The Hard Look and Bald Conclusions (Appendix E)
U.S. Department of the Interior, Interior Board of Land Appeals (IBLA)
June 20, 2017 Letter/Email to BLM Medford: EA Testimony Comments

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

June 20, 2017

- **June 20, 2017 Public Comments Letter/Email to Don Ferguson, Public Information Specialist, BLM Grants Pass Interagency Office** from Mike Walker, Chair Hugo Justice System & Public Safety Services (JS&PSS) Exploratory Committee, Hugo Neighborhood Association & Historical Society.

  Subjects
  Subject: Public Comments For the DOI-BLM-ORWA-MO70-0006-2016-EA Pickett West Forest Management Project Environmental Assessment (EA)
  Subject: 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

  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
  Appendix E. The Hard Look and Bald Conclusions

Appendix E. The Hard Look and Bald Conclusions
June 20, 2017 Letter/Email to BLM Medford: EA Testimony Comments

The following references to a "Hard Look and Bald Conclusions" are not comprehensive. It is not know if they are the final majority opinion of the experts. They are random samples of references that the author discovered in his limited web search of the topics. They are arranged in chronological order (i.e., most recent to oldest), with a special emphasis on the U.S. Department of the Interior (USDI), Interior Board of Land Appeals (IBLA) as the USDI is the federal department over the BLM.

U.S. Department of the Interior, Interior Board of Land Appeals (IBLA)
https://www.doi.gov/oha/organization/ibla
Visited June 18, 2017

The Interior Board of Land Appeals (IBLA) is an appellate review body that exercises the delegated authority of the Secretary of the Interior to issue final decisions for the Department of the Interior. Its administrative judges decide appeals from bureau decisions relating to the use and disposition of public lands and their resources, mineral resources on the Outer Continental Shelf, and the conduct of surface coal mining operations under the Surface Mining Control and Reclamation Act. Located within the Department's Office of Hearings and Appeals, IBLA is separate and independent from the Bureaus and Offices whose decisions it reviews.

IBLA has the authority to consider the following types of appeals from a variety of decisions of the Bureau of Land Management (BLM), including but not limited to decisions regarding mining, grazing, energy development, royalty management, timber harvesting, wildfire management, recreation, wild horse and burro management, cadastral surveys, Alaska land conveyances, rights of way, land exchanges, and trespass actions. IBLA is headed by a Chief Administrative Judge. IBLA's decisions are final for the Department and may be reviewed by the United States district courts.

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 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., Lee & Jody Sprout, 160 IBLA 9, 12-13 (2003); Kendall's Concerned Area Residents, 129 IBLA 130, 138 (1994); 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).

The rest of this paper consists of the highlights of the following IBLA cases.

2017. NEPA, FLPMA, and Impact Reduction: an Empirical Assessment of BLM Resource Management Planning and NEPA in the Mountain West
2016. Coalition for Responsible Mammoth Development, et al. 187 IBLA 141 Decided March 18, 2016
2012. Southern Utah Wilderness Alliance IBLA 2011-165 Decided September 6, 2012
2008. Orion Energy, LLC 175 IBLA 81 Decided June 30, 2008
2006. Wyoming Outdoor Council, et al. IBLA 2003-358, 2004-52 Decided September 21, 2006
2006. Wilderness Watch, et al. IBLA 2003-72 Decided February 17, 2006
2005. Lynn Canal Conservation, Inc. 167 IBLA 136 Decided October 19, 2005
2004. In RE Stratton Hog Timber Sale IBLA 2001-222 Decided January 23, 2004
2003. Lee and Jody Sprout Dick and Shauna Sprout IBLA 2001-332, 2001-333 Decided July 29, 2003
2000. Klamath-Siskiyou Wildlands Center, 153 IBLA 110, 121-22 (2000)
2000. *Rosebud Sioux Tribe v. Gover*, 104 F. Supp. 2d 1194 (D.S.D. 2000)
1998. Fort Belknap Community Council, 144 IBLA 92, 101-102 (1998)
1994. Kendall's Concerned Area Residents IBLA 90-112 Decided April 15, 1994
1992. Southern Utah Wilderness Alliance. IBLA 89-73 Decided June 25, 1992
1990. Idaho Natural Resources Legal Foundation, Inc., et al. IBLA 88-631 Decided June 21, 1990
1990. Rex Kipp, Jr. Justin Kipp. IBLA 88-569 Decided May 30, 1990
1988. Elberta M. Taylor Et Al. IBLA 86-1617 Decided June 14, 1988
1987. Idaho Natural Resources Legal Foundation, Inc. IBLA 86-1391 Decided February 26, 1987
1984. In RE Thompson Creek Timber Sale IBLA 82-1325 Decided June 7, 1984
1984. Defenders of Wildlife IBLA 83-464 Decided February 13, 1984
1983. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.

1983. Southwest Resource Council, Inc., 73 IBLA 39 (1983).
1983. Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n. 6 (1983)
1983. In RE Lick Gulch Timber Sale IBLA 81-394 Decided April 28, 1983
1982. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982)
1980. Highland Co-Op. v. City of Lansing, 492 F. Supp. 1372 (W.D. Mich. 1980)
1978. Sierra Club v. Cavanaugh, 447 F. Supp. 427 (D.S.D. 1978)
1975. *McDowell v. Schlesinger*, 404 F. Supp. 221, 253 (W.D.Mo. 1975)
1974. *Hanly v. Kleindienst*, 471 F.2d 823, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) [on appeal following second remand, 484 F.2d 448 2d Cir. 1973), cert. denied, 416 U.S. 936 (1974)].
1973. *Maryland Capitol Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973)

2017. NEPA, FLPMA, and Impact Reduction: an Empirical Assessment of BLM Resource Management Planning and NEPA in the Mountain West

BY John Ruple & Mark Capone
Environmental Law [Vol. 46:953] Pages - 953 - 978
Lewis & Clark Law School
1/24/2017
https://law.lclark.edu/live/files/23293-46-4ruplecaponepdf
viewed June 17, 2017

NEPA has proven to be a controversial statute, with supporters claiming that it enhances public involvement and leads to environmentally aware decision making.[4] Detractors contend that NEPA is unduly burdensome and unnecessarily expensive, that it results in unnecessary and unreasonable project delays, and that the burden of compliance outweighs speculative environmental benefits.[5] **These competing claims are difficult to evaluate because NEPA is a purely procedural statute, and statutory compliance is measured with regard to the adequacy of the investigation rather than the environmental impacts resulting from the final decision** (emphasis added).[6] Indeed, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[7] Furthermore, as the United States Government Accountability Office explained recently, "agency activities under NEPA are hard to separate from other environmental review tasks under federal laws, such as the Clean Water Act and the Endangered Species Act; executive orders; agency guidance; and state and local laws."[8]

