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

Subj: 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

Dear Don:

First, nice to hear you are still active with BLM in retirement. Outstanding! For my years with BLM I had always observed you were one of the best Public Information Specialists that I had ever worked with. Many times I have missed the old gang.

Second, I would first like to complement the BLM for making it extremely difficult for me, as a member of the public, to participate in its Pickett West Forest Management Project. First I could not find any information on the BLM Medford District's web site on the project's EA. Finally I had to ask a neighbor for the BLM web page address. Next the DOI-BLM-ORWA-MO70-0006-2016-EA web page was designed so that the public could not copy any of the information from its web pages, forcing me to go from the web page to my computer typing the information manually rather than the normal cut-and-paste method. I even had to retype your name and contact information manually. This method of sharing information to the public is not in compliance with BLM's own Council of Environmental Quality (CEQ) NEPA compliance regulations (i.e., *BLM National Environmental Policy Act Handbook H-1790-1*, January 30, 2008), and does not met the PI test to *"Make diligent efforts to involve the public in preparing and implementing their NEPA procedures*." (BLM. 2008, p. 2; 40 CFR 1500.1(b), 40 CFR 1501.4(b), 40 CFR 1500.2(b), 40 CFR 1500.2(d), and 40 CFR 1506.6(a)). BLM is supposed to make public participation easier, not harder.

For example, the BLM and its EA interdisciplinary (ID) team's PI NEPA "shall" purpose requirement (i.e., "must" requirement) responsibility as stated in the BLM NEPA Handbook follows (NEPA, Section 102(2)(B); 40 CFR 1502.22 Incomplete or Unavailable Information; 40 CFR 1502.24 Methodology and Scientific Accuracy; 40 CFR1506.6 Public Involvement; 40 CFR 1507.3 Agency Procedures; Section 6.8.1.2 Analyzing Effects Methodology, BLM NEPA Handbook. 2008, p. 55).

- 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).
- This Handbook contains direction for use by BLM employees from all levels of our organization, including decision-makers, program managers, specialists, interdisciplinary team members, and any BLM contractors involved in the NEPA process. ***"We" (BLM) believe it will help "you" (the reader) help us in meeting the legal requirements of the NEPA*** (BLM. 2008, p. 2).

Third, per the notice at the DOI-BLM-ORWA-MO70-0006-2016-EA web page (visited on June 13, 2017), I request a copy of the Pickett West Forest Management Project EA - *"Hard copies are available at the Grants Pass Interagency Office at 2164 NE Spalding Avenue, Grants Pass, Oregon 97526."* Could you mail it to me, or do I have to come in for a visit?

> DOI-BLM-ORWA-MO70-0006-2016-EA. Pickett West Forest Management Project
> https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=87220

Fourth, I understand the EA is 400 pages plus. The complexity of a project that requires that amount of explanation is beyond what I had ever experienced for an EA. It sounds like consideration for an environmental impact statement (EIS) as described by questions from the USDI Office of Environmental Policy and Compliance (Appendix C).

> *Do circumstances require the bureau or office to make the FONSI available for the public to review for 30 days before the bureau or office makes its final determination whether to prepare an EIS and before the action can begin? (Public review is necessary, for example, (a) if the proposal is a borderline case, i.e., when there is a reasonable argument for preparation of an EIS; (b) if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area; (c) when there is either scientific or public controversy over the proposal; or (d) when it involves a proposal which is or is closely similar to one which normally requires preparation of an EIS.* (40 CFR § 1501.4(e)(2) and CEQ; Forty Most Asked Questions; 37b)).

From what I understand about the Pickett West Forest Management Project EA, all of the 10 criteria of intensity in the definition of "Significantly" (40 CFR 1508.27) applicable to this EA require an analysis for considerations of needing an EIS. *Intensity* (40 CFR 1508.27(b)) refers to the severity of impact. The following four of the 10 criteria are areas of public concern and need to be comprehensively addressed in evaluating "intensity" in the EA by the BLM ID EA team members (Section 6.8.1.2 Analyzing Effects Methodology, BLM NEPA Handbook. 2008, p. 55).

- Intensity Criteria. (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- Intensity Criteria. (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- Intensity Criteria. (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.

- Intensity Criteria. (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.

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 (Appendix C; USDI OEPC. 2013, Attach. to ESM 13-13, p. 12).

- 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)).
- Department of the Interior regulations for Implementation of the National Environmental Policy Act (NEPA) of 1969, at 43 CFR Part 46.
- Department of the Interior, Departmental Manual (Part 516 DM, Chapters 1-15).
- Individual bureau and office NEPA handbooks.
  [Author Note: For example, *BLM National Environmental Policy Act Handbook H-1790-1*: January 30, 2008 (BLM. 2008).]

Sixth, These comments are from me as the Chair of the Hugo JS&PSS Exploratory Committee. I and the committee continue to study NEPA because the committee's proposed public safety study is designed around the requirements of an EIS.

> Justice System & Public Safety Services Study Design: 2015
> Hugo Justice System & Public Safety Services (JS&PSS) Exploratory Committee
> Hugo Neighborhood Association & Historical Society
> http://www.hugoneighborhood.org/justicesystemexploratorycommittee.htm

Seventh, and last, I provide public comments for the record on the DOI-BLM-ORWA-MO70-0006-2016-EA Pickett West Forest Management Project EA. They are for my main relevant area of environmental concern which is the issue of BLM's NEPA compliance responsibilities for the PI purpose of NEPA's procedural mandate requiring ID team members to be accessible to the public.

Public access to both EA and EIS ID team members is a function of the "Analyzing Effects Methodology" of information the public needs to understand "significant" impacts " (Chapter 6, Section 6.8.1.2 "Analyzing Effects" *BLM NEPA Handbook (H-1790-1)* (BLM. 2008, p. 55).

This public access is part of NEPA's "twin aims" and the "hard look" NEPA mandate as clarified by the 1983 U.S. Supreme Court in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.* (Appendix A. CRS. 2005. p. CRS 9). It is especially so when the U.S. Supreme Court opinion is combined with the BLM's procedures to supplement the CEQ regulations (40 CFR 1507.3; BLM. 2008) including the United States Department of Interior (USDI) regulations for implementation of NEPA (43 CFR Part 46), and the USDI Manual (Part 516 DM, Chapters 1-15).

> 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). Second, **it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process** (emphasis added). Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the **agency take a "hard look" at the environmental consequences before taking a major action** (emphasis added). Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise. Rather, Congress intended that the "hard look" be incorporated as part of the agency's process of deciding whether to pursue a particular federal action. (Appendix A. CRS. 2005. p. CRS 9)

The CEQ in its 2007 publication, *A Citizen's Guide to the NEPA: Having Your Voice Heard*, corroborates the U.S. Supreme Court's opinion of NEPA's twin aims (Appendix A; CEQ 2007, p. 2; Appendix D).

Minimum NEPA PI CEQ regulations, often includes notices of meetings, hearings, and the availability of environmental documents (40 CFR 1508.10). The disappointing part for PI is that the public was probably provided minimum participation opportunities. My incomplete PI research has not found that judges have asked agencies to do more than these minimum requirements (e.g., little to no direct court PI precedence on public access to ID team members, public members observe ID team meetings, public members participate in ID team meetings in issue identification, etc.). However, the Department of the Interior (USDI), Interior Board of Land Appeals (IBLA), is moving in that direction (Appendix E). I believe if "*informed decisions and citizen involvement*" (CEQ. 2007, p. 2) are to be truely valued under NEPA, BLM decision-makers' efforts are needed to expand PI in all phases of the analysis process.

For example, according to the CEQ federal agencies have the discretion as to the level of PI when preparing an EA. The CEQ regulations provide that the agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing EAs. They also require all federal agencies, including BLM, to the fullest extent possible, to encourage and facilitate public involvement in decisions which affect the quality of the human environment. Sometimes agencies will choose to mirror the scoping and public comment periods that are found in the EIS process. However, not all agencies systematically provide information about individual EAs, so <u>it is important that the interested public read the specific federal agency's implementing procedures</u> (40 CFR 1507.3; CEQ 2007, p. 12; BLM 2008, p. ix).

In this case the BLM's <u>must</u> "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.

Per *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc*. (CRS. 2005, pps. 9 - 10), the CEQ NEPA regulations, the USDI NEPA regulations and manual, and the BLM NEPA Handbook, the minimal NEPA "PI" compliance standards require access by the public to both EA and EIS ID team members, one-on-one (i.e., includes contact information: address, telephone, & email). The purpose for access is public understanding of the ID team members individual "hard look" impact analysis work and their avoidance of bald conclusions (BLM. 2008, pps. 33 - 68, 70 - 74; Appendix E), especially their individual descriptions of scoping issue analytical methodologies sufficiently so that the interested public can understand how the analyses were conducted, and why their particular methodologies were used. This one-on-one interaction opportunity would be best initiated during scoping for both EAs and EISs, but public access to ID team members after the EA or EIS is made available for public comment is also in compliance with BLM's "diligent efforts to involve the public" test at 40 CFR 1506.6.

The rest of this public comments letter/email will address the BLM's responsibilities to consider the significant aspects of the environmental impacts of a proposed action through a "hard look", and its responsibilities that ensure the BLM's PI program will *make diligent efforts to involve the public* in projects covered by NEPA, while providing a professional, relevant, and safe setting for the public and ID team members.

- Hard Look.
- Diligent Efforts to Involve the Public.
- Professional, Relevant, & Safe Setting.

"Shall" Hard Look by EA and EIS ID Teams The BLM ID team's mandate is to utilize a systematic, interdisciplinary approach (Section 102(2)(A) of NEPA) 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 the human environment (40 CFR 1508.14). The responsibilities of the BLM's EA and EIS ID team members is at the center of NEPA's systematic, interdisciplinary approach. The BLM management, land use planners, NEPA specialists, and team leaders are not responsible for identifying and developing methods and procedures for determining significant impacts (Section 102(2)(B) of NEPA), nor to study the effects of appropriate alternatives (Section 102(2)(E) of NEPA). That is the job of the ID team. Its members may get direction, advice, and/or consul from management and other specialists, but the responsibility for the determination of analyzing effects methodologies and their products of significance and/or non-significance, is their's alone (BLM. 2008, p. 55). Without public access

to individual ID team members to explain their analyses of effects, the public will fail to really understand how the analysis was conducted and why particular methodologies were used.

The BLM ID team's responsibility in an EA and/or EIS is to determine the significance (40 CFR 1508.27. Significantly) and/or the non-significance of "issue" effects/impacts (40 CFR 1508.8. Effects (direct and indirect); 40 CFR 1508.7 Cumulative Impact) to the natural and physical environment and the relationship of people (i.e., the economic or social effects with that environment; 40 CFR 1508.14; BLM. 2008, pps. 54 - 62).

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 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 (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.

The "Hard Look" doctrine is a principle of administrative law that says a court should carefully review an administrative-agency decision to ensure that the agencies have genuinely engaged in reasoned decision making. A court is required to intervene if it "becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems." (USLegal - https://definitions.uslegal.com/h/hard-look-doctrine/. Viewed June 17, 2017).

A hard look is about the absence of bald conclusions, which for me are professional opinions either standing alone, or without sufficient investigation, supporting data, and/or a convincing rationale. I could not find a good simple definition of "NEPA bald conclusions" on the web (i.e., there are complicated ones from the court which follow), but I did find one for "bald assertions" for advertising at Wikipedia: "*Bald assertion in advertising, sometimes referred to as non establishment claim, is a subcategory of a literally false advertising claim. A bald assertion is a statement used in marketing, advertising or promotions by a company without proof or evidence of truth. An example of such advertising practices is when a company claims their product is the best on the market*." The part of the definition that worked for me as a bald conclusion was an assertion, or act of affirming something, *without proof or evidence of truth*.

