1-13 (Haug, BLM. 1984).
1987. Valerie M. Fogleman. 1987. *Threshold Determinations Under the National Environmental Policy Act*. 15 Boston College Environmental Affairs Law Review. 59 (Fogleman. 1987).
1988. *BLM National Environmental Policy Act Handbook H-1790-1*: October 25, 1988.
2005. Congressional Research Service (CRS), The Library of Congress. November 16, 2005. *The National Environmental Policy Act: Background and Implementation*. CRS Report for Congress (CRS. 2005).
2007. Council on Environmental Quality, Executive Office of the President. December 2007. *A Citizen's Guide to the NEPA: Having Your Voice Heard*. Washington, D.C (CEQ. 2007).
2008. USDI. October 15, 2008. *43 CFR Part 46 Implementation of the National Environmental Policy Act (NEPA) of 1969; Final Rule*. Federal Register / Vol. 73, No. 200 / Wednesday, October 15, 2008 / Rules and Regulations, pages 61292 - 61323. Washington, DC.
2008. *BLM National Environmental Policy Act Handbook H-1790-1*: January 30, 2008 (BLM. 2008). The BLM NEPA Handbook (H-1790-1) was last updated October 25, 1988 and revisions were necessary to update the information and to reflect current NEPA guidance.
2010. USDOA, USFS, Rocky Mountain Research Station. October 2010. *Numerical Visitor Capacity: A Guide to its Use in Wilderness*. Fort Collins, CO (USDOA USFS. 2010).
2012. Council on Environmental Quality. March 6, 2012. *Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act*. Memo for Heads of Federal Departments and Agencies. Washington, D.C. 20503 (CEQ. 2012). https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf.
2012. USDI. Department of the Interior, Departmental Manual (NEPA procedures at 516 DM, Chapters 1-3).
2013. USDI Office of Environmental Policy and Compliance (OEPC). January 7, 2013. *PEP – Environmental Statement Memorandum No. ESM 13-131: Standard Checklist for Use in Preparing National Environmental Policy Act (NEPA) Documents and for Complying with NEPA, Council on Environmental Quality, and Departmental Procedures*. Washington, D.C. (USDI OEPC. 2013).
2017. Mike Walker, Chair, Hugo JS&PSS Exploratory Committee, Hugo Neighborhood Association & Historical Society. June 20, 2017. *Public Comments For the DOI-BLM-ORWA-MO70-0006-*

2016-EA Pickett West Forest Management Project Environmental Assessment (EA); BLM's Responsibilities For Public Involvement (PI) Purpose Of National Environmental Procedures Act's (NEPA) Procedural Mandate Requires Interdisciplinary (ID) Team Members To Be Accessible To The Public. Includes Appendices: Appendix A. National Environmental Procedures Act's (NEPA) Procedural Requirements; Appendix B. Interdisciplinary Team's Responsibilities for Public Involvement From BLM National Environmental Policy Act Handbook H-1790-1 (April 24, 2008); Appendix C. USDI *PEP – Environmental Statement Memorandum No. ESM 13-131* (January 7, 2013); Appendix D. A Citizen's Guide to the NEPA: Having Your Voice Heard; and Appendix E. The Hard Look and Bald Conclusions. Hugo, OR.

5. Need Applicable List of NEPA Compliance Standards and an Explanation of How They Were Used (Recommendation)

- The National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321-4347).
- Council on Environmental Quality regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Parts 1500-1508).
- Council on Environmental Quality Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act regulations (46 Fed. Reg. 18026, March 23, 1981).
- U.S. Department of Interior (USDI). October 15, 2008. *43 CFR Part 46 Implementation of the National Environmental Policy Act (NEPA) of 1969; Final Rule.* Federal Register / Vol. 73, No. 200 / Wednesday, October 15, 2008 / Rules and Regulations, pages 61292 - 61323. Washington, DC.
<https://www.doi.gov/sites/doi.gov/files/migrated/pmb/oepec/upload/Federal-Register-October-15-2008-NEPA.pdf>

Observation. What is the purpose of the October 15, 2008 NEPA procedures final rule? The Department of the Interior's NEPA procedures rule places the procedures for implementing NEPA into the Code of Federal Regulations (CFR). **The Department's NEPA procedures now more fully encourage public involvement and access to project planning and analysis throughout the NEPA process rather than only early in the planning process, during scoping, and late, during public comment periods for EAs and draft EISs** (emphasis added). The rule also clarifies both Departmental and CEQ NEPA procedures ([Questions & Answers](#), Department of the Interior NEPA Information, Code of Federal Regulations, <https://www.doi.gov/oepec/resources/nepa-procedures>).

Observation. By converting the NEPA procedures from the Departmental Manual (DM) at 516 DM, Chapters 1-6, into the CFR, the Department joins the majority of other Federal agencies that have their NEPA procedures located in the CFR. The Department is also replacing the NEPA procedures at 516 DM, Chapters 1-6, not otherwise covered in the new regulation, with any residual explanatory guidance on the regulations as new 516 DM, Chapters 1-3.
<https://www.doi.gov/sites/doi.gov/files/uploads/Background-Summary.pdf>

- USDI. Department of the Interior, Departmental Manual (NEPA procedures at 516 DM, Chapters 1-3).
[Chapter 1: Protection and Enhancement of Environmental Quality](#)
Last Modified 8/26/2012; Creation Date 2/2/2012
<https://elips.doi.gov/ELIPS/DocView.aspx?id=1717>
[Chapter 2: Relationship to Decision Making](#)
Last Modified 8/26/2012; Creation Date 2/2/2012
<https://elips.doi.gov/ELIPS/DocView.aspx?id=1731>
[Chapter 3: Managing the NEPA Process](#)
Last Modified 8/26/2012; Creation Date 2/2/2012
<https://elips.doi.gov/ELIPS/DocView.aspx?id=1733>
- *BLM National Environmental Policy Act Handbook H-1790-1*: January 30, 2008 (BLM. 2008).
- USDI Office of Environmental Policy and Compliance (OEPC). January 7, 2013. *PEP – Environmental Statement Memorandum No. ESM 13-131*: Standard Checklist for Use in Preparing National Environmental Policy Act (NEPA) Documents and for Complying with NEPA, Council on Environmental Quality, and Departmental Procedures. Washington, D.C. (USDI OEPC. 2013).
- Applicable Court Cases, (e.g., Appendix E. The Hard Look and Bald Conclusions, Walker's June 20, 2017 EA Comments, Valerie M. Fogleman. 1987. *Threshold Determinations Under the National Environmental Policy Act.* etc.).

6. Hard Look and Bald Conclusions (Recommendation; Appendix E of Walker's June 20, 2017 EA comments). Exactly what is meant by actions which will, or conversely which will not, significantly affect the human environment has not adequately been developed for BLM. The courts have several standards. The standard by which the USDI, Interior Board of Land Appeals (IBLA) reviews an EA has been set forth in numerous IBLA decisions. Most basically, an EA must (*Lynn Canal Conservation, Inc.* 167 IBLA 136. October 19, 2005):

- (1) **Take a hard look at the environmental consequences, as opposed to reaching bald conclusions,**
- (2) **Identify the relevant areas of environmental concern, and**
- (3) **Make a convincing case that environmental impacts are insignificant in order to support a conclusion that an EIS is not required.**

The three IBLA references for *Lynn Canal Conservation, Inc.* (i.e., 1. Lee & Jody Sprout, 160 IBLA 9, 12-13 (2003); 2. Kendall's Concerned Area Residents, 129 IBLA 130, 138 (1994); and 3. Southern Utah Wilderness Alliance, 123 IBLA 302, 308 (1992)) eventually lead back to *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681-82 (D.C. Cir. 1982), and the phrase "convincing case" since its original appearance in *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973).

Bald Conclusions - *Sierra Club v. Cavanaugh*, 447 F.Supp. 427 (1978) (Appendix E of Walker's June 20, 2017 EA comments)

The Congressional command that NEPA be complied with "to the fullest extent possible" requires that agency decisions regarding environmental impacts of proposed federal actions be made only after a full and good faith consideration of the environmental factors. *MPIRG v. Butz*, supra at 1320; *McDowell v. Schlesinger*, 404 F. Supp. 221, 253 (W.D.Mo. 1975). This good faith effort requires that the agency take a "hard look" at all potential impacts and when a negative determination is arrived at, with regard to preparation of an EIS, the agency must avoid making "**bald conclusions**" as to the magnitude or variety of potential effects of the proposed action.

Bald Conclusions - *McDowell v. Schlesinger*, 404 F. Supp. 221, 253 (W.D.Mo. 1975) (Appendix E of Walker's June 20, 2017 EA comments)

Certain general requirements for agency **threshold determinations** (emphasis added) have been developed, however. The agency must identify all areas of potential environmental concern flowing from the proposed action, and must take a "hard look" at all potential impacts so identified, including secondary impacts. **Sufficient investigation** (emphasis added) must be done and **sufficient data gathered** (emphasis added) to allow the agency to consider realistically and in an informed manner the full range of potential effects of the proposed action. In making a negative determination as to the applicability of [NEPA] § 102(2) (C) to a particular project, the agency must avoid making "**bald conclusions**" (emphasis added) as to the magnitude or variety of potential effects of the proposed action. Similarly, the agency is not permitted to base a negative decision as to the applicability of § 102(2) (C) upon **superficial reasoning or perfunctory analysis** (emphasis added). Rather for an agency's **threshold decision** (emphasis added) that § 102(2) (C) does not apply to a particular proposed action to be upheld in review, **it must affirmatively appear from the administrative record, and from the written assessment** (emphasis added) where one is prepared, that the agency has given **thoughtful and reasoned consideration** (emphasis added) to all of the potential effects of the proposed action, and that a **convincing case** (emphasis added) has been made that the proposed impacts are insignificant **after a**

careful balancing of the relevant factors (emphasis added). See, generally, *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972); *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972); *Arizona Public Serv. Comp. v. Federal Power Comm.*, 483 F.2d 1275 (D.C. Cir. 1973); *Maryland-National Cap. Pk. & Pl. Comm. v. U. S. Postal Service*, 159 U.S.App.D.C. 158, 487 F.2d 1029 (D.C. Cir. 1973); *First National Bank of Chicago v. Richardson*, 484 F.2d 1369 (7th Cir. 1973).