Footnotes
1. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370(h) (2012).
2. Id. § 4332(2)(C). 3 40 C.F.R. §§ 1501.3–.4 (2015).
4. See Daniel R. Mandelker et al., NEPA Law and Litigation § 11:2 (2016) (summarizing the arguments of supporters and detractors of NEPA).
5. Id.
6. Md.-Nat'l Capital Park & Planning Comm'n v. U.S. Postal Serv., 487 F.2d 1029, 1040 (D.C. Cir. 1973) ("There are a number of criteria that can be used by a court to make such a determination. First, did the agency take a 'hard look' at the problem, as opposed to bald conclusions, unaided by preliminary investigation? . . . Second, did the agency identify the relevant areas of environmental concern?").
7. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).
8. U.S. Gov't Accountability Office, GAO-14-370, National Environmental Policy Act: Little Information Exists on Nepa Analyses 11 (2014); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

2016. Coalition for Responsible Mammoth Development, et al. 187 IBLA 141 Decided March 18, 2016

A BLM decision to approve a plan for developing geothermal resources will be affirmed where BLM prepared an EIS that took a **hard look at the significant environmental consequences** (emphasis added) of drilling geothermal wells and constructing, operating, maintaining, and IBLA 2013-222 & 223 187 IBLA 142 decommissioning a geothermal energy-generating plant, and the appellant has failed to carry its burden to demonstrate, with objective proof, that BLM did not, as required by section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006), adequately consider the likely individual and cumulative impacts on an endangered fish species, mule deer, wetlands and other waters of the United States, surface and groundwater, geothermal resources, and air quality.

BLM is required by section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), to supplement an EIS only when **new information or circumstances** (emphasis added) demonstrate that the remaining Federal action will affect the quality of the human environment in a significant manner or to a significant extent not already considered in the EIS. An appellant fails to demonstrate that supplementation is required based on the mere assertion that the future adoption of measures for avoiding or mitigating adverse impacts to air quality and groundwater, in accordance with the approved plan, are likely to significantly change the expected impacts of a BLM decision to approve a plan for developing geothermal resources.

2012. Southern Utah Wilderness Alliance IBLA 2011-165 Decided September 6, 2012

A BLM decision to proceed with a proposed action, based on an EA tiered to an Environmental Impact Statement, will be upheld where BLM has taken a **hard look at the potentially significant environmental consequences** (emphasis added) of doing so, and its decision is supported by an administrative record that establishes that a careful review of environmental impacts has been made, all relevant areas of environmental concern have been identified, and BLM has made a **convincing case** (emphasis added) that no significant impact that was not addressed in the Environmental Impact Statement will result or that any such impact will be eliminated or reduced to insignificance by the adoption of appropriate mitigation measures. A party challenging a BLM decision must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action.

A BLM decision to proceed with a proposed action, absent preparation of an EIS, will be upheld under section 102(2)(C) of NEPA, where the record demonstrates that BLM has considered all relevant matters of environmental concern, taken a **“hard look” at potential environmental impacts, and made a convincing case** (emphasis added) that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. An appellant seeking to overcome such a decision must carry its burden of demonstrating, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA.

2008. Orion Energy, LLC 175 IBLA 81 Decided June 30, 2008

BLM properly authorizes rights-of-way for access roads across public lands to private lands, absent preparation of an EIS, where, in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000), it has taken a **hard look at the environmental consequences** (emphasis added) of issuing the rights-of-way, considering all relevant matters of environmental concern, and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. BLM’s decision will be set aside where the appellants demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action or otherwise failed to abide by the statute.

2006. Wyoming Outdoor Council, et al. IBLA 2003-358, 2004-52 Decided September 21, 2006

A BLM decision dismissing a protest challenging the approval of a competitive oil and gas lease sale will be affirmed as to the sale parcels for which the appellant has established standing, when the record shows that existing environmental documentation provided BLM with a **hard look at the environmental consequences** (emphasis added) of leasing, supporting the conclusion that the impacts from exploration and development of coal bed methane would not be significantly different from those associated with conventional oil and gas exploration and development.

2006. Wilderness Watch, et al. IBLA 2003-72 Decided February 17, 2006

NEPA is a procedural, not a substantive, statute and thus does not mandate a substantive outcome; it surely does not mandate a FONSI each time an EA is prepared. Rather, if the agency chooses to, it may prepare an EA instead of an EIS for a proposed action. Then it may decide to go forward with the action on the basis of the EA if it makes a corresponding finding (amply supported by the facts of record) that there is no significant impact (a FONSI), subject to agency rules and those of theCouncil on Environmental Quality (CEQ) at 40 CFR Subpart 1500. If, by contrast, the analysis projects a significant impact, the EA is insufficient and an EIS is required. An EA thus serves to (1) provide evidence and analysis for determining whether to prepare an EIS or a FONSI; (2) aid an agency's decisionmaking process when no EIS is necessary; and (3) facilitate preparation of an EIS when one is necessary. 40 CFR 1508.9; Southern Utah Wilderness Alliance, 166 IBLA 270, 277 (2005). To support a FONSI, and, hence, the conclusion that an EIS is not required, an **EA must take a hard look at the environmental consequences of a proposed action, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts from it are insignificant** (emphasis added). Lee & Jody Sprout, 160 IBLA 9, 12-13 (2003); Kendall's Concerned Area Residents, 129 IBLA 130, 138 (1994).

Applying these principles here, it is clear that BLM failed to employ the EA in the correct manner required in 40 CFR 1508.9, because the EA does not meet this test in supporting a FONSI. **The EA took a hard look at environmental consequences and generally identified relevant areas of environmental concern, but failed to make a convincing case that the identified impacts were not significant** (emphasis added).

2005. Lynn Canal Conservation, Inc. 167 IBLA 136 Decided October 19, 2005

U.S. Department of the Interior, Interior Board of Land Appeals (IBLA)
(https://www.oha.doi.gov/IBLA/Ibladecisions/167IBLA/167IBLA136.pdf)

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. (emphasis added) A party challenging a 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.

LCC's statement of reasons (SOR) presents a variety of arguments in support of its claim that BLM failed to satisfy section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000). Briefly stated, LCC contends

(1) that the procedure BLM followed in issuing the EA and DR/FONSI violated the letter and spirit of NEPA by **failing to make information available to the public and provide public involvement**;
(2) that the EA does not include a reasonable range of alternatives;
(3) that the EA fails to analyze various direct and indirect effects of the proposed action;
(4) that the EA suffers from a variety of other deficiencies; and
(5) that the FONSI is not supported by the EA and an environmental impact statement (EIS) is required. BLM filed an answer which will be discussed along with LCC's related arguments.

NEPA requires Federal agencies to take environmental considerations into account when making decisions and to prepare an EIS if approval of a proposed action would constitute a "major federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2000). In most cases, the determination of whether to write an EIS is made by preparing an EA. See 40 CFR 1501.3, 1501.4(b), 1508.9, 1508.27. An EA is a "concise"

document which briefly provides sufficient evidence and analysis of relevant issues to determine whether to prepare an EIS, and, if not, to support a finding of no significant impact. 40 CFR 1508.9(a)(1), see 40 CFR 1508.13; Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985).