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

Did preparation of the BLM's EA or EIS use an interdisciplinary approach to insure the integrated use of natural and social sciences and the environmental design arts (40 CFR 1502.6)? Were the disciplines of the preparers appropriate to the scope and issues of the analysis? Was a multidisciplinary team used (Appendix C)?

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).

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.

The BLM's EA and EIS documents **must describe** the analytical methodologies used to determine effects and significantly sufficiently so that the reader can understand how the analyses was conducted and why the particular methodologies were used (BLM. 2008, pps. 33 - 68). This NEPA compliance standard is usually not met by all ID team members' documented methodologies for scoping issues in EAs/EISs as reflected in the last BLM EIS I provided extensive public comments for (i.e., 1. 2001 *Hellgate Recreation Area Management Plan/Draft Environmental Impact Statement*, and 2. Is the record adequate for outstandingly remarkable values (ORVs)? – 2014 *Scoping Rogue River's Outstandingly Remarkable Values* (http://www.hugoneighborhood.org/OutstandinglyRemarkableValues_DraftFINAL120814.pdf). I suspect this situation lingers even though timber issues are generally well known in the BLM Medford District Office after decades of controversial public participation and litigation.

"Shall" Diligent Efforts to Involve the Public by EA and EIS ID Teams In 2005 the Congressional Research Service, Library of Congress, published a report for the U.S. Congress, *The National Environmental Policy Act: Background and Implementation*. The report identified four purposes of the NEPA process, two of which address public involvement (CRS. 2005, p. 11).

- **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);**
- **Facilitate public involvement in the federal decision-making process.**

The following CEQ NEPA regulations make it clear that NEPA's statutory scheme clearly envisions active PI in the NEPA process. The regulations are also a mandate applicable to, and binding on, all federal agencies, including BLM, for implementing the procedural provisions of NEPA (40 CFR 1500.3). Further, each agency shall interpret NEPA as a supplement to its existing authority. They shall review their policies, procedures, and regulations accordingly and

revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the federal government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible (40 CFR 1500.6).

- **40 CFR 1500.1(b), the purpose of NEPA is to "ensure that the environmental information made available to public officials and citizens is of high quality** (emphasis added)(i.e., includes accurate scientific analysis, expert agency comments, and public scrutiny).
- 40 CFR 1500.2(b) **requires "all Federal agencies, including BLM, 'to the fullest extent possible" . . . "Implement procedures to make the NEPA process more useful to decisionmakers and the public**." (emphasis added).
- **40 CFR 1500.2(d) requires "all Federal agencies, including BLM, 'to the fullest extent possible" . . . "encourage and facilitate public involvement in decisions which affect the quality of the human environment."** (emphasis added)
- **40 CFR 1501.4(b) requires agencies to involve the public "to the extent practicable" in preparing an EA.** (emphasis added)
- 40 CFR 1501.4(e)(1) requires that a FONSI be made available to the public.
- **40 CFR 1506.6 Public involvement.** Agencies, including BLM, shall:
- **40 CFR 1506.6(a) requires that Federal agencies shall "Make diligent efforts to involve the public in preparing and implementing their NEPA procedures."** (emphasis added)
- 40 CFR 1506.6(b) requires that Federal agencies shall "Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.
- 40 CFR 1506.6(c) requires that Federal agencies shall "Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is: (1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing. (2) A request for a hearing by another agency . . ."
- 40 CFR 1506.6(d) requires that Federal agencies shall "Solicit appropriate information from the public."
- 40 CFR 1506.6(e) requires that Federal agencies shall "Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process."
- 40 CFR 1506.6(f) requires that Federal agencies shall "Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552) . . . . Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies . . .

The BLM management and their EA and EIS ID teams' PI purpose of NEPA's "shall" requirement (i.e., "must" requirement) responsibility follows (NEPA, Section 102(2)(B); 40 CFR 1502.24; BLM. 2008, pps. 2 & 55).

- *"Make diligent efforts to involve the public in preparing and implementing their NEPA procedures*."
- *"We" (BLM) believe it* [BLM NEPA Handbook] *will help "you" (the reader)* [Interested Public] *help us in meeting the legal requirements of the NEPA*."

The BLM may be in non-compliance with 40 CFR1506.6 – Public Involvement by not making EA ID team members accessible to the public to explain their "Analyzing Effects Methodologies" during scoping before NEPA documents become publicly available. It would be in non-compliance if it did not make the EA ID team members accessible after the availability of environmental documents for public review. Beyond the BLM NEPA Handbook, the purposes for accessible EA ID team members follow.

- Describing the EA ID team members' analytical methodologies sufficiently so that the public can understand (40 CFR 1506.6) how the analysis was conducted and why particular methodologies were used (40 CFR 1502.24).
- Explaining with descriptions of any limitations inherent in the methodologies to the public (40 CFR 1502.22).
- Recognizing and explaining substantial dispute over models, methodology, or data, by recognizing the public's viewpoint(s) and EA ID team members' rationale for their choice of analyses methodologies (40 CFR 1502.24; 40 CFR 1502.24; BLM. 2008, p. 55).

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.

The BLM management should allow and encourage individual EA and EIS ID team members being allowed to supplement BLM NEPA Handbook training for the public by reaching out, or at least being accessible to the public with information on their individual "Analyzing Effects Methodologies" for documenting significance or non-significance (40 CFR 1502.24; BLM. 2008, p. 55).

The theme of the following CEQ regulations is the relationship of PI, "must describe" analyzing effects methodologies, and access to ID team members by the public.

- 40 CFR 1500.1 Purpose
  - 40 CFR 1500.1(a) inform federal agencies of what they must do to comply with the procedures and achieve the goals of NEPA;
  - 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)** (emphasis added);
  - 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 Policy. Federal agencies shall to the fullest extent possible:
  - 40 CFR 1500.2(b) **Implement procedures to make the NEPA process more useful to decisionmakers and the public** (emphasis added); to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives.
  - 40 CFR 1500.2(d) **Encourage and facilitate public involvement in decisions** (emphasis added) which affect the quality of the human environment.
- 40 CFR 1500.3 Mandate Parts 1500 through 1508 of this title provide regulations applicable to and **binding on all federal agencies** (emphasis added) for implementing the procedural provisions of the National Environmental Policy Act of 1969.
- 40 CFR 1500.6 Agency authority. Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. **The phrase "to the fullest extent possible" in section 102 means that each agency of the federal government shall comply** (emphasis added) with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.
- 40 CFR 1500.6(b). Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents **so as to inform those persons and agencies who may be interested or affected** (emphasis added).

- 40 CFR 1501.4(b). If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).
- 40 CFR 1501.4(e). Prepare a finding of no significant impact (§1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement. (1) The agency shall make the finding of no significant impact available to the affected public as specified in §1506.6.
- 40 CFR 1501.7 Scoping. [Allow the public to help shape the content of the EA and EIS by participating in scoping.] (40 CFR 1501.7(a)(1)).
- 40 CFR 1502.10(h). [EIS) List of preparers.
- 40 CFR 1502.14. Alternatives Including the Proposed Action
  - 40 CFR 1502.14(a). (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
  - 40 CFR 1502.14(c). (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
  - 40 CFR 1502.14(d). (d) Include the alternative of no action.
- 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** (emphasis added) [BLM. 2008, p. 70]. An agency may place discussion of methodology in an appendix.
- 40 CFR 1503.1 Inviting Comments. [Give the public an opportunity to review the analysis and any underlying documents.] (40 CFR 1503.1(a)(4)).
- 40 CFR 1503.4 Response to Comments. [Require the agency to respond to public comments and make these comments available to the public in a final document.] (40 CFR 1503.4).
- 40 CFR 1506.6 Public involvement. Agencies shall: **(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures**.
- 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** (emphasis added). Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.
- 40 CFR 1508.9(b). "Environmental assessment": (b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.
- 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. . . . [see original for 10 intensity standards].

Profession, Relevant, & Safe Setting for Public & EA and EIS ID Teams As vital as access to the ID teams by the public is, it must be recognized that this access is not unconditional. To proceed beyond the PI stage of the availability of an environmental document for public review, the access must have the goal of understanding by the public and BLM, and be relevant, professional, and safe for the public and ID team members. There must be an agreement between

the public member(s) and the BLM ID team member(s) that all four of the following meeting criteria exist prior to scheduling one-on-one meetings. Criteria 1 is the only NEPA shall requirement which is for ID team members to be accessible to the public, per the previous "shall" topics: 1. hard look and 2. diligent efforts to involve the public. Criteria 2 - 4 are brainstorming ideas for consideration by BLM.

1. Goal Of Understanding By Public.
2. Relevant Comments From Public.
3. Professional Relationship Between Public and ID Team Members.
4. Meeting Safe for Public and ID Team Members.

1. Goal Of Understanding By Public. 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).

2. Relevant Comments From Public Are Substantive Comments (BLM. 2008, pps. 65 - 67; Appendix B).

Substantive Public Comments do one or more of the following:

- Question, with reasonable basis, the accuracy of information in the EIS or EA.
- Question, with reasonable basis, the adequacy of, methodology for, or assumptions used for the environmental analysis.
- Present new information relevant to the analysis.
- Present reasonable alternatives other than those analyzed in the EIS or EA.
- Cause changes or revisions in one or more of the alternatives.

Public Comments that are not considered substantive include the following.

- Comments in favor of or against the proposed action or alternatives without reasoning that meet the criteria listed above (such as "we disagree with Alternative Two and believe the BLM should select Alternative Three").
- Comments that only agree or disagree with BLM policy or resource decisions without justification or supporting data that meet the criteria listed above (such as "more grazing should be permitted").
- Comments that don't pertain to the project area or the project (such as "the government should eliminate all dams," when the project is about a grazing permit).
- Comments that take the form of vague, open-ended questions.

3. Professional Relationships Between Public Members and ID Team Members. For this discussion a professional relationship has to do with how business is conducted between a member(s) of the public and an ID team member(s). A number of important example professional relationships characteristics for consideration that can apply to virtually any type of human interactions follow, including one-on-one meetings between the public and the ID team members.

- NEPA Processes & Relevant Issues. Stick to the understanding the NEPA processes and relevant issues.
- Demeanor. Be polite and well-spoken. Communications, both oral and written, should be relevant to the analysis of the proposed action, and the tone of the communications should be polite and respectful. People with understanding relationships treat others as they want to be treated. Do not make it personal.
- Witten Communication Pre-requisite. Written information questions from public and responses from BLM provided before meeting.
- Reliability. As a professional, you will be counted on to find a way to get the job done. Responding promptly and following through on promises in a timely manner is also important, as this demonstrates reliability.
- Competence. Professionals strive to become experts in their field, which sets them apart from the rest of the pack. This includes citizens by making relevant comments and asking information understanding questions, including responses from BLM ID team members.
- Ethics. You should display ethical behavior at all times.
- Maintaining Your Poise. Professionals maintain their poise even when facing a difficult situation.
- Etiquette. Be sure not to dominate the conversation and listen intently to the other party.
- Accountability. Professionals are accountable for their actions at all times. If you make a mistake, own up to it and try to fix it if possible. Don't try to place blame, take responsibility and work to resolve the issue.

4. Meeting Safe for Public and ID Team Members. Safe for all parties is more than physical safety. It includes honest and appreciative listening without judgement. Its focus is asking and responding to "understanding information" questions from all parties. It is a safe environment without the stress of hostile situations. A meeting would normally only occur after it is obvious that: 1. the public member(s) had read a description of the analytical analysis effects methodologies (i.e., scoping), or the environmental document in question (i.e., after document availability for public review) through providing written information understanding questions to the ID team member(s), and 2. the appropriate ID team members had read any disputes over models, methodology, or data, from the public and recognized the opposing viewpoint(s) as well as explaining the rationale for the choice of methodologies. No. 2 also includes a written clarification response(s) from the BLM ID team member(s) on the analytical methodology and/or methodologies in question that were not sufficient for the public to understand how the analysis was conducted, and why the particular effects methodologies were used (BLM. 2008, p. 55). If possible, early public scoping, before the availability of the environmental document and comment periods, is the best PI stage for this communications work.