Non-compliance NEPA conclusions by DCVNRCA need to be supported with an identification of the legal standard(s) not in compliance with, including a rationale of how the law applies to the issue/argument. Where it exists, a “hard look” analysis summary from a supporting “reference” source (in references section) needs to be identified by page number.

It should be noted that the NEPA review conclusions legally applicable to the federal agency are usually applicable to the public giving written testimony. This does not mean that they are legally required by the public, only those public interests that really mean to be effective in having BLM meaningfully consider its processes for NEPA compliance, and the value of public comments. For example, bald conclusion comments by the public, including expert witnesses, are just as weak as those made by BLM, and for the same reasons. A “hard look” rationale by the public supporting its impact analysis conclusions is the gold and winning standard.

7. EA ID Team Members Responsible For NEPA Analysis/Significant Impact

Determination Methodologies Thoughts (i.e., court needed “hard look”). ID team members do not have authority to make recommendations outside of ID process. They have the authority and responsibility to determine the impacts of a change agent(s).

The ID team members’ analysis and significant impact methodologies assessments in BLM environmental documents (e.g., EAs, FONSI, EISs, etc.) are covered by public comments on these documents, including protests, and legal appeals.

Public comments/protests/appeals on ID team members specific scoping issues can alert the ID team members on how important the hard look is before BLM management, the public, and the courts. These comments can reward team members developing adequate to exceptional NEPA impact methodologies and conducting significant impact analysis. These public comments can also alert ID team members whose hard look analysis needs improvement. Make no mistake, ID team members are territorial when it comes to the scientific integrity of their disciplines’ credibility, of their work.

8. Agency Comments On BLM EA? Thoughts. Were there any expert witness comments on the BLM EA (e.g., NMFS, EPA, etc.)

9. References on Issues/Arguments from EA Analysis and FONSI. Recommendation. References on Issues/Arguments should include page number references to both EA and FONSI.

10. Scientific Authority Of Comments Testimony. Recommendation. All text references in comments testimony should be in bibliography references section. This is the basic authority of any opinions/conclusions in text without specific explanations. It is also the scientific authority and rationale for summary explanations.

B. Standardized Significant Analysis Format For Issues/Arguments

It is recommended that the DCVNRCA consider using a standard format developed from: 1. CRAC method of legal analysis, 2. BLM's work in the 1980s to *Determining Significance of Environmental Issues Under NEPA*, and 3. the Hugo Justice System & Public Safety Services Exploratory Committee's methodology models.

1. CRAC Method Of Legal Analysis
2. BLM's 1980s Work Determining Issue Significance Under NEPA
3. Hugo Justice System & Public Safety Services Exploratory Committee's Methodology Models
 - a) Impact Methodology Model: 2015
 - b) NEPA Design Group: 2001
4. Synthesis: Potential Method of Analysis

1. CRAC Method Of Legal Analysis (Observation). The CRAC method of legal analysis includes: Conclusion > Rule > Application > Conclusion.

1. Conclusion. What is the conclusion you want to judge to make after reading your brief?
2. Rule. What is the law that supports your conclusion?
3. Application. Explain how the law applies to the issues.
4. Conclusion. Restate the conclusion to the judge.

2. BLM's 1980s Work Determining Issue Significance Under NEPA (Recommendation)

- P.T. Haug, R.W. Burwell, G. Yeager, A. Stein, and B.L. Bandurski. 1982. Preliminary Draft Not For Distribution. *A Systematic Interdisciplinary Language For Environmental Analysis Under NEPA*. BLM, USDI. Washington, DC (Haug, BLM. 1982).

A Common Language for Analysis The basis for the systematic, interdisciplinary language of environmental analysis present is found in the principal aims of the NEPA regulations and other criteria listed in Table 1. This paper describes how our approach addresses criteria while attempting to reduce the threefold problem of predicting impacts, organizing information, and communicating (Haug, BLM. 1982, p. 4). Table 1 - Criteria for an effective approach to environmental analysis, documentation, and decisionmaking. Three set of criteria are displayed: (1) principal aims of NEPA regulations; (2) criteria found in NEPA regulations; and (3) other practical criteria (Haug, BLM. 1982, original at p. 5).

Criteria Found in NEPA Regulations (Table 1; Haug, BLM. 1982, p. 5)

4. **Provide high quality information** [40 CFR 1500.1(b)]
5. **Conduct state-of-the-art analysis** [40 CFR 1501.8(b)(1)(iii); 40 CFR 1502.22(b)]
6. **Maintain scientific accuracy** [40 CFR 1502.24]
7. **Product analytic rather than encyclopedic EISs** [40 CFR 1500.4(b); 40 CFR 1502.2(a)]
8. **Address incomplete or unavailable information** [40 CFR 1502.22]
9. **Consider risk, uncertainty, and likelihood of impacts** [40 CFR 1502.9(a); 40 CFR 1502.22; 40 CFR 1505.1(b); 40 CFR 1508.27]
10. **Provide for mitigation and monitoring** [40 CFR 1502.14(c); 40 CFR 1502.16(e-h); 40 CFR 1503.3(d); 40 CFR 1505.2(c); 40 CFR 1505.3; 40 CFR 1508.20; 40 CFR 1508.28(b)]
11. **Communicate information clearly** [40 CFR 1500.4(d); 40 CFR 1502.8]
12. **Facilitate decisionmaking** [40 CFR 1500.1(b,c); 40 CFR 1501.2(a); 40 CFR 1501.8(b); 40 CFR 1502.1; 40 CFR 1502.2; 40 CFR 1502.22; 40 CFR 1502.23; 40 CFR 1505.1; 40 CFR 1506.1; 40 CFR 1507.2; 40 CFR 1508.23]

Vocabulary The vocabulary proposed for environmental analysis (Table 2) begins with the definition of an environmental consequence, impact, or effect; they are synonymous. An environmental consequence has three components (Haug, BLM. 1982, p. 7):

- (1) It is a change of some indicator in the human environment, or ecosystem. This implies some baseline condition from which to perceive or measure the change, and it implies a magnitude and direction for that change.
- (2) It is linked to man’s activities through a cause, a change agent. This distinguishes an environmental impact from a change in the human environment caused by forces other than man.
- (3) It has a meaning or value separate from the change itself. Depending on the context within which a change takes place, an impact can be positive, negative, beneficial, adverse, good, bad, etc. These types of imprecise, judgmental, and qualitative evaluation are often found in environmental documents with no explanation or substantiation for the evaluation.

Already we have used nine of our 12 vocabulary words (underlined above). The remaining three are types of indicators: structural components, functional processes, and environmental indexes. These 12 words can accommodate environmental impacts describe by virtually any **discipline** (emphasis added).

Walker’s Comments: The above 12 vocabulary words are described on pages 8 - 9 of the document, *A Systematic Interdisciplinary Language For Environmental Analysis Under NEPA* (Haug, BLM. 1982). This paper does not take on the “threshold” of significance directly but references 40 CFR 1508.27 and the importance of context of an impact and its relative importance (intensity). Its real contribution is developing a systematic interdisciplinary language (i.e., impact methodology: NEPA, Section 102(2)(B); 40 CFR 1507.3; 40 CFR 1502.24; 40 CRF 1502.22) for environmental analysis compliance with NEPA (i.e., baseline, change agent, component, context, ecosystem, effect, environmental consequence, human environment, impact, index, and indicator).

The Grammar: A Worksheet The “grammar” for our language consists of a single worksheet for organizing and displaying information about environmental consequences. The information at the top of the sheet allows the user systematically to break down a plan, proposed action, or alternatives into smaller increments to identify the actual change agents that will cause impacts (Fig. 2). Each line is designed to read like a simple declarative sentence with a subject, verb, object, and a string of modifiers. The subject is the change agent; the verb is either “increase” or “decrease”; and the object is the indicator being impacted. The change is described by modifiers that include the estimated quantity of change, the units of change, and the probability that this particular estimated change will actually occur (Haug, BLM. 1982, p. 10).

Figure 2. Impact Sentence of Environmental Consequences Worksheet							
Change Agent	+ Increase	- decrease	Indicator	Change			Context (Relative Importance, Duration, Timing, Spatial Extent, Intensity, Risk, Thresholds, etc.)
				Estimated Quantity	Units of Measurement	Probability	
SUBJECT	VERBS		OBJECT	MODIFIERS			MODIFYING CLAUSE

All the columns through Probability represent the factual estimate of the impact. The right hand column, Context or Relative Importance, is available for the user to interpret the meaning of value of that estimated change. The worksheet thus clearly separates the relatively objective estimate of an

environmental consequence from the often more subjective meaning of that consequence. This distinction aids in identifying conflicts (and hopefully in resolving them; Haug, BLM. 1982, p. 10).

By thus separating the fact of an impact from its meaning, we eliminate a major source of confusion commonly found in controversies about environmental consequences. Legitimate differences of opinion about the fact of an impact can be specifically addressed and recorded on the worksheet. For instance, arguments about the fact of an impact can be reduced sometimes if probabilities are used. **Opposing experts in the same discipline** (emphasis added) can state their professional expectations clearly in probabilistic terms about differing estimates of a controversial impact. Arguments over the relative importance, or meaning, of an impact may be less easily resolved, but opposing points of view can still be recorded and **displayed for the decisionmaker and the public to see** (emphasis added). An example worksheet is presented in Fig. 2, and a set of instructions is listed in Table 3 (Haug, BLM. 1982, pps. 10 & 12)

Use of the Methodology We have found that this methodology is extremely flexible, and it seems to satisfy all the criteria listed in Table 1 (Haug, BLM. 1982, p. 12).

The methodology forces staff analysts (emphasis added) to organize their information in a clear, concise format so that consequences of several alternative can be compared easily. . . . **Environmental analysts** (emphasis added) often are not used to quantifying estimates (Haug, BLM. 1982, p. 17).

Discussion This auxiliary “language” of environmental analysis . . . allows the **disciplinary specialist** (emphasis added) complete freedom to estimate and calculate environmental consequences according to state-of-the-art methods in that discipline, but it **forces all specialists to describe consequences in a common format based on a common understanding of what an environmental consequence is. The language thus provides a medium of communication between specialists of widely varying disciplines, between an interdisciplinary team and decisionmakers, and between an agency and the general public** (emphasis added) (Haug, BLM. 1982, p. 19).

National Environmental Policy Act (1969) Most importantly NEPA requires impact methodologies and impact analysis.