[1] The standard by which the Board reviews an EA has been set forth in numerous decisions. Most basically, an EA must

(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.

Lee & Jody Sprout, 160 IBLA 9, 12-13 (2003); Kendall's Concerned Area Residents, 129 IBLA 130, 138 (1994); Southern Utah Wilderness Alliance, 123 IBLA 302, 308 (1992), and cases cited. A party challenging a 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. Oregon Natural Resources Council, 131 IBLA 180, 186 (1994)**. In this case, we do not reach the arguments presented by LCC which assert deficiencies in the EA's content because we agree that BLM failed to allow public participation in its environmental decision-making as required by NEPA.** Accordingly, we will set aside its decision to approve the applications and remand the matter for compliance with 40 CFR 1506.6.

As explained by LCC and documented in the case files on appeal, on October 2, 2001, the voters of Haines Borough, excluding those within the boundaries of the City of Haines, created a Commercial Helicopter Flight-Seeing Area to be administered by the Helicopter Service Area Board (HSAB) with authority to regulate and permit commercial helicopter flight-seeing tours. After the HSAB's initial meeting on December 27, 2001, the corresponding secretary sent a letter to BLM dated January 4, 2002, notifying it of the Board's creation and requesting that it be sent all helicopter landing permit applications for the Borough. 5/ LCC claims that BLM was working on two permit applications at the time and that **its failure to respond to the request violated 40 CFR 1506.6(a) and (b)(1).** (SOR at 3.) 6/ In addition, LCC asserts that BLM did not "inform the general public that an EA was in progress" (SOR at 2), and that the HSAB learned that the EA was being prepared only through a telephone call. (SOR at 3.) 7/ LCC argues that **the partial EA which the HSBA received on February 15, 2002, cannot be regarded as providing the "high quality" information called for by 40 CFR 1500.1(b)** because it lacked a number of the sections included in the final document. Id. at 3-4. It further asserts that the release of the decision on May 1 after the end of the 2002 heli-ski season was unnecessary and had the effect of excluding the HSAB and the general public from participating in the NEPA process. Id. at 4. **BLM had time, LCC contends, to provide the high quality information and the opportunity to participate which 40 CFR 1506.6 requires**. "The end result," LCC maintains, "would have been a better environmental document" for the 2003 heli-ski season rather than "an inadequate document fast tracked for no apparent reason." Id.

LCC also charges BLM with violating the policy found at 40 CFR 1500.2(d) to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." Id. Instead of public involvement, LCC asserts, "BLM created a long list of consultants which makes it appear they had indeed involved the public." Id. In particular, LCC objects to the use of its name as a consultant when it "was never consulted regarding the 2002 EA." Id. LCC states that it "commented extensively on the 1995 EA, which only dealt with summer helicopter tours, did not include the entire area being evaluated in 2002, and had absolutely nothing to do with winter recreation." Id. It also acknowledges commenting in 1999 "on a heliskiing proposal based in Skagway," but "objected to BLM fast-tracking the permit because BLM would not have sufficient time to do an adequate analysis and because LCC did not have sufficient time to make extensive comments (see Mar. 12, 1999,letter)." Id. "Thus," LCC concludes, it "has never made comments on winter recreation issues." Id.

In response, BLM asserts that the record does not support LCC's position. (Answer at 6-7). It argues that BLM is not required to "conduct a formal public hearing during the scoping process" and maintains that it benefitted from the "extensive scoping process" undertaken during preparation of the 1995 EA for summertime landing tours. Id. at 7. 8/ BLM points out that it participated as a panelist at a June 27, 2001, heli-skiing meeting, and that a BLM

wildlife biologist not only spoke at that meeting but made a second presentation in Haines to members of the public on March 13, 2002. Id. BLM also lists its response to numerous recommendations made by the HSBA. Id. at 8-11. BLM concludes that it did make "a concerted effort to involve the public in its scoping process through both accepting comments and making them part of the record, keeping interested members of the public informed through public presentations as the process proceeded, and by incorporating many of the recommendations received from the public." Id. at 11.

Upon review, the Board finds that LCC raises several legitimate points about the process by which the EA was issued. Its assertion that "BLM has never come to Haines to assess the community's concerns about heli-skiing" appears to be correct. (SOR at 2.) BLM does not dispute LCC's statement that the January 27, 2000, "open house" scheduled to discuss the heli-skiing applications was cancelled due to weather and never rescheduled. Id.; see "Open House Brief" dated Jan. 14, 2000, attached to SOR. Nor does BLM indicate why no meeting was scheduled during the next two years. BLM relies upon the scoping process undertaken for the 1995 EA, but the subject of heli-skiing does not appear to have been considered at the time. As described in the 1995 EA, none of the applications pending before either the U.S. Forest Service or BLM sought to land on glaciers for skiing during the winter months, and no mention of skiing appears in the description of the scoping process. (EA AK-040-95-015 at 1-4 through 1-7; see Haines Borough Assembly, 145 IBLA at 16 (permits allow glacier landings early May through late September).)

The 2002 EA refers to "meetings held in Haines in 2001," but the only meeting identified in the record is the June 2001 heli-skiing forum. As described by the BLM outdoor recreation planner who participated (along with LCC), the meeting consisted . . . .

Several decisions of this Board have been critical of practices which limit public participation. For example, in ***Southern Utah Wilderness Alliance***, 122 IBLA 334, 341 (1992), the Board stated that "NEPA and its regulations do not explicitly require a Federal agency to allow public comment on every EA." 11/ However, the Board went on to affirm that NEPA's statutory scheme "clearly envisions active public involvement in the NEPA process" and noted, as does LCC, that **40 CFR 1500.2(d) requires "all Federal agencies, including BLM, 'to the fullest extent possible * * * [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.'" 122 IBLA at 341.** After discussing provisions of the Departmental Manual, the Board concluded: **"Because the statutory and regulatory scheme heavily favors public participation, such participation must be the norm, and BLM must have a compelling reason for not providing any public comment period during the EA process."** Id. at 342. It determined that, in the circumstances of the case, BLM should have provided a public comment period, and having already concluded that the EA was deficient and the decision on appeal was to be remanded, the Board required BLM to "provide a public comment period on the revised EA prepared for this project." Id.

Footnote 11/ The decision cited 40 CFR 1501.4(e)(2) and in a footnote stated: "At least one U.S. Court of Appeals * * * has held that public participation is required in the preparation of an EA under NEPA. Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) [on appeal following second remand, 484 F.2d 448 2d Cir. 1973), cert. denied, 416 U.S. 936 (1974)]." More recent case law is discussed infra.

DOI OHA WEB ISYS Search
https://www.oha.doi.gov:8080/isysquery/f2c0042f-1c10-4283-a712-34cc589fcc2a/-relevance/sort/
Viewed June 17, 2017

2004. In RE Stratton Hog Timber Sale IBLA 2001-222 Decided January 23, 2004

An environmental assessment may be tiered to another NEPA document which has considered particular impacts of a broader Federal action and need not restate the analysis of those impacts, **but the issue must necessarily have been addressed adequately in the first document** (emphasis added). In challenging an EA, appellant must establish by objective proof that the determination was premised on a clear error of law or a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. In cases where the BLM decision appealed from is a denial of a protest, appellant must affirmatively point out error in the decision from which it directly appeals.