- Scheduled Meeting. Known time and meeting duration, after public written information questions provided and ID team member response(s).
- Keep your calm, even during tense situations.
- Public access should not be used as a platform for irrelevant comments, nor intimidation or political abuse because the public member(s) disagrees with an ID team member(s)' analyzing effects methodology(s) and/or resulting impacts.
- Number of Participants. If the number of participants is more than one-on-one, consideration of mutual support from all parties for a meeting criteria rules facilitator should be considered.
- Maintaining Your Poise. Participants in a professional relationship must maintain their poise even when facing a difficult situation. If one meeting participant treats another in a belligerent manner, you should not resort to the same type of behavior. This is also a potential reason for ending the meeting.
- Threats of property or personal injury are relevant reasons for terminating the meeting.

The goal of understanding each others' viewpoints through one-on-one meetings is hard work. This does not normally occur in internal BLM ID team meetings as each ID team member is usually the only specialist for the scoping issue, and probing questions from other ID team member disciplines are minimal.

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 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.

Formal written comments may be the most important contribution from citizens, especially during the earliest possible PI stages. Public comments, both oral and written, should be relevant to the analysis of the proposed action, and the tone of the comments should be polite and respectful (Appendix D). People with understanding relationships, even if they don't always agree, are the means for achieving both the BLM's and the public's goals. For example, when the public and BLM understand and accept mutual ground rules (e.g. BLM NEPA Handbook, etc.) for managing a conflict, resolution becomes much more likely.

These comments are public comments available, as applicable, for inclusion in the digital and traditional public square for the purpose of exchanging views and issues, ideas and opinions, while developing solutions to challenges for the public and BLM.

Please acknowledge that these public comments for the DOI-BLM-ORWA-MO70-0006-2016-EA Pickett West Forest Management Project environmental assessment were received.

Don, you have a great day while Cindy and I avoid the heat.

Sincerely,

Mike :) Mike Walker

Mike Walker, Chair
Hugo JS&PSS Exploratory Committee
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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.

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Appendix A. National Environmental Procedures Act's (NEPA) Procedural Requirements

I NATIONAL ENVIRONMENTAL POLICY ACT (1969)

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 the quality of the human environment, **a detailed statement** (emphasis added) 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)]

(F) recognize the worldwide and long-range character of environmental problems (emphasis added) and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment; [42 U.S.C § 4332(2)(F]

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment (emphasis added); [42 U.S.C § 4332(2)(G)]

(**H) initiate and utilize ecological information in the planning and development of resource-oriented projects** (emphasis added); [42 U.S.C § 4332(2)(H)] . . .

II. THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION (CRS. 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)

A. National Environmental Policy Act (1969)

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(2) of NEPA contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act.

B. Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the NEPA, 40 C.F.R. parts 1500-1508 (1986 - 2011).

Legislative History. In the more than 30 years since passage of NEPA, Congress has amended the law only to include minor technical changes. However, within a year after NEPA's passage, a section was added to the Clean Air Act (42 U.S.C. 7401 et seq.) that affected the way NEPA is implemented. To **further clarify agencies' responsibilities with regard to public involvement in the NEPA process** (emphasis added), in December 1970, Congress added Section 309 to the Clean Air Act. Provisions of Section 309 made explicit that the Administrator of the newly formed Environmental Protection Agency (EPA) has a duty to examine and comment on all EISs. After that review, the Administrator was directed to make those comments public and, if the proposal was environmentally "unsatisfactory," to publish this finding and refer the matter to the CEQ. EPA subsequently developed a program for reviewing and rating federal agency projects (CRS. 2005. p. CRS 6).

The Role of the Courts in Implementing NEPA. Almost since NEPA's enactment, the courts have played a prominent role in interpreting and, in effect, enforcing NEPA's requirements. Beginning almost immediately and continuing into the early 1980s, the courts emphasized agency compliance with NEPA's procedural EIS requirements but did little to delineate specific compliance requirements connected to the substantive environmental policy goals. In 1983, the U.S. Supreme Court, in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.,* clarified that (CRS. 2005. p. CRS 9):

> 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). Second, **it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process** (emphasis added). Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the **agency take a "hard look" at the environmental consequences before taking a major action** (emphasis added) . . . Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise. Rather, Congress intended that the "hard look" be incorporated as part of the agency's process of deciding whether to pursue a particular federal action.

This specification of **NEPA's "twin aims" and the "hard look" requirement** (emphasis added) are often cited by both federal agencies and environmental advocates to articulate NEPA's mandate. In 1989, the U.S. Supreme Court, in *Robertson v. Methow Valley Citizens Council*, reiterated that NEPA does not mandate particular results, but simply prescribes a process. If the adverse environmental effects of a proposed action are adequately identified and evaluated, NEPA does not constrain an agency from

deciding that other values outweigh the environmental costs. The Court further clarified that "other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed, rather than unwise, agency action." (CRS. 2005. p. CRS 9).

In addition to determining the substantive versus procedural question, the courts have determined many specific procedural elements of NEPA compliance. For example, for individual actions, courts have ruled on agency interpretation of the meaning of the phrases "federal action," "significantly affecting," and "human environment." Also, the courts played a significant role in determining how and when federal agencies were required to prepare EISs. Some questions decided by the courts involved such issues as the adequacy of individual EISs, who must prepare an EIS, at what point an EIS must be prepared, and how adverse comments from agencies should be handled. Such decisions were, at least in part, the basis of CEQ guidelines released during the 1970s and were subsequently considered when CEQ promulgated its regulations (CRS. 2005. pps. CRS 9 - 10).

The Role of CEQ in Implementing NEPA. Authority to promulgate regulations to implement NEPA's provisions was not expressly included among the duties and responsibilities given to CEQ under NEPA (CRS. 2005. p. CRS-10).

Executive Order 11514, Protection and Enhancement of Environmental Quality. However, shortly after signing NEPA, President Nixon issued an Executive Order authorizing CEQ to issue "regulations" for the implementation of the procedural provisions of the act.[29] . . . The Executive Order did not extend to CEQ the authority to make these regulations legally binding on federal agencies. Therefore, they would serve as only guidance for compliance (CRS. 2005. p. CRS-10).

> [Footnote] 29. *Executive Order 11514, Protection and Enhancement of Environmental Quality*, signed by President Nixon, March 5, 1970, 35 Federal Register 4247.

Executive Order 11991, Relating to Protection and Enhancement of Environmental Quality. During the mid-1970s, frequent complaints were raised regarding the delays that the NEPA process was perceived to cause in the decision-making process. Some observers attributed these problems to a lack of uniformity in NEPA implementation and uncertainty regarding what was required of federal agencies. Also, in response to increasing NEPA-related litigation, agencies often produced overly lengthy, unreadable, and unused EISs. In an effort to standardize an increasingly complicated NEPA process, President Carter amended President Nixon's Executive Order, directing CEQ to **issue regulations that would be legally binding on federal agencies** (emphasis added).[33] Final regulations replacing the previous guidelines were issued in the fall of 1978 and became effective on July 30, 1979.[34] (CRS. 2005. pps. CRS 10 - 11).

> [Footnote] 33. *Executive Order 11991, Relating to Protection and Enhancement of Environmental Quality*, signed by President Carter, May 24, 1977, 42 Federal Register 26967.
> [Footnote] 34. 43 Federal Register 55978, November 28, 1978; 40 C.F.R. §§ 1500-1508.

CEQ's regulations also specified that the purpose of the NEPA process was to (CRS. 2005. p. CRS 11):

- **inform federal agencies of what they must do to comply with the procedures and achieve the goals of NEPA** (emphasis added) [40 CFR 1500.1(a)];
- **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)** (emphasis added) [40 CFR 1500.1(b)];

- **foster better decision making by helping public officials make decisions based on an understanding of the environmental consequences of their actions** (emphasis added) [40 CFR 1500.1(c)]; and
- **facilitate public involvement in the federal decision-making process** (emphasis added) [40 CFR 1500.2(d)].

The CEQ 40 C.F.R. parts 1500-1508 require Federal agencies to address these situations in their NEPA implementing procedures. All agencies are required to adopt procedures that supplement the CEQ regulations and provide NEPA implementing guidance that both provides agency personnel with additional, more specific direction for implementing the procedural provisions of NEPA, and informs the public and State and local officials of how the CEQ regulations will be implemented in agency decisionmaking (40 C.F.R. § 1507.3(b)(1)). Those procedures are required by 40 CFR Sections 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

Appendix B. Interdisciplinary Team's Responsibilities for Public Involvement From BLM National Environmental Policy Act Handbook H-1790-1 (April 24, 2008)

- 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. (BLM. 2008)

The reader can observe from the outline of the “BLM NEPA Manual Handbook” that many NEPA requirements apply to both EAs and EISs (Chapters 1 -6). The following are only a few quotes from the handbook.

HANDBOOK USER'S GUIDE (BLM. 2008, p. ix)

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. "We" (BLM) have written it for use by "you," the reader involved in the NEPA process (emphasis added). The "NEPA process" means all measures necessary for compliance with the requirements of the Purpose (section 2 of the Act) and the Congressional Declaration of National Environmental Policy (Title 1 of the Act). Meeting our NEPA compliance responsibilities requires help from all levels of our agency, including decision-makers, program managers, specialists, interdisciplinary team members, and BLM contractors.

The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment (40 CFR 1500.1(c)). Early chapters in this Handbook address the legal requirements and our analytical approach to complying with the NEPA. We then explain content requirements of specific types of NEPA compliance documents.

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** (emphasis added). 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.

A **requirement to meet NEPA compliance is that we encourage and facilitate public involvement in decisions which affect the quality of the human environment (40 CFR 1500.2(d)). Information relating to public participation in the NEPA process is contained primarily in Chapters 6, 8, 9, and 12** (emphasis added).

To assist you in carrying out your NEPA responsibilities, this Handbook includes references to documents contained in the **BLM NEPA Handbook Web Guide (Web Guide). The Web Guide includes** (emphasis added) copies of official guidance, such as CEQ citations, and provides examples for your use in complying with the NEPA. For example, an interdisciplinary team preparing an EIS with tribal or county cooperators can review a number of sample memorandums of understanding (MOUs) written to identify the responsibilities of cooperating agency status. These MOUs serve as models, although they are not official guidance. **The Web Guide also contains excerpts of BLM NEPA documents** (emphasis added). Other materials include helpful ideas, tools, and techniques for making the NEPA process more efficient and effective and for adding clarity to the NEPA documents. **References to the Web Guide are shown in this Handbook in blue text** (emphasis added).

CHAPTER 1—NEPA BASICS (BLM. 2008, p. 2)

In addition to setting policy goals for environmental planning, the NEPA created the Council on Environmental Quality (CEQ), in the Executive Office of the President, to be the "caretaker" of the NEPA. The CEQ issued final regulations for Implementing the Procedural Provisions of NEPA (40 CFR 1500–1508) in 1978 (revised in 1986), and added to them in 1981 with a guidance document titled "Forty Most Asked Questions Concerning CEQ's NEPA Regulations." The NEPA and the CEQ regulations establish procedures to ensure proper consideration of environmental concerns, but they do not dictate a particular result or decision. **The CEQ regulations also require that agencies "make diligent efforts to involve the public in preparing and implementing their NEPA procedures"** (emphasis added) (40 CFR 1506.6(a)) (BLM. 2008, p. 2).