- **Section 102(2) of NEPA** contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act.
- **Section 102 [42 USC § 4332]**. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and **(2) all agencies of the Federal Government shall** (emphasis added) --
- **(A) utilize a systematic, interdisciplinary approach** (emphasis added) which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment; [42 U.S.C § 4332(2)(A)]
- **(B) identify and develop methods and procedures** (emphasis added), in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations; [42 U.S.C § 4332(2)(B)]
- **(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting** (emphasis added) the quality of the human environment, a detailed statement by the responsible official . . . [42 U.S.C § 4332(2)(C)]
- **(E) study, develop, and describe appropriate alternatives** (emphasis added) to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; [42 U.S.C § 4332(2)(E)]

1982. P.T. Haug, R.W. Burwell, G. Yeager, A. Stein, and B.L. Bandurski. 1982. Preliminary Draft Not For Distribution. *A Systematic Interdisciplinary Language For Environmental Analysis Under NEPA*. BLM, USDI. Washington, DC (Haug, BLM. 1982).
1984. P.T. Haug, R.W. Burwell, A. Stein, and B.L. Bandurski. 1984. *Determining Significance of Environmental Issues Under NEPA*. Journal of Environmental Management. Vol. 18: 15 - 24 (Haug, BLM. 1984).
1984. P.T. Haug, R.W. Burwell, G. Yeager, A. Stein, and B.L. Bandurski. 1984. *A Systematic Interdisciplinary Language For Environmental Analysis Under the National Environmental Policy Act*. Journal of Environmental Management. Vol. 18: 1-13 (Haug, BLM. 1984).

To be developed.

3. Hugo Justice System & Public Safety Services Exploratory Committee's Methodology Models

- a) Impact Methodology Model: 2015
- b) NEPA Design Group: 2001

a) Impact Methodology Model: 2015 (Observation). May 25, 2017 Letter/Email to DCVNRCA from Hugo Justice System & Public Safety Services (JS&PSS) Exploratory Committee, Hugo Neighborhood Association & Historical Society, On *Impact Methodology Model* (Appendix A; Attachment 1).

Appendix A. *Impact Methodology Model*

- IV. PROCEDURAL REQUIREMENTS
 - A. Procedural Requirements For JS&PSS Study Design
 - B. Impact Methods
 - 2. Significant Impact
 - C. Analysis Documentation & Method
- V. BASIC IMPACT METHODOLOGY MODEL
 - A. Basic Impact Methodology Model
 - B. Contract Compliance Impact Methodology

IV. PROCEDURAL REQUIREMENTS (part of Section IV.B.3a))

IV.B.2. Significant Impact (part of Section IV.B.3a)). Carrying capacity and thresholds with indicators and standards are today considered normal impact methodologies. In the early 1980s, interdisciplinary specialists were experts at describing their resources of responsibility, but were behind the curve in explaining why impacts to these resources were significantly beneficial and/or adverse.

And early effort at organizing impacts in a concise logical way was a 1982 BLM publication (USDI, BLM. Preliminary draft June 11, 1982. *A Systematic Interdisciplinary Language For Environmental Analysis Under NEPA*. Authors P. T. Haug, R.W. Burwell, G. Yeager, A. Stein, and B. L. Bandurski. pages 24. Washington D.C.). This was normal and different from the other ID specialists that were responsible for resource programs, not process. This simple brief working glossary for analysis is illustrative.

- | | |
|-------------------------------|-------------------------------------|
| • Environmental Consequence = | • Change Agent |
| Effect = Impact | • Context |
| • Indicator | • Structural Components |
| • Human Environment | • Functional Processes |
| • Ecosystem | • Environmental Indexs (one example |
| • Baseline | of a standard) |

NEPA, Section 102(2)(C) — Threshold Determinations. All agencies shall include an EIS with any proposal which is a major federal action significantly affecting the quality of the human environment. Therefore, all agencies must make a threshold determination concerning any proposal as to whether it is a major federal action, and if so, whether it significantly affects the quality of the human environment (i.e., EAs & EISs).

What criteria should be used to assess whether or not impacts are significant (see 40 CFR 1508.27)? The ID team is responsible for the identification and use of thresholds of context and intensity for use in determining impacts.

Factors for consideration in determining significance are set forth in 40 CFR 1508.27. The determination of significance starts with the identification of the change agent. To determine significance, impact prediction of environmental consequences are compared to some quantitative or qualitative parameter or maximum/minimum level of effect (i.e., a significance threshold) beyond which the impacts become significant, or below which the impacts are non-significant. Law, regulation, prior commitments, professional expertise, the manager's best judgement, and public opinion are a few of the context qualities that can affect the setting of significance thresholds.

The analysis of impacts must address direct, indirect (i.e., regional), and cumulative impacts on all affected conditions of the human environment (40 CFR 1508.14), including critical social, political, and economic elements with a relationship to the natural and physical environment. Impacts should be identified in relationship to thresholds of context and intensity.

C. Analysis Documentation & Method (part of Section IV.B.3a))

- *Hugo Justice System Exploratory Committee*. July 8, 2013. *Analysis Method*. Brochure IIIC.1, Justice System & Public Safety Services Series. Hugo, OR.

1. Information Statements by Government and Other Publications, Including News Articles Information sometimes meets standards, sometimes not. As an example, "It is most helpful for the public that information statements on levies where the government wishes to tax should be written statements of fact, conclusions, and determinations based upon the evidence or facts at hand, presented relative to the applicable standards for the proposed levy proposed by county. The objective is to minimized opinions and sensationalism."

2. Information Statements Should

1. Identify the information issue.
2. Respond to specific issues raised by citizens.
3. Identify the relevant standards or authorities.
4. Identify the facts which were believed would be relied upon by the decision makers.
5. Explain how those facts lead to the conclusion that the standards are, or are not, satisfied.
6. State that the standards are met or not.

3. Analysis Method The JS&PSS Exploratory Committee and JS&PSS Study Team will use the following analysis methodology in researching and documenting information issues.

a) Information Issue Why is the issue being analyzed and/or documented?

1. How does the issue relate to the question: "Is JO CO providing an adequate level of public safety services?"
2. Was the issue raised by the public?²

b) Known Facts What are the known facts? The power of future information abstracts documented in brochures is that they spur the question of whether there are better facts and the information can be updated. Sometimes research projects will focus solely on a description of the facts or standards.

c) Standards Are there standards or authorities? Sometimes there are scientific standards by which a proposal can be analyzed, sometimes not. Standards could be the law, official county polls, or professional opinions by recognized authorities or experts.

d) Analysis The goal is objective analysis and documents, not whether the proposed legislation was right or wrong, or in some overt way to try to influence a yes or no vote from the public.

e) Conclusion/Recommendation The analysis conclusions would be a set of recommendations to the public.

V. BASIC IMPACT METHODOLOGY MODEL (part of Section IV.B.3a))

A. Basic Impact Methodology Model (part of Section IV.B.3a))

1. Legal Requirements There are no legal requirements except contract law for the *Justice System & Public Safety Services Study Design: 2015* “request for proposal,” and there is no legal requirement for specific “significant impact methodology models.” There is a legal responsibility to document methodologies, the specific impact models used, and the resulting analysis (BLM. 2008, Section 6.8.1.2).

The ID Team’s analysis methodology responsibility for determining significance in an EA and/or an EIS is described in the BLM NEPA Handbook (H-1790-1).¹ The handbook satisfies the BLM’s responsibilities to identify and develop methods and procedures for determining significant impacts (NEPA, Section 102(2)(B); 40 CFR 1502.24).

Section 6.8.1.2 Analyzing Effects Methodology: A NEPA document must describe the analytical methodology sufficiently so that the reader can understand how the analysis was conducted and why the particular methodology was used (40 CFR 1502.24). This explanation must include a description of any limitations inherent in the methodology. If there is substantial dispute over models, methodology, or data, you must recognize the opposing viewpoint(s) and explain the rationale for your choice of analysis (BLM. 2008, Chapter 6, Section 6.8.1.2, Analyzing Effects, p. 70).

40 CFR 1502.24. Methodology and Scientific Accuracy. Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

2. Basic Impact Model The basic impact methodology model is derived from NEPA. The requirement is for impact studies to be analytic rather than encyclopedic.

- Scoping
- Range of Alternatives
- Affected Conditions
- Impacts
- Incomplete or unavailable information
- Affecting
- Affects/Effects/Consequences
- Human Conditions (physical, biological, economic, & social)
- Significantly

Step 1. Scoping And Documenting Significant Planning Issues. The standard impact methodology of identifying impacts starts first with the documented significant issues primarily identified during scoping. Although informative, there need be no documentation in later chapters of an impact study that does not relate to the significant issues identified during scoping. In fact, other documentation is usually not needed and not helpful to the public in understanding the significant impacts resulting from the alternatives.

An exception would be “clearing the air” statements about process issues and concerns, other legal disclosures and requirements, and new information. The reasons for documenting this kind of information should be provided.

Step 2a. Range of Alternatives Designed And Documented Around Significant Planning Issues. The second step of the basic impact methodology model is to design a range of reasonable alternatives around the significant planning issues identified during scoping. The alternatives section is the heart of the impact study. The no action

alternative is the baseline to which the other alternatives are compared. The requirement is to design the alternatives to sharply reflect the issues and provide a clear basis for choice among options by the public.

Step 2b. Range of Alternatives Compared And Documented By Impact A second additional, and just as important, requirement of the alternatives section in the impact study is to present the significant impacts of the range of alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the public. This portion of the alternatives section of the study is based on the information and analysis which is later developed in the sections on the affected conditions and impacts sections of the impact study.

Step 2c. Range of Alternatives Considers And Documents Mitigation Measures The alternatives section should also include appropriate mitigation measures not already included in the design of the alternatives.

Step 3a. Affected Conditions – Description of Existing Conditions Being Significantly Affected. The third step of the basic impact methodology model is to document the affected conditions being impacted by the alternatives in some significant way. The impact study succinctly describes the conditions of the area(s) to be affected or created by the alternatives under consideration. The affected conditions is the baseline for comparing the effects of the alternatives. The descriptions should be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a study should be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Useless bulk should be avoided and impact studies should concentrate effort and attention on important issues. Verbose descriptions of the affected conditions are themselves no measure of the adequacy of a study.