[1] Before addressing the merits, we set forth the governing law applicable to this appeal. Section 102(2)(C) of the National Environmental Policy Act of 1969(NEPA), 42 U.S.C. § 4332(2)(C) (2000), requires Federal agencies to prepare an EIS for a major Federal action significantly affecting the quality of the human environment. The agency must consider its preferred course of action and alternatives to that action **and take a "hard look" at the environmental consequences** (emphasis added). 42 U.S.C. § 4332(2)(E) (2000); 40 CFR 1501.2(c). If the agency chooses to, it may prepare an EA for a proposed action and go forward if it makes a "finding of no significant impact," subject to agency rules and those of the Council on Environmental Quality (CEQ) at 40 CFR Subpart 1500. If a significant impact is anticipated, an EIS is prepared.

It is well-settled that an EA or EIS may be tiered to another NEPA document which has considered particular impacts of a broader Federal action. Tiering is defined in the CEQ regulations as "coverage of general matters in broader [EISs] * * * with subsequent narrower statements or environmental analyses * * * incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 CFR 1508.28. An EA which is tiered to a final EIS need not restate the cumulative impacts analysis or a no action alternative that was already considered in the document to which the EA is tiered. Blue Mountains Biodiversity Project, 139 IBLA 258, 267 (1997); Oregon Natural Resources Council, 115 IBLA 179, 186 (1990); In re Long Missouri Timber Sale, 106 IBLA 83, 87 (1988), reconsideration denied (1989); In re Upper Floras Timber Sale, 86 IBLA 296, 311 (1985); see also Southern Utah Wilderness Alliance, 158 IBLA 212 (2003). In Kern v. BLM, No. 99-35254 (9 Cir. Mar. 22, 2002), the Ninth Circuit Court of Appeals concluded that a NEPA document may only be tiered under the CEQ regulations to a document which has itself been issued as a document under NEPA. It also held that an environmental impact, consideration of which is eschewed in an EA, must necessarily have been addressed adequately in a document to which the EA is tiered.

In Fredric L. Fleetwood, 159 IBLA 375, 382 (2003), the Board explained the standard of review applicable to an appeal from a BLM decision to undertake an action which was analyzed in an EA and for which a FONSI has been issued. Such a decision

> **will be affirmed when the record demonstrates that BLM has considered the relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures** (emphasis added). Southern Utah Wilderness Alliance, 158 IBLA 212, 219 (2003); see Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982); Maryland-National Capitol Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973);

2003. Lee and Jody Sprout Dick and Shauna Sprout IBLA 2001-332, 2001-333 Decided July 29, 2003

A decision to limit use of a recreational site to day-use only (no overnight camping) will be affirmed (1) where BLM took a **hard look at the environmental consequences as opposed to reaching conclusions unaided by preliminary investigation, identified relevant areas of environmental concern, and made a convincing case that environmental impact is insignificant; (2) where BLM's decision is supported by valid reasons clearly set out in the supporting documentation** (emphasis added); and (3) where those reasons are not challenged on appeal.

An EA must (1) take a **hard look at the environmental consequences as opposed to reaching bald conclusions unaided by preliminary investigation, (2) identify relevant areas of environmental concern, and (3) make a convincing case** (emphasis added) 160 IBLA 12 IBLA 2001-332, 2001-333 that environmental impact is insignificant. Southern Utah Wilderness Alliance, 123 IBLA 302, 308 (1992), and cases cited; see also Kendall's Concerned Area Residents, 129 IBLA 130, 138 (1994). A party challenging a 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. Oregon Natural Resources Council, 131 IBLA 180, 186 (1994).

2000. Klamath-Siskiyou Wildlands Center, 153 IBLA 110, 121-22 (2000)

In *Klamath-Siskiyou Wildlands Center*, 153 IBLA 110, 121-22 (2000), **the Board concluded that neither 40 CFR 1501.4(e)(2) nor BLM's NEPA Handbook requires a period for public review and comment** (emphasis added) before BLM may make a final determination on the proposed action, but it quoted Southern Utah Wilderness Alliance to the effect that NEPA requires **BLM to encourage and facilitate public involvement, and concluded that "[t]herefore BLM should demonstrate a 'compelling reason for not providing any public comment period during the EA process.'"** (emphasis added).

Although the Board agreed that the appellant "and other members of the public were not afforded the opportunity to comment on the final EA prior to the DR/FONSI decision," it found that "the objective of encouraging and facilitating public involvement in the NEPA process was satisfied by BLM's solicitation of comments during the scoping period." 153 IBLA at 122; see also Haines Borough Assembly, 145 IBLA at 28 ("informal meetings met all relevant legal requirements"). Similarly, the Board noted in Haines Borough Assembly that BLM had failed to "provide a copy of the draft or final EA to interested members of the public and solicit comments for a specific period of time, prior to issuing its ROD [record of decision]," but held that the failure was not fatal due to the solicitation of public input prior to preparation of the EA, and the fact that the ROD had been "widely distributed, and interested members of the public have had an opportunity to dispute it before the Board." 145 IBLA at 29. 12/ The same cannot be said in this case.

> Footnote 12/ In Sierra Club, Inc., 92 IBLA 290, 299 n. 5 (1986), the Board determined that BLM had "clearly failed to comply with" 40 CFR 1501.4(e)(1) and 40 CFR 1506.6(b) prior to issuing a right-of-way grant, but it declined to overturn the decision because the appellants had participated to some degree in the review of the project before various agencies, had previously made their views known to BLM, and had an opportunity to have their concerns addressed by the Board.

[2] It has frequently been pointed out that NEPA is essentially procedural in nature, designed to insure that Federal agencies make fully informed and considered decisions. See ***Robertson v. Methow Valley Citizens Council***, 490 U.S. 332, 350-51 (1989); ***Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc***., 435 U.S. 519, 558 (1978). Its purposes cannot be met when, as in this case, there has been little or no public involvement. The Board holds that BLM's failure to provide notice of the availability of the draft EA to the general public, including interested and affected members of the public and organizations and allow a period for comment, or alternatively to provide notice of the EA and proposed pending decision with time to provide written comments, violated 40 CFR 1506.6(a), (b), and (d). Stated in another manner, **the requirement in 40 CFR 1501.4(b) that an agency involve the public "to the extent practicable" in preparing an EA**, the requirement in 40 CFR 1501.4(e)(1) that a FONSI be made available to the public, the requirement of 40 CFR 1506.6(a) that Federal agencies "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures," the requirement of 40 CFR 1506.6(b) that environmental documents be made available, and the requirement of 40 CFR 1506.6(d) that an agency solicit information from the public would be diminished or rendered meaningless if an agency can, as in this case, complete an EA and FONSI without any notice to the public calculated to allow participation and an opportunity to challenge the decision. Presumably the instruction of 516 DM 3.3.A (May 27, 2004) that "[t]he public must be provided notice of the availability of EAs" means documents upon which comments can be made, not documents and decisions which are fait accompli.