1.2 DEPARTMENTAL GUIDANCE AND THIS BLM HANDBOOK (BLM. 2008, p. 2)

The Department of the Interior's (DOI) NEPA policy is found in the Departmental Manual (DM) Part 516. Chapter 11 of the manual (516 DM 11) is specific to the BLM's management of the NEPA process. The **DOI, through the Office of Environmental Policy and Compliance (OEPC)** (emphasis added), also continuously updates a series of environmental statement, review, and compliance memoranda, which further interpret DM Part 516 (BLM. 2008, p. 2).

This Handbook contains direction for use by BLM employees from all levels of our organization, including decision-makers, program managers, specialists, interdisciplinary team members, and any BLM contractors involved in the NEPA process. **"We" (BLM) believe it will help "you" (the reader) help us in meeting the legal requirements of the NEPA** (emphasis added) (BLM. 2008, p. 2).

[Author's Note. 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). In this case the ID Team member's analysis methodologies responsibility for determining significance, or non-significance, is identified in its NEPA handbook,

Chapter 6 “NEPA Analysis” (pages 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).[1]

For more information see the BLM Planning and NEPA Library Web page (BLM. 2008, p. 2).

[Author’s Note: This web link like all web links to the BLM Planning and NEPA Library Web page does not work.]

1.4 THE NEPA APPROACH (BLM. 2008, p. 3)

As described by the CEQ regulations, the NEPA “is our basic national charter for protection of the environment” (40 CFR 1500.1). According to the regulations, “The NEPA process is intended to help public officials **make decisions that are based on understanding of environmental consequences** (emphasis added), and take actions that protect, restore, and enhance the environment” (40 CFR 1500.1(c)). **Analysis and disclosure of the effects** (emphasis added) of a proposed action and its alternatives are the underlying NEPA principles that move agencies toward achieving this goal (BLM. 2008, p. 3).

Figure 1.1, "NEPA Screening Process," is a flow chart that shows our NEPA screening process. The NEPA process starts when the BLM has a proposal for action (see section **3.1, *Determining When NEPA Applies***). The CEQ regulations require that the NEPA process begin and be “integrate[d] with other planning at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts” (40 CFR 1501.2) (BLM. 2008, p. 3).

Several factors guide the timing of NEPA analysis and agency decision-making ((40 CFR 1502.5) and (40 CFR 1506.1)). For example (BLM. 2008, p. 3):

– You must finish all of the steps necessary for completing the NEPA process prior to issuance of a formal decision, to enable you to make a well-informed decision (40 CFR 1505.1(d), 40 CFR 1506.1, 516 DM 1.2(D)) (BLM. 2008, p. 3).

– **You must not authorize any action that would limit the choice of alternatives being analyzed under the NEPA until the NEPA process is complete (40 CFR 1506.1). However, this requirement does not apply to actions previously analyzed in a NEPA document that are proposed for implementation under an existing land use plan** (emphasis added). For instance, an existing plan will continue to guide the BLM's processing of site-specific permits on existing oil and gas leases. Drilling permits, sundry notices, and similar authorizations will be allowed as long as the actions do not exceed limits that were delineated in the existing land use plan (LUP) and analyzed in the associated NEPA document (BLM. 2008, p. 3).

> [Author’s Note. What about a resource management plan (RMP)/EIS that has an impacts section, but does not meet the CEQ regulation requirements (e.g., 1500.3 Mandate, or 1500.6 Agency authority, or 1502.22 Incomplete or unavailable information, or 1506.6 Public involvement, 1508.7 or Cumulative impact, or 1508.25 Scope, and/or 1508.27 Significantly, etc.)? A specific example, is that several topic impact sections in the EIS do not have a description of the impact methodology and analytical assumptions for the effects analysis (6.8.1.2 Analyzing Effects, BLM. 2008, p. 55).]
>
> > [Methodology: Your 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)** (emphasis added). This explanation **must include a description of any limitations inherent in the methodology** (emphasis added). 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** (emphasis added). You may place discussions of methodology in the text or in the appendix of the document. To the extent possible, we recommend that the analysis of impacts be quantified (BLM. 2008, p. 55).]

You must prepare NEPA analyses using an interdisciplinary approach, and the **disciplines of the preparers must be appropriate to the scope of the analysis and to the issues identified in the scoping process** (emphasis added) (40 CFR 1502.6). The requirement for an interdisciplinary approach is met when preparer(s) consult with all appropriate sources for the analysis of affected resources. This may include staff from other BLM offices or other Federal or non-Federal agencies, as needed, to provide a rational basis for decision-making (BLM. 2008, p. 4).

The CEQ regulations require NEPA documents to be "concise, clear, and to the point" (40 CFR 1500.2(b), 1502.4). **Analyses must "focus on significant environmental issues and alternatives" and be useful to the decision-maker and the public (40 CFR 1500.1)** (emphasis added). Discussions of impacts are to be proportionate to their significance (40 CFR 1502.2(b)). Similarly, the description of the affected environment is to be no longer than is necessary to understand the effects of the alternatives (40 CFR 1502.15). "Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail." (40 CFR 1500.1) (BLM. 2008, p. 4).

5.1.2 Reviewing Existing Environmental Documents (BLM. 2008, pps. 23 - 24)

In addition to answering the above questions, **evaluate whether the public involvement and interagency review associated with existing EAs or EISs are adequate for the new proposed action** (emphasis added). In general, where the new proposed action has not already been discussed during public involvement for the existing EA or EIS, some additional public involvement for the new proposed action will be necessary (BLM. 2008, p. 23).

If you conclude that additional public involvement is necessary, the type of public involvement is at the discretion of the decision-maker. Public involvement may include any of the following: external scoping, public notification before or during your review of the existing EA or EIS, public meetings, or public notification or review of a completed DNA Worksheet (see section **5.1.3, *Document the Review***) (BLM. 2008, p. 24).

CHAPTER 6—NEPA ANALYSIS

6.2 PURPOSE AND NEED (BLM. 2008, pps. 35 - 38)
See the Web Guide for examples of purpose and need statements (emphasis added) (BLM. 2008, p. 35).

6.3 SCOPING (BLM. 2008, pps. 38 - 40)

Scoping is the process by which the BLM solicits internal and external input on the issues, impacts, and potential alternatives that will be addressed in an EIS or EA as well as the extent to which those issues and impacts will be analyzed in the NEPA document. Although it is not required, you may also elect to scope for issues and impacts associated with actions under CX or DNA review. **Begin considering cumulative impacts during the scoping process** (emphasis added); **use scoping to begin identifying actions by others that may have a cumulative effect with the proposed action** (emphasis added), and identifying geographic and temporal boundaries, baselines and **thresholds** (emphasis added). Scoping also helps to begin identifying **incomplete or unavailable information and evaluating whether that information is essential to a reasoned choice among alternatives** (emphasis added) (BLM. 2008, p. 38).

Scoping is one form of public involvement in the NEPA process. Scoping occurs early in the NEPA process and generally **extends through the development of alternatives** (emphasis added) (BLM. 2008, p. 38).

6.4 ISSUES (BLM. 2008, pps. 40 - 42)

The CEQ regulations provide many references to "issues," though the regulations do not define this term explicitly. At 40 CFR 1501.7(a)(2), 40 CFR 1501.7(a)(3), (40 CFR 1502.1, and 1502.2(b), the CEQ explains that issues may be identified through scoping and that only significant issues must be the focus of the environmental document. **Significant issues are those related to significant or potentially significant effects** (emphasis added) (see section **7.3, *Significance***) (BLM. 2008, p. 40).

For the purpose of BLM NEPA analysis, **an "issue" is a point of disagreement, debate, or dispute with a proposed action based on some anticipated environmental effect** (emphasis added). An issue is more than just a position statement, such as disagreement with grazing on public lands. An issue (BLM. 2008, p. 40):

- has a cause and effect relationship with the proposed action or alternatives;
- is within the scope of the analysis;
- has not be decided by law, regulation, or previous decision; and
- is amenable to scientific analysis rather than conjecture.

Issues point to environmental effects; as such, issues can help shape the proposal and alternatives. (For externally generated proposals, the proposed action is not developed through scoping, but other action alternatives are). Issues may lead to the identification of design features that are incorporated into the proposed action (see section **6.5.1.1, *Design Features of the Proposed Action***) or mitigation measures (see section **6.8.4, *Mitigation and Residual Effects***) (BLM. 2008, p. 40).

6.4.1 Identifying Issues for Analysis (BLM. 2008, p. 41)

Preliminary issues are frequently identified during the development of the proposed action through internal and external scoping. Additionally, supplemental authorities that provide procedural or substantive responsibilities relevant to the NEPA process may help identify issues for analysis. See **Appendix 1**, ***Supplemental Authorities to be Considered***, for a list of some common supplemental authorities. There is no need to make negative declarations regarding resources described in supplemental authorities that are not relevant to your proposal at hand (BLM. 2008, p. 41).

While many issues may arise during scoping, not all of the issues raised warrant analysis in an EA or EIS. Analyze issues raised through scoping if (BLM. 2008, p. 41):

- Analysis of the issue is necessary to **make a reasoned choice between alternatives. That is, does it relate to how the proposed action or alternatives respond to the purpose and need?** (emphasis added) (See section **6.6, *Alternatives Development***).
- The issue is significant (an issue associated with a **significant direct, indirect, or cumulative impact, or where analysis is necessary to determine the significance of impacts -** emphasis added).

The Web Guide contains examples of issues identified for analysis (emphasis added).

6.4.2 Issues Not Analyzed (BLM. 2008, p. 42)

You need not analyze issues associated with the proposed action that do not meet the criteria described in section **6.4.1., *Identifying Issues for Analysis*. We recommend that you document such externally generated issues along with rationale for not analyzing them in the administrative record or in the EA or EIS itself** (emphasis added). You have more flexibility in tracking internally generated issues. For example, in a preliminary brainstorming session, it may not be important to record all issues raised. However, if after careful and detailed consideration you determine not to analyze an internally-generated issue, we recommend that you document the reasons in the administrative record, or in the EA or EIS. The detail used to explain why an issue was not analyzed is largely dependent on how the issue was presented and why you are not analyzing it. See the Web Guide for an example of how issues not analyzed can be treated in a NEPA document (emphasis added) (BLM. 2008, p. 42).

[Author's Note: Per previous comments the "Web Guide" links do not work.]

6.8 ENVIRONMENTAL EFFECTS

6.8.1 Effects Analysis

6.8.1.1 Defining Environmental Effects (BLM. 2008, pps. 54 - 55)

Your **EA or EIS** (emphasis added) must identify the known and predicted effects that are related to the issues (40 CFR 1500.4 (c)), (40 CFR 1500.4(g), 40 CFR 1500.5(d), 40 CFR 1502.16) (*see **6.4 Issues***). An issue differs from an effect; an issue describes an environmental problem or relation between a resource and an action, while effects analysis predicts the degree to which the resource would be affected upon implementation of an action.

Effects can be 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. Effects may also include those resulting from actions that may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial (40 CFR 1508.8).

Analyze relevant short-term and long-term effects and disclose both beneficial and detrimental effects in the NEPA analysis. We recommend you define the duration of long term and short-term, as it can vary depending on the action and the scope of analysis. You must consider and analyze three categories of effects for any BLM proposal and its alternatives: direct, indirect, and cumulative (40 CFR 1508.25(c)).

To help decision-makers understand how a resource will be affected, focus the discussion of effects on the context, intensity, and duration of these effects (see section ***7.3, Significance***).

Your effects analysis must also identify possible conflicts between the proposed action (and each alternative) and the objectives of Federal, State, regional, local, and tribal land use plans, policies, or controls for the area concerned (40 CFR 1502.16(c)).