Although informative, there need be no documentation in the affected conditions section of a impact study that does not relate to the significant issues identified during scoping (unless new significant issues and impacts beyond those identified during scoping are identified during the analytical analysis process), and the significant impacts identified in the environmental impacts section. In fact, other documentation is usually not needed and not helpful to the public in understanding the significant impacts resulting from the alternatives.

Step 3b. Affected Conditions – Incomplete Or Unavailable Information [40 CFR 1502.22]. A second additional, and just as important, requirement of the affected conditions section in the study is to always make it clear when there is any incomplete or unavailable information relating to any reasonably foreseeable significant adverse effects on the human conditions. If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not exorbitant, the information shall be included in the impact study.

However, if the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant, or the means to obtain it are not known, the affected conditions section shall have a statement that such information is incomplete or unavailable. The next step in the impacts section will address the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human conditions.

Step 4a. Impacts – Identifying And Documenting Significant Impacts The fourth and last step of the basic impact methodology model is to identify the significant impacts of the alternatives.

The impacts section forms the scientific and analytic basis of the study. Any direct, indirect, and cumulative effects from the alternatives and their significance must be analyzed and documented. The discussion will also include the relationship between short-term uses of man's conditions and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the range of alternatives should any be implemented. The baseline for the comparison of the impacts resulting from the different alternatives is the "affected conditions." In bullet summary, the following types of significant impacts must be analyzed and documented as applicable.

- adverse

- beneficial
- short term
- long term
- direct
- indirect
- cumulative
- irreversible
- irretrievable

Step 4b. Impacts – Incomplete Or Unavailable Information [40 CFR 1502.22]. The CEQ regulations formerly mandated preparation of a “worst case analysis” when scientific uncertainty existed. The CEQ withdrew the worst case analysis regulation in 1986. The present CFR, like the old, provides that information relevant to reasonably foreseeable significant adverse impacts might not be obtained because the overall costs of obtaining it were too high. However, this situation requires further information and analysis on reasonably foreseeable significant adverse impacts (see 40 CFR 1502.22(b) that follows).

40 CFR 1502.22(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement [also EAs per BLM. 2008, p. ix]: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, **“reasonably foreseeable” includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence** (emphasis added), is not based on pure conjecture, and is within the rule of reason.

It is not yet clear what the practical difference will be between the new regulation and the old regulation. Arguably, the analysis mandated by the old regulation will continue to be required in order for federal agencies to comply with NEPA case law. For example, scientific uncertainty and significant scientific risks must be disclosed and weighed in a decision to proceed with an action. A good faith effort to describe reasonably foreseeable environmental impacts must be made even if it requires speculation. If significant environmental effects are the subject of scientific conflict, an EIS [also EAs per BLM. 2008, p. ix] must disclose the uncertainty by including "responsible opposing views." Courts generally defer to an agency's decision about which scientific opinion the agency chooses unless the agency's discussion of scientific data is cursory and conclusive (Fogleman. 1987. *Threshold Determinations Under the National Environmental Policy Act*, pps. 89 - 94).

Further the analysis must consider risk, uncertainty, and likelihood of impacts (40 CFR 1502.9(a); 40 CFR 1502.22; 40 CFR 1505.1(b); 40 CFR 1508.27 [EAs & EISs per BLM. 2008, p. ix]).

- 40 CFR 1502.9 Draft, final, and supplemental statements; 1502.9(a) “. . . must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. . . so inadequate as to preclude meaningful analysis . . . shall make every effort to disclose all major points of view on the environmental impacts of the alternatives.”
- 40 CFR 1502.22 (see above).
- 40 CFR 1505.1 Agency decisionmaking procedures; 1505.1(b) “Designating the major decision points for the agency’s principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.
- 40 CFR 1508.27 Significantly.

B. Contract Compliance Impact Methodology (part of Section IV.B.3a))

The following is the impact methodology which will be used by all study team members. The impact methodology is based upon significant planning issues identified during scoping and the public's identification of the range of alternatives. A significant compliance standard is for the study team to use the Basic Impact Methodology Model in fulfilling the requirements of this section on contract compliance. It is also based upon the concept of indicators and standards which will be addressed in this section. The most important concept of the impact methodology or "impacts methodology" is that it uses the scientific method - it is not rocket science, but the process is logical, and traceable, and the analysis of the public situation (APS) is available to public, agency, and government review. The methodology should identify the process to determine whether an impact is significant, or not, and the rationale (threshold) to support the significance determination.

An impact study is intended to provide the public with a complete and objective evaluation of significant impacts, both beneficial and adverse, resulting from a range of reasonable alternatives.

An impact study shall provide full and fair discussion of significant impacts and shall inform the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human conditions.

The five parts of the impact methodology are 1. issue, 2. impact, 3. indicator, 4. standard, 5. significance determination.

1. Significant Issue A significant issue is a subject or question of widespread public discussion or interest regarding the issue. The impact methodology of identifying significant impacts starts first with the definition of the significant issues during scoping.

2. Significant Impact A significant impact is a change in the human conditions which if beyond a certain threshold become important. The components of a significant impact are its indicator, standard, and conclusion.

Impacts, effects, and consequences are synonymous. Effects may be direct, indirect, or cumulative. Impact predictions are compared to identified standards (i.e., maximum/minimum level of effect) beyond which the impacts become significant).

3. Indicator An indicator is a variable, either singly or in combination with another variable, which is taken as indicative of the condition of the overall issue. An indicator is the specific variable by which impacts are described. A comprehensive description of the indicator(s) are the documented affected conditions being impacted by the alternatives in some significant way (see Basic Impact Methodology Model). The indicators in the affected conditions section provide a benchmark or baseline for enabling the public to compare the magnitude and time effects of the alternatives.

4. Standard A standard is a measurable aspect of an indicator. Setting standards is a judgmental process; however, the process is logical, traceable, and subject to agency and public review (i.e., the scientific method) in the APS.

A standard is the level, point, or value above which something will take place, or below which it will not take place. A standard provides a base against which a particular condition and/or change can be judged as acceptable or not. Standards or thresholds can be used to determine whether a change in an indicator or impact is significant (either beneficial or adverse).

5. Significance Determination A determination of significance requires a consideration of both context and intensity. To determine significance, impact predictions are compared to identified standards/thresholds (i.e., maximum/minimum level of effect) beyond which the impacts become significant. The standard is the basis for identifying the conclusionary levels of an impact:

- significantly beneficial impact, and/or
- beneficial impact, and/or
- neutral impact, and/or
- adverse impact, and/or
- significantly adverse impact.

In summary, the five parts of the impact methodology follows. These five parts are part of step 3 of the CRAC method of legal analysis.

1. Significant Issue
2. Significant Impact
3. Indicator
4. Standard
5. Significance Determination

CRAC Method of Legal Analysis: Conclusion -> Rule -> Application -> Conclusion. It is modified for inclusion of the impact methodology.

1. Conclusion. What is the conclusion you want the BLM manager or judge to make after reading your issue/argument comments on a NEPA document, a protest, or a legal brief. [It includes #3, Develop a theme for your brief, How To Write a Legal Brief, pps. 2 - 3).
2. Rule. What is the NEPA or other law that supports the conclusion (BLM NEPA Handbook topics & Other).
3. Application/Analysis. Explain how the law applies to the issue/argument.
 - a) Significant Scoping Issue and/or Public Issue Rejected
 - b) Significant Impact
 - c) Indicator
 - d) Standard
 - e) Significance Determination
4. Findings/Conclusions. Restate the Conclusion.

b) NEPA Design Group: 2001 (Observation). February 15, 2001 Comments to BLM From NEPA Design Group On Evaluation of Significant Impacts and Recommended Impact Methodology (Appendix D)

Appendix D has five parts (see Attachment 2 for complete document). The first part is a collection of legal references demonstrating the requirement for an evaluation and documentation of significant impacts supported by an analytical record of their determination. The second part is a list of variables found in the DEIS that, if addressed in a comprehensive way, are the potential basis for an impact methodology to address significant impacts. The third part is NEPA Design Group's translation of NEPA's procedural requirements into a impact methodology model. The fourth part is NEPA Design Group's summary evaluation of whether the DEIS provides decisionmakers and the public with a complete and objective evaluation of significant environmental impacts. The fifth and last part is NEPA Design Group's recommendation to BLM of a specific impact methodology for use in a supplemental DEIS. The following are elements of two of the five parts: III and V.

- I. Legal requirements for significant impacts and impact methodologies.
- II. References to significance and impact methodologies in the DEIS.
- III. NEPA's basic impact methodology model.**
- IV. Evaluation of DEIS.
- V. Recommended impact methodology.**

III. BASIC IMPACT METHODOLOGY MODEL FROM NEPA (part of Section IV.B.3b))

The basic impact methodology model is derived from NEPA and from sections described in CEQ's implementing regulations (Appendix B). The requirement is for EISs to be analytic rather than encyclopedic.

- 40 CFR 1501.7 Scoping
- 40 CFR 1502.14 Alternatives including the proposed action
- 40 CFR 1502.15 Affected environment
- 40 CFR 1502.16 Environmental consequences
- 40 CFR 1502.22 Incomplete or unavailable information
- 40 CFR 1508.3 Affecting
- 40 CFR 1508.8 Effects
- 40 CFR 1508.14 Human environment
- 40 CFR 1508.27 Significantly

Step 1. Scoping And Documenting Significant Planning Issues. The standard impact methodology of identifying impacts starts first with the documented significant issues identified during scoping. Although informative, there need be no documentation in later chapters of an EIS that does not relate to the significant issues identified during scoping. In fact, other documentation is usually not needed and not helpful to the decisionmaker and public in understanding the significant environmental impacts resulting from the alternatives.

An exception would be "clearing the air" statements about process issues and concerns or other legal disclosures and requirements. The reasons for documenting this kind of information should be provided.

Step 2a. Alternatives Including The Proposed Action Designed And Documented Around Significant Planning Issues. The second step of the basic impact methodology model is to design a range of reasonable alternatives around the significant planning issues identified during scoping. The alternatives section is the heart of the environmental impact statement. The no action alternative is the baseline to which the other alternatives are

compared. The requirement is to design the alternatives to sharply reflect the issues and provide a clear basis for choice among options by the decisionmaker and the public.

Step 2b. Alternatives Including The Proposed Action Compared And Documented By Impact. A second additional, and just as important, requirement of the alternatives section in the EIS is to present the significant environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. This portion of the alternatives section of an EIS is based on the information and analysis which is later developed in the sections on the affected environment and environmental consequences sections of the EIS.