The Board's ruling is supported, if not required, by recent court decisions. Most notably, the **Ninth Circuit has concluded that 40 CFR 1506.6 requires that "[t]he public must be given an opportunity to comment on draft EAs and EISs * * *." Anderson v. Evans, 314 F.3d 1006, 1016 (9th Cir. 2002), amended, 350 F.3d 816, 830**

(2003), second amendment, 371 F.3d 475, 487 (2004). 13/ Although the Ninth Circuit has "not established a minimum level of public comment and participation required by the regulations governing the EA and FONSI process," it has held that "a complete failure to involve or even inform the public about an agency's preparation of an EA and a FONSI, as was the case here, violates these regulations."

Citizens for Better Forestry v. U.S. Department of Agriculture, 341 F.3d 961, 970 (9th Cir. 2003); see ***Montana Wilderness Association v. Fry***, 310 F. Supp. 2d 1127, 1147-48 (D. Mont. 2004); ***The Fund for Animals v. Norton***, 281 F. Supp. 2d 209, 226-27 (D.D.C. 2003) (two weeks was insufficient time to comment); ***Strahan v. Linnon***, 581 F. Supp. 581, 630 (D. Mass. 1997) (citing 40 CFR 1506.6 to state that concerning preparation of an EA "the public must be involved in the Coast Guard's efforts to comply with NEPA"); *Wroncy v. Bureau of Land Management*, 777 F. Supp. 1546, 1549 (D.Or. 1991); see also ***Hanly v. Kleindienst***, 471 F.2d at 836 ("before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision").

> Footnote 13/ The First Circuit has declined to follow the Ninth Circuit, finding that in the case before it the Government had involved the public "to the extent practicable" by issuing public notice of the application, providing a comment period, holding two public hearings, and responding to the comments received in the EA. Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army, 398 F.3d 105, 114-15 (1st Cir. 2005). BLM took no such steps in this case.

2000. *Rosebud Sioux Tribe v. Gover*, 104 F. Supp. 2d 1194 (D.S.D. 2000)

Rosebud Sioux Tribe v. Gover, 104 F. Supp. 2d 1194 (D.S.D. 2000)
District Court, D. South Dakota
Filed: February 3rd, 2000
Precedential Status: Precedential
Citations: 104 F. Supp. 2d 1194
Docket Number: Civ. 99-3003
Author: Charles B. Kornmann

40 C.F.R. § 1508.13.

[¶ 28] In Lockhart v. Kenops, the Eighth Circuit held that the arbitrary and capricious standard should be applied to informal determinations of an agency, including an agency's decision not to prepare an EIS. 927 F.2d 1028, 1032 (8th Cir.1991), citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989). In a challenge to an agency's decision not to prepare an EIS, the initial burden is on the challengers to raise "a substantial environmental issue" that has been omitted from consideration in the EA or otherwise in the administrative record. See Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 271 (8th Cir.1980). Similarly, the decision to issue a FONSI is committed to the agency's discretion, the judgment made is presumptively correct, and the burden is on the challengers to prove that the decision is erroneous. See Ringsred v. Duluth, 828 F.2d 1305, 1307 (8th Cir.1987) and Kuff v. U.S. Forest Serv., 22 F. Supp. 2d 987, 993 (W.D.Ark.1998). **If it is shown that the agency "took a `hard look' at the project, identified relevant areas of concern, and made a convincing case for the FONSI," the environmental review is sufficient.** See Sierra Club v. United States Forest Serv., 46 F.3d 835, 838-39 (8th Cir.1995). The adequacy of the EA as a basis for issuing the FONSI and approving the lease must be reviewed within the confines of the administrative record[12] and the Court must extend substantial deference to the decisions of the local BIA officials. See Troy Corp. v. Browner, 120 F.3d 277, 283 (D.C.Cir.1997). **A decision to forego preparation of an EIS will not be found arbitrary and capricious if it appears from the record that the decision was based on a "reasoned evaluation `of the relevant factors.'" Marsh, 490 U.S. at 378, 109 S.Ct. at 1861.** Moreover, a party challenging an agency decision under NEPA must provide evidence to substantiate any claim of environmental harm and "cannot simply doubt the FONSI ... without pointing to more than speculative impacts." Sierra Club, 46 F.3d at 839. Having heard the evidence, this Court is convinced that nothing more than "speculative impacts" were put forward by the intervenors. Witnesses presented by intervenors *1208 were certainly people of good faith with honestly held convictions but nothing was presented to substantiate any claim of environmental harm. The defendants called no witnesses at all. The witness from the EPA admitted that she was "out

of the loop." She admitted that as the project is now designed and will apparently be operated, there would be no environmental harm. By contrast, the testimony of the witnesses for plaintiffs was compelling. This is especially the case of the testimony and the evidence presented by BIA Superintendent Burr, a very credible witness.

[¶ 29] Whether an EIS must be prepared to satisfy compliance with NEPA requirements is governed by a set of regulations developed by CEQ. See 40 C.F.R. §§ 1500-1508 (1998). BIA has developed guidelines for implementing CEQ regulations, as have other agencies. See 30 BIAM Supplement 1 NEPA Handbook ("BIA NEPA Handbook"). CEQ regulations describe an EA as a "concise public document" which includes a "brief discussion" of (1) the need for proposed action, (2) alternatives to the proposed action, and (3) the environmental impacts of the proposed action and alternatives. See 40 C.F.R. § 1508.9. An EA is intended to provide "sufficient evidence" to determine if a full EIS is warranted but, because of the nature of the document, it is not intended to provide a comprehensive evaluation of NEPA issues. Id.; see also Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 809 (8th Cir.1998) (quoting Cronin v. United States Dep't of Agric., 919 F.2d 439, 443 (7th Cir.1990), to explain that "[a]n EA is a `rough-cut, low-budget environmental impact statement ...'"). Under CEQ regulations and the BIA implementation guidelines, the purpose of the FONSI is to briefly explain why the agency action will not have a significant effect on the human environment, but it need not reiterate all of the evidence accumulated in the administrative record. Id. at § 1508.13 and BIA NTEPA Handbook, § 4.3H. Moreover, an EA may incorporate by reference, information and analysis already available in both NEPA-compliant materials, see, e.g., 40 C.F.R. §§ 1500.4-.5, 1506.4 and BIA NEPA Handbook §§ 3.2(B), 4.5(B), and general background information, documents, and studies not prepared for NEPA purposes. See Jackson County v. Jones, 571 F.2d 1004, 1008 (8th Cir.1978).