6.8.1.2 Analyzing Effects (BLM. 2008, pps. 55 -56)

The **effects analysis must demonstrate that the BLM took a "hard look" at the impacts of the action** (emphasis added). The level of detail must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (40 CFR 1502.1). See the Web Guide for recent examples of how the Interior Board of Land Appeals (IBLA) has dealt with the concept of "hard look." A "**hard look**" is a reasoned analysis containing quantitative or detailed qualitative information.

Use the best available science to support NEPA analyses, and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed.

Describe the methodology and analytical assumptions for the effects analysis as explained below (emphasis added)**:**

Methodology: Your 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)** (emphasis added). This explanation **must include a description of any limitations inherent in the methodology** (emphasis added). 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** (emphasis added). You may place discussions of methodology in the text or in the appendix of the document. To the extent possible, we recommend that the analysis of impacts be quantified.

> [Author's Note. I added the following CFRs for a clarification of Section 6.8.1.2 Analyzing Effects.]
>
> **[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.]

Assumptions: We recommend that your NEPA document state the analytical assumptions, including the geographic and temporal scope of the analysis (which may vary by issue), the baseline for analysis, as well as the reasonably foreseeable future actions (see section **6.8.3, *Cumulative Effects***). You must also explain any assumptions made when information critical to the analysis was incomplete or unavailable (40 CFR 1502.22). See section **6.7.2, *Use of Relevant Data***, for more discussion of incomplete or unavailable information.

Analytical assumptions may include any reasonably foreseeable development (RFD) scenarios for resources, such as RFDs for oil and gas development. A reasonably foreseeable development scenario is a baseline projection for activity for a defined area and period of time, and though commonly used in minerals development, these scenarios may be used for other resources as well. Examples of reasonably foreseeable development scenarios can be found in the Web Guide.

Clarity of expression, logical thought processes, and rational explanations are more important than length or format in the discussion of impacts. Following these guidelines will help the decision-maker and the public understand your analysis.

- Use objective, professional language without being overly technical.
- Avoid subjective terms such as "good," "bad," "positive," and "negative." The term "significant" has a very specific meaning in the NEPA context (see section **7.3, *Significance***). While it is a common descriptor, do not use it in NEPA documents unless it is intended to take on the NEPA meaning.
- Avoid the use of acronyms.

6.8.2 Direct and Indirect Effects (BLM. 2008, p. 56)

EAs and EISs (emphasis added) must analyze and describe the direct effects and indirect effects of the proposed action and the alternatives on the quality of the human environment (40 CFR 1508.8). The value in requiring analysis of both direct and indirect effects is to make certain that no effects are overlooked. Because it can be difficult to distinguish between direct and indirect effects, you do not have to differentiate between the terms. When you are uncertain which effect is direct and which is indirect, it is helpful to describe the effects together. Effects are weighted the same; you do not consider an indirect effect less important than a direct effect in the analysis. Examples of direct and indirect effects can be found in the Web Guide.

Direct effects are those effects "…which are caused by the action and occur at the same time and place" (40 CFR 1508.8(a)).

Indirect effects are those 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 water and air and other natural systems, including ecosystems" (40 CFR 1508.8(b)).

6.8.3 Cumulative Effects (BLM. 2008, pps. 56 - 57)

The purpose of cumulative effects analysis is to ensure that Federal decision-makers consider the full range of consequences of actions (the proposed action and alternatives, including the No Action alternative). Assessing cumulative effects begins early in the NEPA process, during internal and external scoping.

"Analyzing cumulative effects is more challenging than analyzing direct or indirect effects, primarily because of the difficulty of defining the geographic (spatial) and time (temporal) boundaries. For example, if the boundaries are defined too broadly, the analysis becomes unwieldy; if they are defined too narrowly, significant issues may be missed, and decision-makers will be incompletely informed about the consequences of their actions" (CEQ, "Considering Cumulative Effects Under the National Environmental Policy Act").

In addition to the direction described below, the Web Guide contains a list of "Principles of cumulative effects analysis" that is useful in guiding effective cumulative effects analysis, as well as examples of cumulative effects. The Web Guide also includes "Steps in cumulative effects analysis to be addressed in each component of environmental impact assessment" from the CEQ's "Considering Cumulative Effects Under the National Environmental Policy Act (Table 1-5)."

The CEQ regulations define **cumulative effects** as "…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 actions" (40 CFR 1508.7).

The following sections lay out steps in cumulative effects analysis. This is not a required format for documentation but is a useful way to think about the process and ensure an adequate analysis.

6.8.3.1 Cumulative Effects Issues (BLM. 2008, pps. 57 - 58)

Determine which of the issues identified for analysis (see section **6.4, *Issues***) may involve a cumulative effect with other past, present, or reasonably foreseeable future actions. If the proposed action and alternatives would have no direct or indirect effects on a resource, you do not need a cumulative effects analysis on that resource. Be aware that minor direct and indirect effects can potentially contribute to synergistic cumulative effects that may require analysis (see section **6.8.3.5 *Analyzing the Cumulative Effects***).

6.8.3.2 Geographic Scope of the Cumulative Effects Analysis (BLM. 2008, p. 58)

We recommend that you establish and describe the geographic scope for each cumulative effects issue, which will help bound the description of the affected environment (see section **6.7.1, *Affected Environment***). Describe in your EA or EIS the rationale for the geographic scope established. The geographic scope is generally based on the natural boundaries of the resource affected, rather than jurisdictional boundaries. The geographic scope will often be different for each cumulative effects issue. The geographic scope of cumulative effects will often extend beyond the scope of the direct effects, but not beyond the scope of the direct and indirect effects of the proposed action and alternatives. As noted above, if the proposed action and alternatives would have no direct or indirect effects on a resource, you do not need to analyze cumulative effects on that resource.

6.8.3.3 Timeframe of the Cumulative Effects Analysis (BLM. 2008, p. 58)

We recommend that you establish and describe the timeframe for each cumulative effects issue—that is, define long-term and short-term, and incorporate the duration of the effects anticipated. Long-term could be as long as the longest lasting effect. Timeframes, like geographic scope, can vary by resource. For example, *the timeframe for economic effects may be much shorter than the timeframe for effects on vegetation structure and composition.* Base these timeframes on the duration of the direct and indirect effects of the proposed action and alternatives, rather than the duration of the action itself. Describe in your EA or EIS the rationale for the timeframe established.

6.8.3.4 Past, Present, and Reasonably Foreseeable Actions (BLM. 2008, pps. 58 - 59)

The cumulative effects analysis considers past, present, and reasonably foreseeable future actions that would affect the resource of concern within the geographic scope and the timeframe of the analysis. In your analysis, you must consider other BLM actions, other Federal actions, and non-Federal (including private) actions (40 CFR 1508.7).

You must consider past actions within the geographic scope to provide context for the cumulative effects analysis (40 CFR 1508.7). Past actions can usually be described by their aggregate effect without listing or analyzing the effects of individual past actions (CEQ, *Guidance on the Consideration of Past Actions in Cumulative Effects Analysis*, June 24, 2005). Summarize past actions adequately to describe the present conditions (see section **6.7.1, *Affected Environment***).

In some circumstances, past actions may need to be described in greater detail when they bear some relation to the proposed action. For example, past actions that are similar to the proposed action might have some bearing on what effects might be anticipated from the proposed action or alternatives. You should clearly distinguish analysis of direct and indirect effects based on information about past actions from a cumulative effects analysis of past actions. (CEQ, *Guidance on the Consideration of Past Actions in Cumulative Effects Analysis*, June 24, 2005).

You must consider present actions within the geographic scope (40 CFR 1508.7). Present actions are actions which are ongoing at the time of your analysis.

You must include reasonably foreseeable future actions within the geographic scope and the timeframe of the analysis (40 CFR 1508.7). You cannot limit reasonably foreseeable future actions to those that are approved or funded. On the other hand, you are not required to speculate about future actions. Reasonably foreseeable future actions are those for which there are existing decisions, funding, formal proposals, or which are highly probable, based on known opportunities or trends. Reasonably foreseeable development scenarios may be valuable sources of information to assist in the BLM's cumulative effects analysis. When considering reasonably foreseeable future actions, it may be helpful to ask such questions as:

- Is there an existing proposal, such as the submission of permit applications?
- Is there a commitment of resources, such as funding?
- If it is a Federal action, has the NEPA process begun (for example, publication of an NOI)?

Analyzing future actions, such as speculative developments, is not required but may be useful in some circumstances. Including assumptions about possible future actions may increase the longevity of the document and expand the value for subsequent tiering. For example:

> *The EIS for oil and gas leasing in the Northwest NPR-A Planning Area in Alaska included analysis of permanent road construction, even though it is not feasible at this time. By including assumptions and analysis about such possible future road construction in the EIS, new NEPA analysis might not be required if such permanent roads become feasible in the future.*

6.8.3.5 Analyzing the Cumulative Effects (BLM. 2008, pps. 59 - 61)

For each cumulative effect issue, analyze the direct and indirect effects of the proposed action and alternatives together with the effects of the other actions that have a cumulative effect. Cumulative effects analysis will usually need to be addressed separately for each alternative, because each alternative will have different direct and indirect effects.

The following structure is not a required format, but may be useful in constructing the cumulative effects analysis. For each cumulative effect issue:

- Describe the existing condition (see section **6.7, *Affected Environment***). The existing condition is the combination of the natural condition and the effects of past actions. The natural condition is the naturally occurring resource condition without the effects of human actions. Detailed description of the natural condition may not be possible for some resources because of **incomplete or unavailable information (40 CFR 1502.22)** (emphasis added) or may not be applicable for some resources. Describe the effects of past actions, either individually or collectively, to understand how the existing condition has been created.
- Describe the effects of other present actions.
- Describe the effects of reasonably foreseeable actions.
- Describe the effects of the proposed action and each action alternatives.

- Describe the interaction among the above effects.
- **Describe the relationship of the cumulative effects to any thresholds** (emphasis added).

See the Web Guide for an example of cumulative effects analysis [links don't work]

Figure 6.3 Cumulative Effects (see original)
Bars in this graph represent effects of actions.
This graphic most clearly represents additive cumulative effects.

The analysis of the No Action alternative describes the cumulative effect of past, other present, and reasonably foreseeable actions, without the effect of the proposed action or action alternatives. The analysis of the proposed action will include those same effects, as well as the effects of the proposed action, and thus will demonstrate the incremental difference resulting from the proposed action. **Regardless of how you present the analysis, you must be able to describe the incremental differences in cumulative effects as a result of the effects of the proposed action and alternatives** (emphasis added) (40 CFR 1508.7).

Describe the interaction among the effects of the proposed action and these various **past, present, and reasonably foreseeable actions** (emphasis added) . This interaction may be:

- additive: the effects of the actions add together to make up the cumulative effect.
- countervailing: the effects of some actions balance or mitigate the effects of other actions.
- synergistic: the effects of the actions together is greater than the sum of their individual effects.

How the different effects interact may help determine how you may best describe and display the cumulative effects analysis. It will often be helpful to describe the cause-and-effect relations for the resources affected to understand if the cumulative effect is additive, countervailing, or synergistic.

The cumulative effects analysis provides a basis for evaluating the cumulative effect relative to any regulatory, biological, socioeconomic, or physical thresholds. Describe how the incremental effect of the proposed action and each alternative relates to any relevant thresholds (emphasis added).

6.8.4 Mitigation and Residual Effects (BLM. 2008, pps. 61 - 62)

6.9 PUBLIC INVOLVEMENT AND RESPONDING TO COMMENTS (BLM. 2008, pps. 62 - 68)

Public involvement is an important part of the NEPA process. The level of public involvement varies with the different types of NEPA compliance and decision-making. Public involvement begins early in the NEPA process, with scoping, and continues throughout the preparation of the analysis and the decision.