Step 2c. Alternatives Including The Proposed Action Considers And Documents Mitigation Measures. The alternatives section should also include appropriate mitigation measures not already included in the design of the proposed action or alternatives.

Step 3a. Affected Environment — Description of Existing Conditions Being Significantly Affected. The third step of the basic impact methodology model is to document the affected conditions being impacted by the alternatives in some significant way. The EIS succinctly describes the environment of the area(s) to be affected or created by the alternatives under consideration. The affected environment is the baseline for comparing the effects of the alternatives. The descriptions should be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement should be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Useless bulk should be avoided and EISs should concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an EIS.

Although informative, there need be no documentation in the affected environment section of an EIS that does not relate to the significant issues identified during scoping (unless new significant issues and impacts beyond those identified during scoping are identified during the analytical analysis process), and the significant impacts identified in the environmental consequences section. In fact, other documentation is usually not needed and not helpful to the decisionmaker and public in understanding the significant environmental impacts resulting from the alternatives.

Step 3b. Affected Environment -- Incomplete Or Unavailable Information. A second additional, and just as important, requirement of the affected environment section in the EIS is to always make it clear when there is any incomplete or unavailable information relating to any reasonably foreseeable significant adverse effects on the human environment. If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the EIS.

However, if the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the federal agency shall include within the affected environment section a statement that such information is incomplete or unavailable. The next step in the environmental consequences section will address the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment.

Step 4a. Environmental Consequence -- Identifying And Documenting Significant Impacts The fourth and last step of the basic impact methodology model is to identify the significant environmental consequences of the alternatives. There are several statutory requirements for an EIS to identify significant impacts that are derived directly from NEPA.

- *102(2)(C) of NEPA — Significantly (Section 1508.27)*
- *102(2)(C) of NEPA — Affecting (Sections. 1508.3, 1508.8)*
- *102(2)(C) of NEPA — The quality of the human environment (Section 1508.14)*

The environmental consequences section forms the scientific and analytic basis of the EIS. Any direct, indirect, and cumulative effects from the alternatives and their significance must be analyzed and documented. The discussion will also include the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. The baseline for the comparison of the impacts resulting from the different alternatives is the "affected environment." In bullet summary, the following types of significant environmental impacts must be analyzed and documented as applicable.

- adverse
- beneficial
- short term
- long term
- direct
- indirect
- cumulative
- irreversible
- irretrievable

Step 4a. Environmental Consequence -- Incomplete Or Unavailable Information.

There is the requirement to always make it clear when there is any incomplete or unavailable information relating to any reasonably foreseeable significant adverse effects on the human environment. If the information relevant to reasonably foreseeable significant adverse impacts could not be obtained because the overall costs of obtaining it were exorbitant or the means to obtain it were not known, the federal agency shall include the following types of statements within the environmental consequences section:

1. that such information is incomplete or unavailable.
2. of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment.
3. summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment.
4. the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

The requirement of estimating significant adverse impacts based upon theoretical approaches or research methods generally accepted in the scientific community is crucial to the credibility of the environmental consequences section. Conclusionary statements do not help decisionmakers and the public understand the tradeoffs of significant environmental impacts, both beneficial and adverse. Bald statements of incomplete or unavailable data does not help either.

What does help toward the goal of an informed decisionmaker and informed public is to make it clear when there is any incomplete or unavailable information relating to any reasonably foreseeable significant adverse effects on the human environment and to estimate those effects by impact methodologies based on theoretical approaches or research methods generally accepted in the scientific community. Pure conjecture is not within the rule of reason.

Step 4c. Environmental Consequence Section Considers And Documents Mitigation Measures. The means to mitigate adverse environmental impacts, if not covered in the alternatives section of the EIS, are to be considered and documented in the environmental consequences section.

Step 4c. Environmental Consequence Section Includes Documentation Supporting Analysis Conclusions. One of the NEPA's toughest standards is the requirement to provide the rationale supporting the analysis and conclusion of significant impacts and/or the absence of significant impacts. However, NEPA, CEQ regulations,

BLM policy (i.e., NEPA Handbook), CEQ's 40 questions, and court cases are sources that clearly identify the requirement that the EIS describe some methodology(s) (i.e., the assumptions and assessment guidelines) used in analyzing the environmental consequences. This impact methodology information provides the decisionmaker and the public with a basis for understanding and judging the reliability of the impact analysis. These requirements do not demand or require a particular model or impact methodology to be used in estimating significant impacts. The federal agency is given the opportunity to develop impact methodologies to fit the specific on-the-ground conditions. The requirement is only to provide the assumptions and assessment guidelines/impact methodologies that were used to support the analysis and conclusion of significant impacts, and/or the absence of significant impacts. The following criteria are the standards.

- to ensure a logical and coherent record of NEPA compliance.
- to be analytic rather than encyclopedic.
- the analysis of impacts should be quantified to the extent possible.
- clarity of expression, logical thought processes, and rationale explanations.
- complete an objective evaluation of significant environmental impacts.
- find the most efficient method(s) of estimating potential impacts.
- substantive disagreements on interpretations of significance need a response.

A recommended impact methodology (i.e., assumptions and assessment guidelines/impact methodologies) used to support the analysis and conclusion of significant impacts and/or the absence of significant impacts is provided in Part V, "Recommended Impact Methodology."

V. RECOMMENDED IMPACT METHODOLOGY

The following is NEPA Design Group's recommended impact methodology which it feels could and should be used by all interdisciplinary team members. The recommended impact methodology is based upon significant planning issues identified during scoping and the agency's identification of the range of alternatives (see Part III, Basic Impact Methodology Model From NEPA). It is also based upon the concept of indicators and standards which will be addressed in this section. The most important concept of the impact methodology or "environmental consequences methodology" is that it uses the scientific method - it is not rocket science, but the process is logical, traceable, and subject to agency and public review. The methodology should identify the process to determine whether an impact is significant, or not, and the rationale (threshold) to support the significance determination.

An EIS is intended to provide decisionmakers and the public with a complete and objective evaluation of significant environmental impacts, both beneficial and adverse, resulting from a proposed action and all reasonable alternatives.

An EIS shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.

Environmental Consequences The five parts of the impact methodology are 1. issue, 2. impact, 3. indicator, 4. standard, 5. significance determination.

Significant Issue A significant issue is a subject or question of widespread public discussion or interest regarding management of the Hellgate Recreation Area. The impact methodology of identifying significant impacts starts first with the definition of the significant issues during scoping.

Significant Impact A significant impact is a change in the environment which if beyond a certain threshold become important. The components of a significant impact are its indicator, standard, and conclusion.

Effects, impacts, and consequences are synonymous. Effects may be direct, indirect, or cumulative. Impact predictions are compared to identified standards (i.e., maximum/minimum level of effect) beyond which the impacts become significant).

Indicator An indicator is a variable, either singly or in combination with another variable, which is taken as indicative of the condition of the overall issue. An indicator is the specific variable by which impacts are described. A comprehensive description of the indicator(s) are the documented conditions (i.e., affected environment) being impacted by the alternatives in some significant way (see steps 3a and 3b of Part III, Basic Impact Methodology Model From NEPA). The indicators in the affected environment provide a benchmark or baseline for enabling decisionmakers and the public to compare the magnitude and time effects of the alternatives.

Standard A standard is a measurable aspect of an indicator. Setting standards is a judgmental process; however, the process is logical, traceable, and subject to agency and public review (i.e., the scientific method).

A standard is the level, point, or value above which something will take place, or below which it will not take place. A standard provides a base against which a particular condition and/or change can be judged as acceptable or not. Standards or thresholds can be used to determine whether a change in an indicator or impact is significant (either beneficial or adverse).

Significance Determination A determination of significance requires a consideration of both context and intensity. To determine significance, impact predictions are compared to identified standards (i.e., maximum/minimum level of effect) beyond which the impacts become significant. The standard is the basis for identifying the conclusionary levels of an impact:

- significantly beneficial impact,
- beneficial impact,
- neutral impact,
- adverse impact, and
- significantly adverse impact.

4. Synthesis: Potential Method of Analysis Format (Recommendation). It is recommended that this potential method be brainstormed by DCVNRCA for comments on NEPA documents, protests, and legal appeals. The application/analysis applies to each individual issue/argument.

Comments Outline (e.g., comments, protests, legal brief, etc.)

1. Conclusion. What is the conclusion you want the BLM manager or judge to make after reading your issue/argument comments on a NEPA document, a protest, or a legal brief?
 - 1b. Themes
 - 1c. Summaries
 - 1d. Background: Alternatives (change agents) & Affected Baseline Environment
2. Standards/Criteria. What is the NEPA or other law that supports the issue/argument conclusion (BLM NEPA Handbook topics & Other)?
3. Application/Analysis. Explain how the law applies to each issue/argument and how the proposal fails to be in compliance (see Section IV.B.3).
 - a) Issue/Argument. Significant Scoping Issue and/or Public Issue Rejected
 1. Issue
 2. Reference/Quote of Environmental Document
 3. Issue/Argument
 - b) Application/Analysis
 1. Definition of Significant Impact
 2. Indicator (effects on issue indicator baseline from change agent: estimated quantity; units of measurement; probability)
 3. Standard for Indicator
 4. Significance Determination (context & intensity)
4. Findings/Conclusions

The bottom line is that the DCVNRCA needs its leaders to have a consensus/ownership of a standard format for DCVNRCA comments on NEPA documents, including protests, and legal appeals. And, of course, the standard can be deviated from once the “dance” is known by everyone.

The focus is all about others understanding DCVNRCA’s issues/arguments for better BLM management. All issues/arguments need a consistent explanation approach. The first job is to determine how to best help the BLM understand the NEPA compliance issues. And ultimately it is to assist/help the judges easily find and reference material from DCVNRCA’s documents on comments, protests, and appeals (i.e., easily understand arguments). Make no mistake, the more difficult it is for BLM, including ID team members (hopefully), and judges to understand DCVNRCA’s issues/arguments, the less satisfaction will be received, regardless of the merits.

C. Specific Thoughts and Recommendations For Sections J & K

The following is some specific thoughts and recommendations for Section J. - Determination of Significance (p. 72), and Section K. - BLM did not comply with NEPA Public Involvement requirements (p. 159).

1. Section J. - Determination of Significance (p. 72). I recommend that the following text be included in this section for each of the ten 40 CFR 1508.7 intensity standards/criteria.