[¶ 33] The second question is whether preparation of an EIS was required based on the information contained in the EA. To reiterate, it is defendants' and intervenors' burden to prove that the decision not to prepare an EIS constitutes a violation of NEPA. **In reviewing an agency's decision not to prepare an EIS, the Eighth Circuit has adopted the "hard look" doctrine**. ***Audubon Society of Central Ark. v. Dailey***, 977 F.2d 428, 434 (8th Cir.1992). A court should consider four factors in determining whether an agency's decision to forego an EIS is arbitrary and capricious:

(1) whether the agency took a **hard look at the problem, as opposed to bald conclusions**, unaided by preliminary investigation;
(2) whether the agency identified the relevant areas of environmental concern;
(3) whether, as to problems studied and identified, the agency made a convincing case that the impact is insignificant; and
(4) if there was impact of true "significance," whether the agency convincingly established that changes in the project sufficiently minimized it.

Id., citing *Cabinet Mountains Wilderness v. Peterson*, 695 F.2d 678, 681-82 (D.C.Cir. 1982). The discussion under the first question above, addressing the adequacy of the EA, leads to an **affirmative answer to the first two prongs of the "hard look" doctrine**.

[¶ 34] **As to the third prong, in making a significance determination**, an agency must consider both the "context" and "intensity" of the impact. 40 C.F.R. § 1508.27. "Context" 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 ... 40 C.F.R. § 1508.27(a). Intensity "refers to the severity of the impact" and the regulations direct an agency to consider a number of relevant factors in this regard:

(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 *1211 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 cannot be avoided 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 historic resources.
(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat ...
(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27(b); BIA NEPA Handbook 5.2, 5.3B (AR 3:0445-0446)

[¶ 40] The fourth prong of the "hard look" doctrine relates to mitigation measures. The BIA NEPA Handbook provides that mitigation measures may be properly integrated into a project to eliminate or substantially reduce potential environmental impacts if such measures are required by statute or regulation and are enforceable, or if the measures are integrated as part of the proposal (AR 1:64-67; 3:440, 529).

1998. Fort Belknap Community Council, 144 IBLA 92, 101-102 (1998)

In *Fort Belknap Community Council*, 144 IBLA 92, 101-102 (1998), the Board stated, citing Southern Utah Wilderness Alliance, that “BLM’s failure to provide notice of the availability of the EA to the public generally, or even to interested or affected members of the public, and to solicit any information from the public generally before taking action” had been a “technical violation” of 40 CFR 1506.6(b) and (d), but determined that the violation had been de minimis given the procedure BLM had in fact followed in the case.

1994. Kendall's Concerned Area Residents IBLA 90-112 Decided April 15, 1994

BLM employs the National Environmental Policy Act (NEPA) process to evaluate both whether a proposed mine plan of operations entails significant effects on the environment and whether mitigation measures are required to prevent unnecessary or undue degradation of the public lands. 43 CFR 3809.2-1. Of course, the consequences of the two determinations differ. The fact that a proposed mine plan of operations would not cause unnecessary or undue degradation of public lands does not preclude the possibility that it would cause **significant environmental effects** (emphasis added) that would require preparation of an environmental impact statement. See Southwest Resource Council, 96 IBLA 105, 120-21, 94 I.D. 56, 64-65 (1987); 45 FR 78902, 78905 (Nov. 26, 1980). If there are significant environmental effects that cannot be mitigated, an EIS must be prepared even if there is no unnecessary or undue degradation of the public lands. 42 U.S.C. § 4332(2)(C) (1988). If there is unnecessary or undue degradation, it must be mitigated. See 43 CFR 3809.2-1(b). If unnecessary or undue degradation cannot be prevented by mitigating measures, BLM is required to deny approval of the plan. 43 CFR 3809.0-3(b); Department of the Navy, 108 IBLA 334, 336 (1989). See 43 U.S.C. § 1732(b) (1988); 43 CFR 3809.0-5(k).

The record in the present case establishes that BLM personnel actively reviewed the proposed EA prepared by DSL and contributed to the final EA. It does not, however, show that BLM met its responsibilities under NEPA. In preparing an EA, BLM must take a **hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that the potential environmental impacts are insignificant in order to support a conclusion that an EIS is not required** (emphasis added). Idaho Natural Resources Legal Foundation, Inc., 115 IBLA 88, 90-91 (1990); Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23, 94 I.D. 35, 38 (1987). If the proposed action will result in significant environmental impact, an EIS must be prepared to review any impacts in detail, unless the proposed action is modified or sufficient mitigation measures are provided to prevent the impact from being significant. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982); Glacier-Two Medicine Alliance, 88 IBLA 133, 148 (1985); D. Mandelker, NEPA Law & Litigation, § 8:55 (1984).

1992. Southern Utah Wilderness Alliance. IBLA 89-73 Decided June 25, 1992

An EA must:

(1) take a hard look at the environmental consequences as opposed to reaching bald conclusions unaided by preliminary investigation,
(2) identify relevant areas of environmental concern, and
(3) make a convincing case that environmental impact is insignificant.

Rex Kipp, Jr., 115 IBLA 1, 2 (1990); accord Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982); Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23, 94 I.D. 35, 38 (1987); Citizens' Committee to Save Our Public Lands, 29 IBLA 48, 54 (1977). When "a salient aspect of a program has not been assessed, and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared." Idaho Natural Resources Legal Foundation, Inc., supra at 24, 94 I.D. at 38.

1990. Idaho Natural Resources Legal Foundation, Inc., et al. IBLA 88-631 Decided June 21, 1990

Compliance with NEPA, 43 U.S.C. § 4332(2)(C) (1982), regarding a range improvement project such as the pipeline at issue here requires BLM to take a **hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that the potential environmental impacts are insignificant** (emphasis added) in order to support a conclusion that an EIS is not required (i.e., a FONSI). Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23, 94 I.D. 35, 39 (1987); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). A FONSI may be predicated on a finding that changes to or restrictions on a project will sufficiently minimize the environmental impact. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982); California Wilderness Coalition, 98 IBLA 314 (1987); Glacier-Two Medicine Alliance, supra; D. Mandelker, NEPA Law & Litigation § 8:55 (1984). However, in such circumstances, NEPA requires analysis of any proposed mitigation measures and how effective they would be in reducing the impact to insignificance. Northwest Indian Cemetery Protective Ass'n. v. Peterson, 795 F.2d 688, 696-97 (9th Cir. 1986); see 40 CFR 1502.16(h).

1990. Rex Kipp, Jr. Justin Kipp. IBLA 88-569 Decided May 30, 1990

The National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321-4370a (1982), and the regulations at 40 CFR Part 1500 require preparation of the EA. A finding of no significant impact (FONSI) will be affirmed if the agency:

(1) took a hard look at the environmental consequences as opposed to reaching bald conclusions unaided by preliminary investigation and
(2) identified relevant areas of environmental concern and
(3) made a convincing case the impact is insignificant.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23, 94 I.D. 35, 38 (1987).

1988. Elberta M. Taylor Et Al. IBLA 86-1617 Decided June 14, 1988

The National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321-4370a (1982), and the regulations at 40 CFR Part 1500 require preparation of the EA. A finding of no significant impact (FONSI) will be affirmed if the agency:

(1) took a hard look at the environmental consequences as opposed to reaching bald conclusions unaided by preliminary investigation and
(2) identified relevant areas of environmental concern and
(3) made a convincing case the impact is insignificant.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23, 94 I.D. 35, 38 (1987).