6.9.1 Involving and Notifying the Public (BLM. 2008, pps. 63 - 65)

The CEQ regulations require that agencies "make diligent efforts to involve the public in preparing and implementing their NEPA procedures" (40 CFR 1506.6(a)) (emphasis added). There are a wide variety of ways to engage the public in the NEPA process. For EA public involvement, see sections **8.2, *Public Involvement;* 8.3.3, *Scoping and Issues;*** and **8.3.7, *Tribes, Individuals, Organizations, or Agencies Consulted*.** For EIS public involvement, see sections **6.3, *Scoping*** and **9.2.10.1, *Public Involvement and Scoping***.

A primary goal of public involvement is to ensure that all interested and affected parties are aware of your proposed action (emphasis added). Knowing your community well is the first step in determining the interested and affected parties and tribes. You may already have a core list of those interested in and potentially affected by the BLM's proposed actions; this may provide a good starting point. Work with your public affairs officer and other BLM staff, community leaders, and governmental agencies (Federal, State, and local) to help determine interested and affected parties and tribes.

[Author's Note. *"A primary goal of public involvement is to ensure that all interested and affected parties are aware of your proposed action*." **Reader is not sure what sentence means as there are six "shall" statements defining federal agency responsibilities for public involvement.** The first shall statement (i.e., not goal) would seem to be the most important (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures (40 CFR 1506.6). All six "shall" statements follow.]

> **[40 CFR 1506.6 Public involvement. Agencies shall** (emphasis added):
> **(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures** (emphasis added).
> (b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.
> (c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency.
> (d) Solicit appropriate information from the public.
> **(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process** (emphasis added).
> (f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act.]

Public meetings or hearings are required when there may be substantial environmental controversy concerning the environmental effects of the proposed action (emphasis added), a substantial interest in holding the meeting, or a request for a meeting by another agency with jurisdiction over the action (40 CFR 1506.6 (c)). You may determine that it is efficient to combine public meetings for the NEPA with hearings required by another law (an example is requirements in the Alaska National Interest Lands Conservation Act that require hearings if certain findings are made regarding the effects of a proposed action on subsistence). There are more stringent requirements for conducting the hearing and recording the proceedings. **You must maintain records of public meetings and hearings including a list of attendees** (as well as addresses of attendees desiring to be added to the mailing list) **and notes or minutes of the proceedings** (emphasis added). **Consult 455 DM 1 for procedural requirements related to public hearings** (emphasis added). Check individual program guidance to determine requirements for public meetings and hearings.

In many cases, people attending field trips and public meetings will be interested and/or affected parties. Make sure that you have attendance sheets that capture contact information at your field trips and meetings; these will provide you with a list of people who may want to be contacted about and involved in the NEPA process. In some cases, **those affected by your proposed action may not be actively engaged in the NEPA process** (emphasis added). In these cases, it is still important for you to reach out to those individuals, parties, or tribes, and we recommend using a variety of methods to help inform and engage those affected.

Notification methods include, but are not limited to: newsletters, Web sites or online NEPA logs [not functioning], bulletin boards, newspapers, and *Federal Register* Notices. EISs have very specific notification requirements, detailed in **Chapters 9 and 13**. Also refer to **Chapters 4, 5, and 8** for more discussion of DNAs, CXs, and EAs.

The CEQ regulations explicitly discusses agency responsibility towards interested and affected parties at 40 CFR 1506.6. **The CEQ regulations require that agencies shall** (emphasis added):

> **(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures** (emphasis added, 40 CFR 1506.6(a) - [diligent: having or showing care and conscientiousness in one's work or duties]).
> (b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected (40 CFR 1506.6(b)).

In all cases the agency shall mail notice to those who have requested it on an individual action. In the case of an action with effects of national concern notice shall include publication in the Federal Register and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the 102 Monitor. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

In the case of an **action with effects primarily of local concern** (emphasis added) the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A- 95 (Revised).
(ii) Notice to Indian tribes when effects may occur on reservations.
(iii) Following the affected State's public notice procedures for comparable actions.
(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).
(v) Notice through other local media.
(vi) Notice to potentially interested community organizations including small business associations.
(vii) Publication in newsletters that may be expected to reach potentially interested persons.
(viii) Direct mailing to owners and occupants of nearby or affected property.
(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency (40 CFR 1506.6(c)). **Criteria shall include whether there is** (emphasis added):

(i) **Substantial environmental controversy concerning the proposed action** (emphasis added) or substantial interest in holding the hearing.
(ii) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public (emphasis added, 40 CFR 1506.6(d)).

(e) Explain in its procedures (emphasis added) where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process (40 CFR 1506.6(e)).

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action (40 CFR 1506.6(f)). Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

6.9.2 Comments (BLM. 2008, pps. 65 - 67)

The BLM has both the duty to comment on other agencies' EISs and to obtain comments on our EISs in cases of jurisdiction by law or special expertise. For more discussion of these requirements, see **Chapter 11, *Agency Review of Environmental Impact Statements***.

Comments on the document and proposed action may be received in response to a scoping notice or in response to public review of an <u>EA</u> and <u>FONSI</u> or <u>draft EIS</u> (emphasis added). Comments received at other times in the process may not need a formal response. However, **all substantive comments received before reaching a decision must be considered to the extent feasible (40 CFR 1503.4)** (emphasis added). **Comments must be in writing (including paper or electronic format or a court reporter's transcript taken at a formal hearing), substantive, and timely, in order to merit a written response** (emphasis added). You may receive oral comments at public meetings and workshops – it is helpful to write these down to revisit during the NEPA process.

To ensure that the true intent of the comment is captured, offer the commenter the opportunity to record his or her comment in writing. The geographic origin of a comment does not alter whether it is substantive.

The requirements for **BLM responses to comments differ between EAs and EISs** (emphasis added) (see section **8.2, *Public Involvement***, and section **9.6.1, *Comments Received Following Issue of the Final EIS***). When an EA and unsigned FONSI are made available for public comment, we recommend that you respond to all substantive and timely comments (emphasis added). You may respond to substantive, timely comments in the EA or in the decision record. If a substantive and timely comment does not lead to changes in the EA or decision, you may reply directly to the commenter, and we recommend that you document the reply in either the EA or the decision record (see section **8.5.1, *Documenting the Decision*).** When preparing a final EIS, you must respond to all substantive written comments submitted during the formal scoping period and public comment period (see section **9.4, *The Final EIS***). You are not required to respond **to comments that are not substantive or comments that are received after the close of the comment period** (emphasis added), but you may choose to reply (516 DM 4.19(A) and (B)) (see section **6.9.2.2, *Comment Response***). However, be cautious about not responding to untimely comments from agencies with jurisdiction by law or special expertise (see section **11.1 *Obtaining Comments on Your EIS***).

6.9.2.1 Substantive Comments

Substantive comments do one or more of the following (emphasis added):

- question, with reasonable basis, the accuracy of information in the EIS or EA.
- question, with reasonable basis, the adequacy of, methodology for, or assumptions used for the environmental analysis.
- present new information relevant to the analysis.
- present reasonable alternatives other than those analyzed in the EIS or EA.
- cause changes or revisions in one or more of the alternatives.

Comments that are not considered substantive (emphasis added) include the following.

- comments in favor of or against the proposed action or alternatives **without reasoning** (emphasis added) that meet the criteria listed above (such as "we disagree with Alternative Two and believe the BLM should select Alternative Three").
- comments that only agree or disagree with BLM policy or resource decisions without justification or supporting data that meet the criteria listed above (such as "more grazing should be permitted").
- comments that don't pertain to the project area or the project (such as "the government should eliminate all dams," when the project is about a grazing permit).
- comments that take the form of vague, open-ended questions.

Examples of substantive comments can be found in the Web Guide.

6.9.2.2 Comment Response

The CEQ regulations at 40 CFR 1503.4 recognize several options for responding to substantive comments, including:

- modifying one or more of the alternatives as requested.
- developing and evaluating suggested alternatives.
- supplementing, improving, or modifying the analysis.
- making factual corrections.
- explaining why the comments do not warrant further agency response, citing cases, authorities, or reasons to support the BLM's position.

Preparing to Respond to Comments

When you anticipate receiving a large number of comments, we recommend that you develop an organized system for receiving and cataloging comments before the comments start arriving. Training (formal or informal) to ensure that staff understand their responsibilities and the system's organization may be valuable. For proposals that may

have a large number of comments, we recommend that you develop a systematic way to track substantive comments and the BLM's response, such as in a searchable database. **Commenters may wish to know how the BLM responded to their comments** (emphasis added); having a well-organized means of determining this will facilitate the process.

Responding to Substantive Comments
You may respond to comments in several ways:

- write a letter to the commenter and record your response in the administrative record.
- present the comment and your response in the NEPA document.
- present the comment and your response in the decision document.

The CEQ recommends that responses to substantive comments should normally result in changes in the text of the NEPA document, rather than as lengthy replies to individual comments in a separate section (emphasis added) (see Question 29a, CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981)*. If the comments are made with respect to the BLM decision, you may respond to the comments in the decision documentation or Record of Decision rather than in the EIS or EA.

A short response to each substantive comment and a citation to the section or page where the change was made may be appropriate. Similar comments may be summarized and one response given to each group of similar comments; this approach is especially useful when a large number of comments is received.

If public comments on a draft EIS identify impacts, alternatives, or mitigation measures that were not addressed in the draft, the decision-maker responsible for preparing the EIS must determine if they warrant further consideration. If they do, the decision-maker must determine whether the new impacts, new alternatives, or new mitigation measures must be analyzed in either the final EIS or a supplemental draft EIS (see Question 29b, CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981)* (see section **5.3, *Supplementing an EIS***). **Similarly, we recommend that the decision-maker responsible for preparing an EA consider whether public comments identify impacts, alternatives or mitigation measures that warrant preparation of a new EA** (emphasis added).

Comments that express a professional disagreement with the conclusions of the analysis or assert that the analysis is inadequate may or may not lead to changes in the NEPA document (emphasis added). When there is disagreement within a professional discipline, a careful review of the various interpretations is warranted. In some instances, public comments may necessitate a reevaluation of analytical conclusions. If, after reevaluation, the decision-maker responsible for **preparing the EA or EIS does not think that a change is warranted, we recommend that your response provide the rationale for that conclusion** (emphasis added). **Thorough documentation of methodology and assumptions in the analysis may improve the reader's understanding of the BLM's analytical methods, and may reduce questions** (emphasis added) (see section **6.8.1.2, *Analyzing Effects***).

Responding to Nonsubstantive Comments
You are not required to respond to nonsubstantive comments such as those comments merely expressing approval or disapproval of a proposal without reason (emphasis added). However, you may wish to acknowledge the comment, and may do so in a variety of methods, including but not limited to sending postcards, letters, or email responses.

CHAPTER 7—DETERMINING WHETHER AN EA OR EIS IS APPROPRIATE (BLM. 2008, pps. 69 - 74)

7.1 Actions Requiring an EA (BLM. 2008, p. 69)
7.2 Actions Requiring an EIS (BLM. 2008, pps. 69 - 70)
7.3 Significance (BLM. 2008, pps. 70 - 74)

7.1 ACTIONS REQUIRING AN EA

Actions are analyzed in an EA if the actions are not categorically excluded, not covered in an existing environmental document, and not normally subject to an EIS. **Use the EA analysis to determine if the action would have significant effects** (emphasis added); if so, you would need to prepare an EIS. If the action would not have significant effects, prepare a Finding of No Significant Impact (FONSI) (see section **8.4.2, *The Finding of No Significant Impact (FONSI)***). If you have already decided to prepare an EIS, you do not need to first prepare an EA (see section **7.2, *Actions Requiring an EIS***).