- Issue/Argument
- NEPA Compliance Standards

a) Code of Federal Regulations (Recommendation)

40 CFR 1508.27 Significantly. “Significantly” as used in NEPA requires considerations of both context and intensity:

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

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

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment. [43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

40 CFR 1508.7 Cumulative impact. “Cumulative impact” is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions

regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 CFR 1508.8 Effects. “Effects” include: (a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

A NEPA document must describe the analytical methodologies sufficiently so that the public can understand how the analyses were conducted and why the particular methodologies were used (BLM. 2008, p. 55).

- 40 CFR 1500.1(b) Ensure that the environmental information made available to public officials and citizens is of high quality (i.e., includes accurate scientific analysis, expert agency comments, and public scrutiny).
- 40 CFR 1500.1(c) Foster better decision making by helping public officials make decisions based on an understanding of the environmental consequences of their actions.
- 40 CFR 1500.2(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public.
- 40 CFR 1500.2(d). Encourage and facilitate public involvement in decisions.
- 40 CFR 1500.6(b). To inform those persons and agencies who may be interested or affected.
- 40 CFR 1502.22 When there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.
- 40 CFR 1502.24. Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.
- 40 CFR 1506.6. Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.
- 40 CFR 1508.7. “Cumulative impact” is the impact which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions.
- 40 CFR 1508.27 Significantly. “Significantly” as used in NEPA requires considerations of both context and intensity (see previous).

b) BLM NEPA Handbook (Thoughts). The BLM ID team members’ responsibility for the analyses methodologies to determine significance in an EA and EIS is described in the BLM NEPA Handbook (BLM. 2008, p. 55). The handbook generally satisfies the BLM’s responsibilities to identify and develop methods and procedures for determining significant impacts (NEPA, Section 102(2)(B); 40 CFR 1502.24), or to impose requirements for it to happen in future environmental documents.

The real BLM NEPA Handbook problem is a lack of examples for scoping issue analyses methodologies like in the early U.S. Forest Service (USFS) and BLM methodologies (i.e., BLM’s approach – *Systematic Interdisciplinary Language For Environmental Analysis Under NEPA* - Haug, BLM. 1982; Haug, BLM 1984, *Determining Significance of Environmental Issues Under NEPA*; Haug, BLM 1984, *A Systematic Interdisciplinary Language For Environmental Analysis Under the National Environmental Policy Act*). Also illustrative is Fogleman’s *Threshold*

Determinations Under the National Environmental Policy Act (Fogleman. 1987), and the USFS' more recent *Numerical Visitor Capacity: A Guide to its Use in Wilderness* (USDOA USFS. 2010). The current ID team members responsibilities for analyzing effects methodologies follow (BLM. 2008, p. 55). (Recommendation).

Section 6.8.1.2 Analyzing Effects Methodology: A NEPA document **must describe** (emphasis added) the analytical methodology sufficiently so that the reader can understand how the analysis was conducted and why the particular methodology was used (40 CFR 1502.24). This explanation **must include** (emphasis added) a description of any limitations inherent in the methodology (emphasis added). If there is substantial dispute over models, methodology, or data, **you must recognize** (emphasis added) the opposing viewpoint(s) **and explain the rationale for your choice of analysis** (emphasis added)”(Chapter 6, Section 6.8.1.2 “Analyzing Effects” BLM NEPA Handbook (H-1790-1) (BLM. 2008, p. 55).

40 CFR 1502.22 Incomplete or Unavailable Information When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, **the agency shall always make clear that such information is lacking** (emphasis added).

40 CFR 1502.24. Methodology and Scientific Accuracy. Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

40 CFR 1507.3 Agency Procedures. (a) . . . each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures.

c) Use the CRAC Method of Legal Analysis for each of the ten DCVNRCA 40 CRF 1508.27 intensity issues/arguments as modified by Section IV.B.4, Synthesis: Potential Method of Analysis Format (Recommendation).

d) Review Fogleman (1987) for applicable court cases to each of the ten 40 CRF 1508.27 intensity standards/criteria (Recommendation).

- Attachment 6a. *Threshold Determinations Under the National Environmental Policy Act*. Fogleman 1987.
- Attachment 6b. Selected Information From *Threshold Determinations Under the National Environmental Policy Act*. Fogleman 1987.

2. Section K. NEPA Public Involvement Requirements (Recommendation). BLM did not comply with NEPA public involvement requirements (p. 159). Why? Need public involvement NEPA compliance standards in this section. I recommend that the following text be included in this section, or if it is already in the document, a reference to where it is.

a) Hard Look & Bald Conclusions. The ID team members for an EA must take a hard look at the environmental consequences, as opposed to reaching bald conclusions, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are insignificant in order to support a conclusion that an EIS is not required. A party challenging a EA/FONSI must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. The standard by which the USDI, Interior Board of Land Appeals (IBLA) reviews an EA has been set forth in numerous decisions (Walker, 2017. Appendix E). Most basically, an EA must (*Lynn Canal Conservation, Inc.* 167 IBLA 136. October 19, 2005):

- (1) **Take a hard look at the environmental consequences, as opposed to reaching bald conclusions,**
- (2) **Identify the relevant areas of environmental concern, and**
- (3) **Make a convincing case that environmental impacts are insignificant in order to support a conclusion that an EIS is not required.**

A hard look is about the absence of bald conclusions, which are professional opinions either standing alone, or without sufficient investigation, supporting data, and/or a convincing rationale. Bald Conclusions - *Sierra Club v. Cavanaugh*, 447 F.Supp. 427 (1978) (Appendix E)

The Congressional command that NEPA be complied with "to the fullest extent possible" requires that agency decisions regarding environmental impacts of proposed federal actions be made only after a full and good faith consideration of the environmental factors. *MPIRG v. Butz*, supra at 1320; *McDowell v. Schlesinger*, 404 F. Supp. 221, 253 (W.D.Mo. 1975). This good faith effort requires that the agency take a "hard look" at all potential impacts and when a negative determination is arrived at, with regard to preparation of an EIS, the agency must avoid making "**bald conclusions**" as to the magnitude or variety of potential effects of the proposed action.

Bald Conclusions - *McDowell v. Schlesinger*, 404 F. Supp. 221, 253 (W.D.Mo. 1975) (Appendix E)

Certain general requirements for agency threshold determinations have been developed, however. The agency must identify all areas of potential environmental concern flowing from the proposed action, and must take a "hard look" at all potential impacts so identified, including secondary impacts. **Sufficient investigation** (emphasis added) must be done and **sufficient data gathered** (emphasis added) to allow the agency to consider realistically and in an informed manner the full range of potential effects of the proposed action. In making a negative determination as to the applicability of § 102(2) (C) to a particular project, the agency must avoid making "**bald conclusions**" (emphasis added) as to the magnitude or variety of potential effects of the proposed action. Similarly, the agency is not permitted to base a negative decision as to the applicability of § 102(2) (C) upon **superficial reasoning or perfunctory analysis** (emphasis added). Rather for an agency's threshold decision that § 102(2) (C) does not apply to a particular proposed action to be upheld in review, **it must affirmatively appear from the administrative record, and from the written assessment** (emphasis added) where one is prepared, that the agency has given **thoughtful and reasoned consideration** (emphasis added) to all of the potential effects of the proposed action, and that a **convincing case** (emphasis added) has been made that the proposed impacts are insignificant **after a careful balancing of the relevant factors** (emphasis added). See, generally,

Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972); Arizona Public Serv. Comp. v. Federal Power Comm., 483 F.2d 1275 (D.C. Cir. 1973); Maryland-National Cap. Pk. & Pl. Comm. v. U. S. Postal Service, 159 U.S.App.D.C. 158, 487 F.2d 1029 (D.C. Cir. 1973); First National Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973). In any event, the agency must consider

b) Improving Public and Agency Involvement (Recommendation)

(1) Training

(a) BLM NEPA Handbook Training (Bill Cohen Summit Report. 2015, pps. 6 - 7). Training may be needed for both the public and for agency staff. Education could include guidance about effective use of scoping, purpose of the Federal Advisory Committee Act, the role of the public in making NEPA an effective decisional tool, and the use of modern technology such as social media for information exchange.

Coordination among different agencies and coordination of interactions between the public and agencies would increase involvement and ensure timely involvement. This could be done by requiring a default status or “opt out” for cooperating agencies, providing early public notice for EAs, amending regulations to encourage early engagement, funding an interagency permitting center, and/or creating bridge positions between technical experts and decision-makers.

(b) Public Comments For Pickett West Forest Management Project Environmental Assessment (EA) (Walker, JS&PSS, HNAHS. 2017, pps. 3 - 4). The following quotes are comments on the EA for the purpose of demonstrating that BLM NEPA Handbook training is needed for both the public and for agency staff.

Fifth, I was disappointed not to find references to the BLM NEPA Handbook (BLM. 2008) in BLM’s PI outreach efforts for the DOI-BLM-ORWA-MO70-0006-2016-EA Pickett West Forest Management Project EA, or handbook training offered by BLM on the NEPA rules for how the public can get involved. Hopefully, I just missed them.

The CEQ’s 2007 publication, *A Citizen’s Guide to the NEPA: Having Your Voice Heard* (CEQ 2007, p. 2 - <https://www.blm.gov/programs/planning-and-nepa/what-informs-our-plans/nepa>; Appendix D), was found on the BLM’s Washington Office web page for “Planning and NEPA.” It corroborates the U.S. Supreme Court’s opinion of NEPA’s twin aims, in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.* (CEQ 2007, pps. 9 - 10).

*“To implement these policies, NEPA requires agencies to undertake an assessment of the environmental effects of their proposed actions prior to making decisions. **Two major purposes of the environmental review process are better informed decisions and citizen involvement** (emphasis added), both of which should lead to implementation of NEPA’s policies.”* (CEQ 2007, p. 2).⁴

The binding 1978 CEQ regulations (40 CFR Parts 1500-1508) require federal agencies to create their own implementing procedures that supplement the minimum requirements based on each agency’s specific mandates, obligations, and missions (40 CFR 1507.3). I could not find the present BLM NEPA Handbook on the normal BLM web sites (e.g., BLM Medford District Office, BLM Oregon/Washington State Office, USDI BLM Washington Office, etc.), even when I suspected there was an update to the 1988 *BLM National Environmental Policy Act Handbook H-1790-1* that I was familiar with. The latest version of

BLM's implementing procedures I found is the 2008 *BLM National Environmental Policy Act Handbook* (BLM. 2008).