1987. Idaho Natural Resources Legal Foundation, Inc. IBLA 86-1391 Decided February 26, 1987

BLM is required to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (1982), in carrying out range management projects such as the Echo pipeline reconstruction, however. Unless a project is categorically exempt, which this one is not claimed to be, 8/ an EA must be prepared. 40 CFR 1501.4(b). **Such an assessment must take a hard look at the issues, as opposed to setting forth bald conclusions, identify the relevant areas of environmental concern, and make a convincing case that environmental impact is insignificant if its conclusion that an environmental impact statement (EIS) is not required is to be upheld** (emphasis added). Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985); Sierra Club, 57 IBLA 79, 83 (1981). If a salient aspect of a program or project has not been assessed, and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared. SOCATS (On Reconsideration), 72 IBLA 9 (1983).

1984. In RE Thompson Creek Timber Sale IBLA 82-1325 Decided June 7, 1984

An agency has a continuing duty to gather and evaluate data pertinent to the environmental impacts of a Federal action after release of an environmental impact statement (EIS) in connection with the action. A supplemental EIS may not be required where some deviation from the action outlined in the EIS is proposed, the change is supported on a rational basis of record, and the adverse impact would be reduced as a result of the change.

1984. Defenders of Wildlife IBLA 83-464 Decided February 13, 1984

In an adequate environmental assessment statement an agency must take a;

- "hard look" at the problem, as opposed to setting forth bald conclusions;
- identify the relevant areas of environmental concern; and
- make a convincing case that environmental impact is insignificant.

Fund For Animals v. Frizzell, 402 F. Supp. 35 (D.D.C.), aff'd, 530 F.2d 982 (D.C. Cir. 1975); Maryland-National Capital Park and Planning Commission v. United States Postal Service, 487 F.2d 1029, 1039-40 (D.C. Cir. 1973).

1983. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.

Baltimore G. & E. Co. v. NRDC 462 U.S. 87 (1983)
U.S. Supreme Court
No. 82-524
Argued April 19, 1983; Decided June 6, 1983

Section 102(2)(C) of the National Environmental Policy Act (NEPA) requires federal agencies to consider the environmental impact of any major federal action. The dispute in these cases concerns the adoption by the Nuclear Regulatory Commission (NRC) of a series of generic rules to evaluate the environmental effects of a nuclear powerplant's fuel cycle. In these rules, the NRC decided that licensing boards should assume, for purposes of NEPA, that the permanent storage of certain nuclear wastes would have no significant environmental impact (the so-called "zero release" assumption), and thus should not affect the decision whether to license a particular nuclear powerplant. At the heart of each rule is Table S-3, a numerical compilation of the estimated resources used and effluents released by fuel cycle activities supporting a year's operation of a typical light-water reactor. Challenges to the rules ultimately resulted in a decision by the Court of Appeals, on a petition for review of the final version of the rules, that the rules were arbitrary and capricious and inconsistent with NEPA because the NRC had not factored the consideration of uncertainties surrounding the zero release assumption into the licensing process in such a manner that the uncertainties could potentially affect the outcome of any decision to license a plant.

Held: The NRC complied with NEPA, and its decision is not arbitrary or capricious within the meaning of § 10(e) of the Administrative Procedure Act (APA). Pp. 462 U. S. 97-108.

The controlling statute at issue here is NEPA. NEPA has twin aims. First, it "places upon an agency the **obligation to consider every significant aspect of the environmental impact of a proposed action**." (emphasis added). Vermont Yankee, supra, at 435 U. S. 553. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U. S. 139, 454 U. S. 143 (1981). Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. See Stryckers' Bay Neighborhood Council v. Karlen, 444 U. S. 223, 444 U. S. 227 (1980) (per curiam). Rather, it required only that the agency **take a "hard look" at the environmental consequences before taking a major action** (emphasis added). See Kleppe v. Sierra Club, 427 U. S. 390, 427 U. S. 410, n. 21 (1976). The role of the courts is simply to ensure that the

1983. Southwest Resource Council, Inc., 73 IBLA 39 (1983).

The criteria for review of a BLM decision declaring the activities in question as nonimpairing and having no significant impact on the environment are:

(1) Did BLM take a hard look at the problem, as opposed to setting forth bald conclusions?;
(2) Did BLM identify the relevant areas of environmental concern?; and
(3) Does BLM make a convincing case that environmental impact is insignificant?

Citizens for Glenwood Canyon, 64 IBLA 346 (1982); Sierra Club, 57 IBLA 79 (1981). See *Maryland Capitol Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973). If the criteria are satisfied, the decision will be affirmed on appeal.

1983. Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n. 6 (1983)

Found not find.

1983. In RE Lick Gulch Timber Sale IBLA 81-394 Decided April 28, 1983

1. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales--Timber Sales and Disposals--Words and Phrases

> "Sustained yield." As used in sec. 1 of the Act of Aug. 28, 1937, 43 U.S.C. § 1181a (1976), the term 'sustained yield' means that the level of timber harvesting established should be such that, considering present levels of silviculture techniques, a constant amount of timber will be annually available on an indefinite basis.

The O&C Act did not, itself define the term "sustained yield." Its meaning, however, was not particularly arcane. In Circular No. 1448, 3 FR 1796 (July 7, 1938), the Department noted that the O&C Act

> laid the foundation and framework of a new forest policy for the revested and reconveyed Oregon grant lands. This measure provides for the conservation of land, water, forest, and forage on a permanent basis; the prudent utilization of these resources for the purposes to which they are best adapted; and the realization of the highest current values consistent with undiminished future returns. It seeks, through the application of the policy of sustained-yield management, to provide perpetual forests which will serve as a foundation for continuing industries and permanent communities.

Thus, lands to which the O&C Act properly applies (timberlands and powersite lands valuable for timber) are managed for the dominant purpose of timber production while recognizing that complementary values such as watershed protection and economic stability for local communities will necessarily result through proper implementation of the concept of sustained yield

1982. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982)

This court has established four criteria for reviewing an agency's decision to forego preparation of an EIS: (1) whether the agency took a "hard look" at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and (4) if there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum (emphasis added). *Maryland-National Capital Park and Planning Comm'n v. United States Postal Service*, 159 U.S.App.D.C. 158, 169, 487 F.2d 1029, 1040 (1973). The fourth criterion permits consideration of any mitigation measures that the agency imposed on the proposal. As this court noted, "changes in the project are not legally adequate to avoid an impact statement unless they permit a determination that such impact as remains, after the change, is not `significant.'" Id. (emphasis supplied). Other courts have also permitted the effect of mitigation measures to be considered in determining whether preparation of an EIS is necessary. See, e.g., Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 860 (9th Cir. 1982); City County of San Francisco v. United States, 615 F.2d 498, 501 (9th Cir. 1980); Sierra Club v. Alexander, 484 F.Supp. 455, 468 (N.D.N.Y.), aff'd mem., 633 F.2d 206 (2d Cir. 1980). Logic also supports this result. 1NEPA's EIS requirement is governed by the rule of reason, Committee for Auto Responsibility v. Solomon, 195 U.S.App.D.C. at 421, 603 F.2d at 1003 (1979), and an EIS must be prepared only when significant environmental impacts will occur as a result of the proposed action. 3If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required. 2To require an EIS in such circumstances would trivialize NEPA and would "diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment." Id.