An EA may demonstrate that a proposed action would have effects that are significant but could be reduced or avoided through mitigation. You may use a mitigated FONSI rather than an EIS if you are **able to reasonably conclude, based on the EA analysis** (emphasis added), that the mitigation measures would be effective in reducing effects to nonsignificance. The FONSI must clearly identify whether the mitigation measures are needed to reduce effects to nonsignificance. You must describe the mitigation measures you are adopting in the decision documentation, and must provide monitoring to ensure the implementation of these measures (see section **10.2, *Developing a Monitoring Plan or Strategy***).

You may prepare an EA for an action that has some significant impacts if the EA is **tiered to a broader EIS which fully analyzed those significant impacts** (emphasis added) (see section **5.2.2, *Tiering)***. For such a tiered EA, you must document in the FONSI a determination that the potentially significant effects have already been analyzed, and no other effects reach significance. Only significant effects that have not been analyzed in an existing EIS will trigger the need for a new EIS.

Note: Though not required, a decision-maker may elect to prepare an EA for an action that is categorically excluded or covered by an existing environmental document to assist in planning or decision-making. In such cases, explain in the EA why you are electing to prepare an EA.

7.2 ACTIONS REQUIRING AN EIS (BLM. 2008, pps. 69 - 70)

7.3 SIGNIFICANCE (BLM. 2008, pps. 70 - 74)

Whether an action must be analyzed in an EA or EIS depends upon a determination of the significance of the effects. "Significance" has specific meaning in the NEPA context and you **must use only this meaning in NEPA documents** (emphasis added).

> **Significance** is defined as effects of sufficient context and intensity that an environmental impact statement is required. The CEQ regulations refer to both significant effects and significant issues (for example, 40 CFR 1502.2(b)). The meaning of significance should not be interpreted differently for issues than for effects: significant issues are those issues that are related to significant or potentially significant effects.

The CEQ regulations explain in 40 CFR 1508.27:

> 'Significantly' as used in the NEPA **requires considerations** (emphasis added) 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, for a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short-term and long-term effects are relevant.

(b) Intensity. This refers to the severity of effect. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. . . ." 40 CFR 1508.27.

Note that to determine the severity of effect, you must look at direct, indirect, and cumulative effects (40 CFR 1508.25(c)).

The CEQ regulations include the following ten considerations for evaluating intensity. – [Author's Note: The following **should be considered** (emphasis added) in evaluating intensity: 40 CFR 1508.27(b); see *Threshold Determinations Under the National Environmental Policy Act* as the **level set for threshold determinations by federal courts and agencies is critical to NEPA's implementation** because the Act does not apply to federal actions unless they "significantly affect" the quality of the human environment (Fogleman. 1987)].

Impacts that may be both beneficial and adverse (40 CFR 1508.27(b)(1)). In analyzing the intensity of effects, you must consider that effects may be both beneficial and adverse. Even if the effect of an action will be beneficial on balance, significant adverse effects may exist. *For example, removal of a dam may have long-term beneficial effects on an endangered fish species. However, the process of removing the dam may have short-term adverse effects on the fish.*

The consideration of intensity must include analysis of both these beneficial and adverse effects, not just a description of the net effects. Only a significant adverse effect triggers the need to prepare an EIS.

Public health and safety (40 CFR 1508.27(b)(2)). You must consider the degree to which the action would affect public health and safety which may require, for example, evaluation of hazardous and solid wastes, air and water quality. In the context of evaluating significance, consideration of these resource effects should describe their relation to public health and safety. Economic or social effects are not intended by themselves to require preparation of an environmental impact statement (40 CFR 1508.14.).

Unique characteristics of the geographic area (40 CFR 1508.27(b)(3)). "Unique characteristics" **are generally limited** (emphasis added) to those that have been identified through the land use planning process or other legislative, regulatory, or planning process; for example:

- prime and unique farmlands as defined by 7 CFR 657.5.
- caves designated under 43 CFR 37.
- wild and scenic rivers, both designated and suitable.
- designated wilderness areas and wilderness study areas.
- areas of critical environmental concern designated under 43 CFR 1610.7-2.

[Authors Note: 40 CFR 1508.27(b)(3) does not provide a "*generally limited*" assumption; it provides the following "*such as*" (i.e., for example) list of possible unique characteristics: "(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." 40 CFR 1508.27(b)(3).]

Degree to which effects are likely to be highly controversial (40 CFR 1508.27(b)(4)). You must consider the degree to which the effects are likely to be highly controversial. **Controversy in this context means disagreement about the nature of the effects** (emphasis added), not expressions of opposition to the proposed action or preference among the alternatives. There will always be some disagreement about the nature of the effects for land management actions, and the decision-maker must exercise some judgment in evaluating the degree to which the effects are likely to be highly controversial. Substantial dispute within the scientific community about the effects of the proposed action would indicate that the effects are likely to be highly controversial.

Degree to which effects are highly uncertain or involve unique or unknown risks (40 CFR 1508.27(b)(5)). You must consider the degree to which the effects are likely to be highly uncertain or involve unique or unknown risks. As with controversy, there will always be some uncertainty about the effects of land management actions, and the decision-maker must exercise some judgment in evaluating the degree to which the effects are likely to be highly uncertain. Similarly, there will always be some risk associated with land management actions, but the decision-maker must consider whether the risks are unique or unknown. (Refer to the Web Guide for examples of both risks that are unique or unknown, and risks that are not).

Consideration of whether the action may establish a precedent for future actions with significant impacts (40 CFR 1508.27(b)(6)). You must consider 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. You must limit this consideration to future actions that are reasonably foreseeable, not merely possible (see section **6.8.3.4, *Past, Present, and Reasonably Foreseeable Actions***).

Consideration of whether the action is related to other actions with cumulatively significant impacts (40 CFR 1508.27(b)(7)). You must consider whether the action is related to other actions with cumulatively significant effects (40 CFR 1508.27(b)(7)). Other actions are "related" to the action if they are connected or cumulative actions (see sections **6.5.2.1, *Connected Actions*** and **6.5.2.2, *Cumulative Actions***). You must analyze the effect of past, present, and reasonably foreseeable future actions, regardless of who undertakes such other actions, in the cumulative effects analysis for the proposed action. This analysis provides the context for understanding the effects of the BLM action (see section **6.8.3, *Cumulative Effects***). In determining the significance of the BLM action, you count only the effects of the BLM action together with the effects of connected and cumulative actions to the extent that the effects can be prevented or modified by BLM decision making (see section **6.5.2.1 *Connected Actions***).

Scientific, cultural, or historical resources, including those listed in or eligible for listing in the National Register of Historic Places (40 CFR 1508.27(b)(8))**.** This factor represents a specific sub-set of the factor, "unique characteristics of the geographic area." Significance may arise from the loss or destruction of significant scientific, cultural, or historical resources. For resources listed in or eligible for listing in the National Register of Historic Places, significance depends on the degree to which the action would adversely affect these resources.

Threatened or endangered species and their critical habitat (40 CFR 1508.27(b)(9))**.** Significance depends on the degree to which the action would adversely affect species listed under the Endangered Species Act or their designated critical habitat. A determination under the Endangered Species Act that an action would adversely affect a listed species or critical habitat does not necessarily equate to a significant effect in the NEPA context. The NEPA analysis and ESA effects determinations have different purposes and use slightly different analytical approaches (for example, regarding connected actions, reasonably foreseeable actions, and cumulative effects). Although ESA documents, such as biological assessments and biological opinions, provide useful information, you must base your evaluation of the degree to which the action would adversely affect the species or critical habitat on the analysis in the EA.

Any effects that threaten a violation of Federal, State, or local law or requirements imposed for the protection of the environment (40 CFR 1508.27(b)(10)). This factor will often overlap with other factors: for example, violations of the Clean Water Act or Clean Air Act would usually involve effects that would adversely affect public health and safety.

Appendix C. USDI *PEP – Environmental Statement Memorandum No. ESM 13-131*

- 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. https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/ESM13-13.pdf

1. Purpose and Scope The purpose of this memorandum is to transmit guidance to be used by bureaus and offices to ensure uniform compliance with the policies and procedural requirements of NEPA, the CEQ regulations implementing NEPA, departmental regulations at 43 CFR Part 46, and the Departmental Manual at Part 516 DM Chapters 1-15 (USDI OEPC. 2013, Cover letter, p. 1).

2. NEPA Compliance Checklist This guidance, in the form of a standard checklist (Attachment), is recommended for use by bureaus and offices while engaging in NEPA compliance to make certain that a series of commonly accepted steps and necessary questions are addressed during completion of the process. The checklist is intended to focus the efforts of decision makers and NEPA practitioners on the broad and common requirements of the NEPA process embodied in the statute, regulations, and the Department's policies and practices for managing its environmental responsibilities. . . . (USDI OEPC. 2013, Cover letter, p. 1).

ATTACHMENT TO ESM 13-13: DECISION MAKING AND NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) COMPLIANCE CHECKLIST

[Note from Walker: Attachment to ESM 13-13 compliance checklist elements need to be considered in relationship to the BLM NEPA Handbook that essential analytical elements are common to the NEPA analysis, regardless of whether an EA or EIS is being developed by ID team members].

[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). In this case the ID Team member's analysis methodologies responsibility for determining significance, or non-significance, is identified in its NEPA handbook, Chapter 6 "NEPA Analysis" (pages 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).]

[*BLM National Environmental Policy Act Handbook H-1790-1*: January 30, 2008 (BLM. 2008)]

Answering the following series of questions and addressing the bulleted items will aid the Department's bureaus and offices in preparing NEPA documents.

1. NEPA Application Considerations (USDI OEPC. 2013, Attachment to ESM 13-13, p. 1)

Does the decision involve a "major Federal action" that may have a "significant" impact on the quality of the human environment? (40 CFR § 1502.3)

A "major Federal action" includes actions "with effects that may be major and which are potentially subject to Federal control and responsibility." (40 CFR § 1508.18) It includes new and continuing activities; project and programs entirely or partly financed, assisted, conducted, regulated, or approved by a Federal agency; new or revised agency rules, plans, policies, or procedures; and legislative proposals. (40 CFR § 1508.18(a)). Does the action meet any of these criteria?

Major Federal actions generally fall into one of the following categories:

- adoption of official policies and rules/regulations,
- adoption of formal plans,
- adoption of programs, and
- **approval of specific projects (e.g., projects implementing a land use plan)** (emphasis added). (40 CFR § 1508.18(b)).

Does the action fall into one of these categories?

2. Circumstances When There is a Major Federal Action, but NEPA Does Not Apply (USDI OEPC. 2013, Attachment to ESM 13-13, p. 1)

3. Initial Development/Internal Scoping (USDI OEPC. 2013, Attachment to ESM 13-13, p. 2)

Is there a proposal for a Federal action? Has the bureau formulated a concise "proposal" and conducted internal scoping to define potential effects and alternatives? Can the potential effects (impacts) of the proposal, and all feasible alternatives to it, be meaningfully evaluated? If not, review the proposal to determine the appropriate level of NEPA documentation or develop a better definition of the proposed action. (43 CFR § 46.100)

Has the bureau or office developed a "purpose and need" statement?

Is the proposal a major Federal action having the potential to significantly affect the quality of the human or natural environment? If so, is an environmental impact statement (EIS) planned? If not, why not?

Has NEPA compliance already been completed for this action in a previous document?