It would be unusual if BLM does not advertize and share the BLM NEPA Handbook during public outreach as the handbook provides the specific rules for developing EAs and EISs, and how the public can become involved in a very complex process. In fact, the process is so complicated (i.e., a complex mass of diverse laws, regulations, and court precedence) that it would be appropriate for BLM to develop a "Citizen Handbook to the BLM Medford District Office NEPA Process." For example, how much does the average citizen know about NEPA? The answer is usually "not much to nothing," and that answer is not from a small minority. It is easily the answer from the huge majority of the U.S. citizenry. Hardly anybody, including experts, knows everything that's in the seemingly infinite number of articles, books, and court opinions that describe the evolving NEPA process. However, it is known that the public cares about management of the public lands BLM administers for citizens. That's why a "Citizen Handbook to the BLM Medford District Office NEPA Process" should be created. The goal is to make PI in NEPA projects more accessible and understandable. This includes providing public access to individual members of the ID team to share their analyzing effects methodologies and any resulting significant impacts.

- 40 CFR1506.6 Public Involvement: "*Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.*" (BLM. 2008, p. 2).
- "*We*" (BLM) believe it will help "*you*" (the reader) help us in meeting the legal requirements of the NEPA (BLM. 2008, p. 2).

It would be especially troubling when BLM's own NEPA handbook makes a point of believing the public will help it in meeting the legal requirements of NEPA (i.e., if the public knows about the handbook guidance for PI opportunities), but its PI program does not acknowledge it during public outreach for the Pickett West Forest Management Project EA. This scenario would not be in compliance with the PI test of 40 CFR 1506.6.

It would be helpful in promoting PI toward compliance with NEPA if the following BLM NEPA references for preparation of NEPA documents were published on the BLM Medford District web page. The purpose is public understanding of how the analysis was conducted and why the particular methodology was used, and, most importantly, the rules for PI in a BLM NEPA process.

(2) Access To Information

(a) Lack of Timely Public and Agency Involvement (Bill Cohen Summit Report. 2015, pps. 6 - 7). Because of a lack of timely public and agency involvement, some decisions are being made without all the relevant information. In order to improve public and agency involvement, the participants discussed whether training, access to information, and/or better coordination is needed.

(b) ID Team Members Not Accessible To Public (Walker, JS&PSS, HNAHS. 2017, pps. 4 - 15). The big picture was that BLM never alerted the public that there was even a BLM NEPA Handbook (BLM. 2008), let alone provide access to the NEPA process through training, nor by making the ID team members available to the public for the purpose of understanding the specialist's EA descriptions of their individual analytical methodologies sufficiently so that the reader could understand how the analysis was conducted and why the particular methodologies were used.

In this case the BLM's must "Analyzing Effects Methodology" implementing regulations responsibility for its EA and EIS ID team member is identified in the BLM NEPA Handbook, Chapter 6 "NEPA Analysis" (40 CFR 1507.3; BLM, 2008, pps. 33 - 68). "*Chapter 6 identifies the essential analytical elements that are common to NEPA analysis, regardless of whether you are preparing an Environmental Assessment or an Environmental Impact Statement.*" (BLM, 2008, p. ix). The handbook's Section 6.8.1.2 Analyzing Effects Methodology provides "*A NEPA document must describe the analytical methodology sufficiently so that the reader can understand how the analysis was conducted and why the particular methodology was used.*" I acknowledge the BLM NEPA Handbook has a forward policy of a "common NEPA analysis approach" for both EAs and EISs as it has evolved to expand PI in more phases of the EA analysis process. Thank you BLM. This is also efficient as the focus of both the EA and EIS has always been in determining significant, or non-significant, impacts.

The following summary addresses the 11 page public comments section on ID team members not accessible to public (Walker, JS&PSS, HNAHS, 2017, pps. 4 - 15).

In summary, public access to the ID team members is a function of the information the public needs to understand "significant" and "non-significant" impacts, and the NEPA mandate to provide this information in environmental documents. This access is part of NEPA's "twin aims" and the "hard look" mandate. The CEQ corroborates NEPA's twin aims as the two major purposes of the environmental review process: 1. better informed decisions and 2. citizen involvement.

Federal agencies are required to create their own supplemental implementing procedures to the CEQ regulations. The latest version of BLM's implementing procedures is the 2008 *BLM National Environmental Policy Act Handbook*. The BLM NEPA Handbook for the ID team member's "must describe" analysis effects methodologies responsibility are common to EAs and EISs.

Per the BLM NEPA Handbook, minimal NEPA public involvement (PI) standards require access by the public to ID team members, one-on-one, for the purpose of understanding their individual "hard look" impact analyses work, and avoidance of bald conclusions. This one-on-one interaction would be best during scoping for both EAs and EISs, but after the EA or EIS is made available for public comment is also a significant NEPA compliance standard. The bottom line, the BLM EA and EIS ID team member's responsibility for determining significance, or non-significance, through its "must describe" analysis effects methodologies is identified in the BLM NEPA Handbook as a "shall" purpose requirement (i.e., "must" requirement) responsibility (NEPA, Section 102(2)(B); 40 CFR 1502.22, 1502.24 and 1507.3; Section 6.8.1.2, BLM NEPA Handbook, 2008, p. 55).

There is an exciting possible future of understanding, if not agreement, between interested public members and the BLM ID team members after NEPA documents describe the following.

1. Analytical analyses effects methodologies used by the ID team members to meet the hard look doctrine and avoid bald conclusions standard,
2. Any limitations inherent in the methodologies, including any incomplete or unavailable information,
3. Opposing viewpoint(s), and rationale for ID team members' choice of analysis methodologies, and
4. Assumed modifications to some methodologies after one-one-one meetings with the public.

The final ID team members' analytical analyses effects methodologies could be part of the recommended BLM "Citizen Handbook to the BLM Medford District Office NEPA Process." Even if there were future refinements of these methodologies, they would act as sterling examples for scoping issue analyses effects

methodologies like BLM's earlier approach (e.g., *Systematic Interdisciplinary Language For Environmental Analysis Under NEPA*, etc.).

Some final thoughts for BLM and the public – Citizens who want to raise issues should do so at the earliest possible stage in the process as federal agencies, including BLM, are much more likely to evaluate a new alternative or address a concern if it is raised in a timely manner (i.e., before time and investment have been expended toward meeting an established product schedule). For the same reasons of efficiency the BLM should do more than make a PI opportunity available. It should facilitate and encourage early PI as part of its “*Make diligent efforts to involve the public*” NEPA compliance standard during scoping and the development of the environmental documents, as well as during any public comment periods.

c) Ensuring Accountability for Mitigation and Monitoring (Recommendation; Bill Cohen Summit Report. 2015, p. 2). Unless mitigation efforts are required to be monitored, very little effective mitigation is actually taking place and a wealth of useful data is being lost. Engage the public in monitoring.

Further, because so many EAs result in a mitigated FONSI, the potential that the current failure to require monitoring may lead to a failure of mitigation and the loss of valuable scientific data, or worse, significant impacts to an important ecosystem component. Requiring a mitigation and monitoring action plan (and its funding) could go a long way to addressing this problem. Such a plan would include a process for administrative review, would consider climate change, and would benefit from a Presidential executive order directing the agencies to engage in early planning, engage the Office of Management and Budget (OMB) in agencies' management of the process, and fully fund commitments made in the NEPA analyses.

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 1. *Lee & Jody Sprout*, 160 IBLA 9, 12-13 (2003)
 2. *Kendall's Concerned Area Residents*, 129 IBLA 130, 138 (1994)
 3. *Southern Utah Wilderness Alliance*, 123 IBLA 302, 308 (1992))

All IBLA opinions eventually lead back to:

 1. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681-82 (D.C. Cir. 1982),
 2. and the phrase "convincing case" since its original appearance in *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973).
 - USDI. October 15, 2008. *43 CFR Part 46 Implementation of the National Environmental Policy Act (NEPA) of 1969; Final Rule*. Federal Register / Vol. 73, No. 200 / Wednesday, October 15, 2008 / Rules and Regulations, pages 61292 - 61323. Washington, DC.
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 - Chapter 1: Protection and Enhancement of Environmental Quality
Last Modified 8/26/2012; Creation Date 2/2/2012
<https://elips.doi.gov/ELIPS/DocView.aspx?id=1717>
 - Chapter 2: Relationship to Decision Making
Last Modified 8/26/2012; Creation Date 2/2/2012
<https://elips.doi.gov/ELIPS/DocView.aspx?id=1731>
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Last Modified 8/26/2012; Creation Date 2/2/2012
<https://elips.doi.gov/ELIPS/DocView.aspx?id=1733>
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RESEARCH (Thoughts)

The following research topics resulted from this NEPA review, especially the 2015 Bill Cohen Summit Report, but they are not part of this review. However, they might be valuable for that purpose or a future better understanding of NEPA.

- Bill Cohen Summit Report: NEPA Summit 2 - 3 December 2014, May 2015. On December 2 and 3, 2014, the Environmental Law Institute, the Nicholas Institute for Environmental Policy Solutions at Duke University, and Perkins Coie LLP sponsored a two-day conference on the National Environmental Policy Act (NEPA). Entitled the Cohen NEPA Summit.

In order to focus efforts and encourage brainstorming, the Cohen Summit participants met in small workgroups to discuss five issues that they agreed were important areas of NEPA practice needing reform. The workgroups then examined the following agreed upon subjects in order to come up with solutions and ideas:

- Building a 21st century environmental impact evaluation model;
- Improving document preparation and access;
- Improving public and agency involvement;
- Ensuring accountability for mitigation and monitoring; and
- Presenting creative concepts for resourcing NEPA.

- General Litigation Section of the Environmental and Natural Resources Division of the Department of Justice versus Branch of Environmental Law, Division of General Law Office of the Solicitor (and its Reports on Significant NEPA Developments: 1978 -1982).

Branch of Environmental Law, Division of General Law Office of the Solicitor?