1980. Highland Co-Op. v. City of Lansing, 492 F. Supp. 1372 (W.D. Mich. 1980)

U.S. District Court for the Western District of Michigan - 492 F. Supp. 1372 (W.D. Mich. 1980) July 7, 1980

Joseph v. Adams reviewed the agency decision according to the criteria set forth in Maryland-National, etc. Park and Planning Commission v. U. S. Postal Service, 487 F.2d 1029, 1040 (D.C.Cir.1973). Specifically they considered:

*1380

(1) Did the agency take a "hard look" at the problem, as opposed to bald conclusions, unaided by preliminary investigation;
(2) Did the agency identify and adequately investigate the relevant areas of environmental concern;
(3) As to problems studied and identified, does the agency make a convincing case that the impact is insignificant;
(4) If an impact is of true significance, has the agency convincingly established that changes in the project have sufficiently minimized it.

Joseph v. Adams, supra at 152.

Here, from the ND it is apparent that the agency did not take a "hard look" at some of the major problems raised by plaintiffs, but rather relied on bald conclusions. Plaintiffs have raised concerns about the changes this four-lane urban arterial will have in a residential area. The ND does not take a "hard look" at the problem, but rather praises the meaningful tax gain to local government by potential commercial and residential properties. In fact, the ND declares that "perhaps a regional mall would be created." However, nowhere is there evidence that the agency considered the harm this might create for residents, it only praises the potential tax base increase. The ND is devoid of any discussion of what impact this land development pressure will have on the vacant woodlots, and on the residential aspects of the project area. The ND also failed to take a "hard look" at the cumulative impact on ambient noise levels expected from the proposed Edgewood Boulevard. While there is analysis of the noise levels on I-96, and predictions of the levels on Edgewood, there is no discussion on the cumulative impact these levels will have on a residential area that is to become an island surrounded by four lanes of traffic. Rather, the ND states that although noise levels will be much higher after construction in some areas, this condition is due to the influence of I-96, rather than the proposed Edgewood Boulevard.

1978. Sierra Club v. Cavanaugh, 447 F. Supp. 427 (D.S.D. 1978)

Sierra Club v. Cavanaugh, 447 F. Supp. 427 (D.S.D. 1978). U.S. District Court for the District of South Dakota - 447 F. Supp. 427 (D.S.D. 1978). March 23, 1978

The comprehensive nature and extensive analysis of the EIA indicate that the Farmers Home Administration took a "hard look" at the environmental consequences of the proposed action and its negative determination was more than a "bald conclusion."

However, beyond taking a hard look and avoiding bald conclusions, there must be a reasonable basis for the negative determination. The defendants contend that the SLRWS will not significantly affect the quality of the human environment. In determining whether a major federal action will significantly affect the environment, the agency must consider:

(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and
(2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.

First National Bank of Chicago v. Richardson, 484 F.2d 1369, 1373 (7th Cir.1973); Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir.1972); McDowell v. Schlesinger, supra at 250. This two part test was designed to avoid semantical

battles over the meaning of the term "significantly" by substituting more precise factors. Hanly, supra at 831; First National Bank v. Richardson, supra.

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. McDowell, supra at 250. The negative determination here was arrived at after preparation of an EIA which conscientiously analyzed the various factors which the Farmers Home Administration is required to consider when assessing a proposed action.[2] The comprehensive nature and extensive analysis of the EIA indicate that the Farmers Home Administration took a "hard look" at the environmental consequences of the proposed action and its negative determination was more than a **"bald conclusion.**"

1975. *McDowell v. Schlesinger*, 404 F. Supp. 221, 253 (W.D.Mo. 1975)

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 must be done and sufficient data gathered 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"** 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. 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 where one is prepared, that the agency has given thoughtful and reasoned consideration to all of the potential effects of the proposed action, and that a convincing case has been made that the proposed impacts are insignificant after a careful balancing of the relevant factors. 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:

"(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and

(2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area."
Hanly v. Kleindienst, supra; First National Bank v. Richardson, supra.

In short, the decision of LTC Reed that the proposed action did not constitute a major federal action significantly affecting the quality of the human environment can only be fairly categorized as a **"bald conclusion"** reached after perfunctory and superficial analysis of clearly inadequate data. Neither the Assessment nor the administrative record support the conclusion that prior to the time LTC Reed made the negative determination that he gave thoughtful and reasoned consideration to all of the potential environmental effects of the proposed action, and that, after a careful balancing of the relevant factors, concluded for sound and convincing reasons that the potential environmental impacts were not significant. The administrative record and the Assessment require the opposite conclusion. LTC Reed's determination that the procedures set forth in § 102(2) (C) did not apply to the proposed action was clearly an unreasonable determination.[40]

1974. ***Hanly v. Kleindienst*, 471 F.2d 823, 836 (2d Cir. 1972)**, cert. denied, 412 U.S. 908 (1973) [on appeal following second remand, 484 F.2d 448 2d Cir. 1973), cert. denied, 416 U.S. 936 (1974)].

U.S. Court of Appeals for the Second Circuit - 484 F.2d 448 (2d Cir. 1973), Argued Aug. 17, 1973. Decided Sept. 10, 1973

1973. *Maryland Capitol Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973)

https://www.gpo.gov/fdsys/pkg/USCOURTS-caDC-10-05345/pdf/USCOURTS-caDC-10-05345-1.pdf

NEPA. NEPA requires that federal agencies prepare Environmental Impact Statements ("EISs") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). "If any significant environmental impacts might result from the proposed agency action then an EIS must be prepared before the [agency] action is taken." Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis omitted). An agency can avoid preparing an EIS if it issues a proper Finding of No Significant Impact ("FONSI"). In reviewing a FONSI our task is to determine whether the agency

(1) has accurately identified the relevant environmental concern,
(2) has taken a hard look at the problem in preparing its [FONSI or Environmental Assessment],
(3) is able to make a convincing case for its finding of no significant impact, and
(4) has shown that even if there is an impact of true significance, an EIS is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum.

TOMAC v. Norton, 433 F.3d 852, 861 (D.C. Cir. 2006); see also 40 C.F.R. § 1501.4. Although our decisions have frequently (but not invariably—see, e.g., Public Citizen v. Nat'l Highway Traffic Safety Admin., 848 F.2d 256, 267 (D.C. Cir. 1988)) **repeated 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), our scope of review is in fact the usual one. TOMAC itself made this clear, introducing the four numbered criteria with the standard language of judicial review of administrative action: "arbitrary, capricious, or an abuse of discretion." 433 F.3d at 861. . . .