- NEPA Topics: Environmental Law Institute (ELI), Nicholas Institute for Environmental Policy Solutions at Duke University, Perkins Coie LLP (law firm), the American Law Institute, and the American Bar Association.
- Building a 21st Century Environmental Impact Evaluation Model (Bill Cohen Summit Report. 2015, pps. 4 - 5). Although this idea was put forth as a total reimagining of NEPA as a fully iterative process for the 21st century, the workgroups largely focused on applying adaptive management as a technique to expedite the process, acting in the face of uncertainty, incorporating monitoring, and ensuring mitigation is executed. This one change could fundamentally alter the existing practices so that the methods improve and data are not lost.

Because NEPA practice is the product of 40 years of case law, it may be difficult to change the practice without rethinking the NEPA regulations. But, in order to reinvigorate NEPA for the 21st century, some participants believed that certain steps must be taken now without contradicting existing case law.

Provocative ideas that were discussed and debated include:

- Expand the use of adaptive management to act in the face of uncertainty;
 - Introduce sanctions and required remedies for mitigation failure
 - Engage the public in monitoring
 - Conduct more aggressive public and analytical scoping
- Provide rearranged and more readable web-based documents; and
- Combine the Final EIS and Record of Decision.

- Improving Document Preparation and Access (Bill Cohen Summit Report. 2015, p. 5). The participants agreed that improving document preparation and access would benefit the public (by making documents

more readable and accessible) as well as agency staff and decision-makers (by making existing information easier to locate and use, and by making documents more readable).

- Sam Kalen, The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy, 33 Wm. & Mary Envtl. L. & Pol'y Rev. 483 (2009), <http://scholarship.law.wm.edu/wmelpr/vol33/iss2/>
- Improving Public and Agency Involvement (Bill Cohen Summit Report. 2015, pps. 6 - 7). Because of a lack of timely public and agency involvement, the participants agreed that some decisions are being made without all the relevant information. In order to improve public and agency involvement, the Summit participants discussed whether training, access to information, and/or better coordination is needed.

Training may be needed for both the public and for agency staff. Education could include guidance about effective use of scoping, purpose of the Federal Advisory Committee Act, the role of the public in making NEPA an effective decisional tool, and the use of modern technology such as social media for information exchange.

Better access to documents, data, and personnel would improve public and agency involvement. Actions that might further this goal include the establishment of a publicly accessible, searchable website or set of websites with all pending and completed EAs and EISs, including geolocation. EPA's "NEPA Assist" is a recent example of this type of tool.

Finally, coordination among different agencies and coordination of interactions between the public and agencies would increase involvement and ensure timely involvement. This could be done by requiring a default status or "opt out" for cooperating agencies, providing early public notice for EAs, amending regulations to encourage early engagement, funding an interagency permitting center, and/or creating bridge positions between technical experts and decision-makers.

- NEPA Case Law Review
National Association of Environmental Professionals (NAEP)
https://ceq.doe.gov/laws-regulations/case_law.html
<https://www.epa.gov/nepa/national-environmental-policy-act-policies-and-guidance>
Viewed August 7, 2017
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- Access to Decision-Makers (Bill Cohen Summit Report. 2015, pps. 10 - 11). The purpose of the NEPA process is to inform decision-makers of the potential of their actions to affect the quality of the human environment. NEPA does not require a specific outcome but requires that the decision-makers as well as the public have been made aware of the potential effects of the action.

Decisions about a project or program under consideration that are made outside of the NEPA process without any engagement or discussion of the decision with the resource experts, the NEPA project manager, or the public minimize the positive impact NEPA can have. This leads to not only program managers and decision-makers viewing NEPA as a check-the-box compliance requirement instead of a decision-making process, but also sends a message throughout the organization that NEPA is perfunctory.

In most agencies, NEPA staff is not organizationally co-located with the program staff who are the project proponents and/or decision-makers nor are they at a senior level to monitor the NEPA program. As a result, agency program staff, and sometimes the NEPA staff, tend to see their responsibilities as separate and distinct rather than as part of the integrated decision-making process that NEPA intended. Similarly, agencies are increasingly leaving the management of the NEPA process to junior-level field staff who

have limited or no ability to communicate with the decision-makers in the regions and at headquarters who will be actually making decisions based on the NEPA analyses that the NEPA staff are preparing. In turn, junior-level staff contracts for the analyses to outside vendors.

To address this challenge, agency heads and their political deputies could:

- Establish a Chief Sustainability Officer that helps to ensure that NEPA analyses are integrated with agency decision-making processes at the highest levels. This person would be a senior-level person with the trust of the agency head and the gravitas to command the respect of the entire agency. It could be a political appointee position.
- Review organizational and office structures to ensure that execution of environmental policy is integrated with program and project development.
- Review field and headquarters office structures to ensure that NEPA staff is on the same organizational level as program decision-making staff and the General Counsel.
- Ensure that NEPA staff does not report directly to program staff with decisionmaking authority on their projects.

- Major Federal Cases Interpreting NEPA

The Council on Environmental Quality publishes a summary of major Federal cases interpreting the National Environmental Policy Act.

<https://sites.google.com/a/alaska.edu/nepa/major-federal-cases-interpreting-nepa>

Viewed August 7, 2017

- Major Cases Interpreting the National Environmental Policy Act

National Association of Environmental Professionals (NAEP)

https://ceq.doe.gov/docs/laws-regulations/Major_NEPA_Cases.pdf

Viewed August 7, 2017

- I. Agencies' Obligation to Comply with NEPA to "fullest extent possible"
- II. "Reasonable Alternatives"
- III. Defining "Significance"
- IV. Defining "Major Federal Action"
- V. Judicial Review of Agency Actions
- VI. Small Federal Handle Issue
- VII. Connected Actions
- VIII. Cumulative Impacts
- IX. Supplementing NEPA Documents
- X. Extraterritorial Application of NEPA
- XI. Standing
- XII. Functional Equivalence Doctrine
- XIII. Miscellaneous
 - A. CEQ NEPA Regulations
 - B. CEQ's Emergency Provision
 - C. Disposition of Federal Property/Scope of Analysis
 - D. Scope of Analysis/@Psychological Stress@
 - E. Classified Information
 - F. Readability Issue
 - G. Environmental Assessments

- Invest in "Streamlining" (Bill Cohen Summit Report. 2015, pps. 11 - 12). While there is much talk and Congressional support for "streamlining" NEPA, there are few analyses with details regarding what investments may be required that would be more than a one-dimensional "do it faster." Few, if any, at the Summit thought that NEPA analyses should not be reviewed to make them more efficient. There are

classical management techniques to make document production move faster. However, to gain these efficiencies and meet the spirit of the law, a more thorough analysis would include making the right investments to ensure performance for the dollars invested. In 2014 the General Accounting Office, at the request of Congress, did a survey and concluded:

“Little information exists on the costs and benefits of completing NEPA analyses. Agencies do not routinely track the cost of completing NEPA analyses, and there is no governmentwide mechanism to do so, according to officials from CEQ, EPA, and other agencies GAO reviewed.”

An investment in monitoring and adaptive management may reduce the amount of time required to complete an analysis. It could also bring maturity to environmental impact analysis. There is almost always pressure to get a document done at the cheapest price point. This really is often a stranded investment because all the predictions about long range impacts are fraught with potential errors and all the mitigation that is promised is not delivered, and the mitigation that is delivered is not monitored to ensure its effectiveness. A better method may be to admit our prediction weaknesses, invest in a solid monitoring program, set performance standards, and practice sound adaptive management.

- Agencies Focus on Trying to Make Their NEPA Analyses Litigation Proof General Counsel offices within federal agencies understandably have the protection of the agency from litigation as one of their primary mission objectives. With 40 years of experience in case law interpreting NEPA to rely upon, the Office of the General Counsel (OGC) staff is often reluctant to embrace new and creative ways of conducting the NEPA process. This is especially true in agencies where there is a long history of litigation such as the Forest Service and Department of Transportation. The result is that agencies may become focused on trying to make their NEPA analyses litigation proof, which has resulted in incredibly lengthy documents (contrary to CEQ regulations) and a misplaced focus on documentation instead of the decision-making process intended by NEPA. While the courts have given federal agencies great deference under NEPA, and the CEQ regulations provide inherent flexibility in how to apply the statute, the fear of litigation has created an inherent tension between the creative and efficient application of the statute as a decision-making process and the OGC’s desire to protect the agency from protracted litigation. Differences of opinion as to the preferred approach should not be left to OGC staff alone unless the proposed approach is clearly in violation of the statute or regulations (Bill Cohen Summit Report. 2015, p. 13).
- Monitoring Could Lead to Supplemental Analysis At the Summit, a participant formerly with DOT recommended combining the Final EIS and the Record of Decision. This suggestion may save time and money, it may have unintended consequences, but it certainly would require a change to the CEQ regulations. The regulations could actually slow the adoption of an adaptive management model. Legal counsels have argued that if an agency monitors under the adaptive management approach and finds inaccurate predictions, the agency would need to conduct a supplemental analysis. The agencies are likely to consider this a penalty of monitoring and believe it gives litigants a second shot at stopping a project (Bill Cohen Summit Report. 2015, p. 14).
- How Citizens can Comment and Participate in the National Environmental Policy Act Process
Environmental Protection Agency
<https://www.epa.gov/nepa/how-citizens-can-comment-and-participate-national-environmental-policy-act-process>
Viewed August 7, 2017
When can citizens participate during the National Environmental Policy Act (NEPA) process?
What is scoping?
How can citizens comment on a NEPA document?
- The National Environmental Policy Act (NEPA)
The National Preservation Institute

<https://www.npi.org/nepa>
Viewed August 7, 2017

NEPA

NEPA

What is NEPA?

What are "Cultural Resources"?

U.S. Government Policy Under NEPA

NEPA Terminology

The NEPA Review Process

NEPA Regulations

Suggestions for Instructional Use

SPECIFIC TOPICS

Categorical Exclusion

Analyst's Tips

Reviewer's Tips

Environmental Assessments and Findings of No Significant Impact

Analyst's Tips

Reviewer's Tips

Environmental Impact Statement and Records of Decision

NEPA and Section 106 of the National Historic Preservation Act

Substituting NEPA for Section 106 Review

- Federal Advisory Committee Act
- Bill Cohen Summit Phase II Sometime in the fall of 2015 a Bill Cohen Summit Phase II will be convened. From this Phase II, the vision to develop a professional report, which would include the 'thinking' of the professional NEPA community, broader dissemination in the environmental community, and recommendations for a new Administration in January 2017 would be finalized (Bill Cohen Summit Report. 2015, p. 16).

AND ON, AND ON, AND ON