4. Categorical Exclusions (USDI OEPC. 2013, Attachment to ESM 13-13, p. 2)

5. Deciding Between an environmental assessment (EA) or EIS (USDI OEPC. 2013, Attachment to ESM 13-13, pps. 2-4)**.** Several important distinctions exist between an EA and an EIS and include the following:

- External Scoping. Scoping is the process by which a bureau or office obtains public input for determining the scope of the issues to be addressed in an EIS and for identifying the significant issues related to the proposed action. (40 CFR § 1501.7) The regulations provide that a bureau or office must go through the scoping process for an EIS (40 CFR §§ 1501.4(d) and 1501.7) Scoping is optional for an EA. (43 CFR § 46.235)

- Public involvement. **For an EA, a bureau or office is required to "make diligent efforts to involve the public."** (emphasis added) (40 CFR § 1506.6) (See also 43 CFR § 46.305) Public involvement often includes notices of meetings, hearings, and the availability of the EA and/or FONSI. The regulations require a bureau or office to make a FONSI available for public review in certain limited circumstances, i.e., when the proposed action is, or is closely similar to, one which normally requires an EIS, and when the nature of the proposed action is one without precedent. (40 CFR § 1501.4(e)(2)) Although there is no requirement to circulate a draft EA for public review and comment, **this is one way to satisfy the requirement for public involvement** (emphasis added). For an EIS, a bureau or office is required to circulate a draft EIS for public review and comment for a minimum of 45 days. (40 CFR §§ 1502.19 and 1503.1)

- FONSI. The second step in the NEPA process when a bureau or office prepares an EA is to then decide whether to prepare an EIS or whether a Finding of No Significant Impact (FONSI) is warranted. A FONSI documents the rationale for why the proposed action will not have a significant effect on the human environment and for which an EIS therefore will not be prepared. (40 CFR § 1508.13) The FONSI includes the EA itself, or a summary of the EA.

- Mitigated FONSI. A mitigated FONSI documents that a project's adverse environmental effects will be reduced below **the significance threshold** (emphasis added) by the application of mitigation measures approved in the decision-making authorizing the project. The Council on Environmental Quality (CEQ) supports the use of mitigated FONSIs to reduce project impacts below the **significance threshold** (emphasis added). See CEQ's January 14, 2011, memo on mitigation and monitoring guidance. (http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf)

- Courts also support agency decisions not to prepare an EIS upon adoption of mitigation measures.[2] (Footnote 2. *City of Auburn v. United States*, 154 F.3d 1025, 1033 (9th Cir. 1998).

Is the proposed action one that normally requires the preparation of an EA under the individual bureau or office procedures in 516 DM?

Is the proposal one which normally requires an EIS under the individual bureau or office procedures in 516 DM?

If the proposed action cannot be categorically excluded and is not an action normally requiring the preparation of an EIS, is it a candidate action for evaluation using an EA?

Has the scoping process been used to evaluate whether an EA or EIS is needed? Did you have a public participation plan for scoping? If a public participation plan for scoping was not used, why not?

Has the bureau or office determined that the impacts of a proposed action will be significant based on the "context" and "intensity" factors identified in 40 CFR § 1508.27?

Can the analysis support a FONSI?

Would an EA aid in the bureau's compliance with NEPA or planning processes when no EIS is necessary?

Would an EA facilitate the preparation of an EIS if one were necessary? Or would it be more efficient to go directly to an EIS if one is needed? (43 CFR § 46.300)

6. Developing the EA (43 CFR Subpart D) (USDI OEPC. 2013, Attachment to ESM 13-13, pps. 4-5)

Should a joint EA be developed to minimize duplication with state, tribal, or local procedures?

If the EA has been applicant-prepared, has the bureau made its own independent evaluation of the environmental issues and assumed responsibility for the scope and content of the EA?

Is the EA a concise document? (40 CFR § 1508.9) The CEQ Forty Most Asked Questions, question 36a issued in 1981 indicated that 10-15 pages is generally appropriate for EAs. However, CEQ states in its memo ***Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act*** that this guidance must be balanced with the **requirement to take a hard look at the impacts of the proposed action** (emphasis added) . An EA's length should vary with the scope and scale of potential environmental problems. Can the EA be made more succinct and useful as a planning tool?

Does the EA provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact? (40 CFR § 1508.9(b))

The EA must include the following:
- brief discussions of the need for the proposal,
- brief discussions of alternatives as required by Section 102(2)(E) of NEPA,
- brief discussions of the environmental impacts of the proposed action and alternatives, and
- a listing of agencies and persons consulted.

See 43 CFR § 46.310(b) for exceptions to alternatives in an EA.

> [Title 43 Public Lands: Interior]
> [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title43/43tab_02.tpl]
>
> [TITLE 43—Public Lands: Interior]
> [Subtitle A—OFFICE OF THE SECRETARY OF THE INTERIOR]
> [PART 46—IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969]
> [https://www.ecfr.gov/cgi-bin/text-idx?SID=1f17dc0905fdd102ab58ddc29889fa95&mc=true&tpl=/ecfrbrowse/Title43/43cfr46_main_02.tpl]
>
> [43 CFR § 46.310(b). "(b) When the Responsible Official determines that there are no unresolved conflicts about the proposed action with respect to alternative uses of available resources, the environmental assessment need only consider the proposed action and does not need to consider additional alternatives, including the no action alternative. (See section 102(2)(E) of NEPA)."]

Has the impact analysis looked at such factors as the anticipated beneficial effects of the proposed action, impacts on public health, the degree of controversy, cultural or historic resources, or threatened or endangered species? Has the EA considered reasonably foreseeable, direct and indirect impacts versus remote and/or speculative impacts? (emphasis added)

Were cumulative impacts of the proposed action and alternatives analyzed and disclosed? (emphasis added)

What kind of public involvement in the preparation of the EA was conducted, if any? If no public involvement opportunity was provided, why not? Was it not practicable? (emphasis added) (43 CFR § 46.305)

Did the EA result in the preparation of a FONSI?

Does the FONSI, if one was prepared, explain the reasons why the action will not have a significant effect on the human or natural environment and thus will not result in the preparation of an EIS?

Do circumstances require the bureau or office to make the FONSI available for the public to review for 30 days before the bureau or office makes its final determination whether to prepare an EIS and before the action can begin? (**Public review is necessary, for example, (a) if the proposal is a borderline case, i.e., when there is a reasonable argument for preparation of an EIS; (b) if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area; (c) when there is either scientific or public controversy over the proposal; or (d) when it involves a proposal which is or is closely similar to one which normally requires preparation of an EIS.** (emphasis added) (40 CFR § 1501.4(e)(2) and CEQ; Forty Most Asked Questions; 37b))

Is the proposal a borderline situation, i.e., is there a reasonable argument for preparing an EIS, rather than an EA? If so, why not prepare one?

7. Cooperating Agencies (40 CFR §§ 1501.5 and 1501.6. See also 43 CFR § 46.230) (USDI OEPC. 2013, Attachment to ESM 13-13, p. 5)

8. Public Participation (USDI OEPC. 2013, Attachment to ESM 13-13, p. 6)

Has a Notice of Intent to Prepare an Environmental Impact Statement been published in the *Federal Register*?

Is there an alternative that is supported by the affected community and stakeholders? If so, is this the preferred alternative? (43 CFR § 46.110)

Is staff trained in public participation practices? If not, training should occur before any public meeting is held.

Has public scoping been planned? Initiated? Completed? If not, what kind of public involvement is anticipated or did occur? (43 CFR § 46.435)

9. Tiered Analysis (40 CFR §§ 1502.20, 1508.28) (USDI OEPC. 2013, Attachment to ESM 13-13, p. 6)

10. Incorporation by Reference (USDI OEPC. 2013, Attachment to ESM 13-13, p. 6)

11. Incomplete or Unavailable Information (40 CFR § 1502.22 and 43 CFR § 46.125) (USDI OEPC. 2013, Attachment to ESM 13-13, p. 6)

If a bureau or office has evaluated reasonably foreseeable significant adverse effects on the human environment in an EIS and **there is incomplete or unavailable information, has the bureau or office made it clear that the information is lacking?** (emphasis added)

12. Adopting another Agency's NEPA Document (USDI OEPC. 2013, Attachment to ESM 13-13, pps. 6-7)

13. EIS Format and Content (USDI OEPC. 2013, Attachment to ESM 13-13, pps. 7-11)

Only few ideas from the 5 page Section 13. EIS Format and Content follow.

Have all reasonable alternatives, including, where applicable, alternatives employing adaptive management strategies, been rigorously explored and objectively evaluated? (See 40 CFR § 1502.14 and 43 CFR § 46.145)

Were any alternatives, identified during the scoping process, eliminated from detailed study? If so, have the reasons been thoroughly explained? (emphasis added) (40 CFR § 1502.14)

Have you considered and included any needed mitigation? (40 CFR §§ 1502.14(f) and 1508.20) See CEQ's January 14, 2011, memo on ***Appropriate Use of Mitigation and Monitoring and Clarifying Appropriate Use of Mitigated Findings of No Significant Impact***.

Did you respond to all substantive comments in your final document? How? (emphasis added) Did you revise relevant analyses, introduce new data and findings, or provide the basis for refuting a comment? (40 CFR § 1503.4)

Is the treatment of the environmental consequences scientific and analytical? (emphasis added) (40 CFR § 1502.16) Does the analysis focus on significant issues and support the comparisons among the alternatives? Can readers make an informed comparison among the alternatives based on the scientific analysis of the environmental consequences associated with each alternative?

Have you **properly acknowledged and/or referenced all sources of data and scientific findings used in the analysis?** (emphasis added)

Does the environmental consequences section clearly show the impacts likely to be associated with each of the impact producing factors that would occur from the adoption of any of the studied alternatives? **Is there a clear demonstration of cause and effect?** (emphasis added)

Is there a clear discussion of **any adverse environmental effects which could not be avoided** (emphasis added) if the proposal or any of the alternatives were implemented? (40 CFR § 1502.16)

Is there a clear discussion of the **relationship between short-term uses of the human and natural environment and the maintenance of long-term productivity?** (emphasis added) (40 CFR § 1502.16)

Did you include a necessary discussion of **any irreversible or irretrievable commitment of resources** (emphasis added) which would result if the proposal were implemented? (40 CFR § 1502.16)

Did you discuss the direct effects, the indirect effects, and the cumulative effects and their significance? (emphasis added) (40 CFR §§ 1502.16, 1508.8)

Did preparation of the EIS **use an interdisciplinary approach to insure the integrated use of natural and social sciences and the environmental design arts?** (emphasis added) (40 CFR § 1502.6)

Were the disciplines of the preparers appropriate to the scope and issues of the analysis? (emphasis added) Was a multidisciplinary team used?

Are there significant new circumstances or information relevant to the environmental concerns and that bear on the proposed action or its impacts that would warrant such an action, i.e., a supplement to an EIS? Would the purposes of NEPA be served by preparing a supplement? (40 CFR § 1502.9(c))

14. Documenting the Decision When the EA or EIS Has Been Completed (USDI OEPC. 2013, Attach. to ESM 13-13, p. 11)

15. Effective Date of the Decision Based on an EA or an EIS (USDI OEPC. 2013, Attach. to ESM 13-13, p. 12**)**

16. Emergencies (USDI OEPC. 2013, Attach. to ESM 13-13, p. 12**)**

17. References for Preparation of NEPA Documents (USDI OEPC. 2013, Attach. to ESM 13-13, p. 12)

- 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)).
- Department of the Interior regulations for Implementation of the National Environmental Policy Act (NEPA) of 1969, at 43 CFR Part 46.
- Department of the Interior, Departmental Manual (Part 516 DM, Chapters 1-15).
- Individual bureau and office NEPA handbooks.
  [Author Note: For example, *BLM National Environmental Policy Act Handbook H-1790-1*: January 30, 2008 (BLM. 2008).]

Appendix D. A Citizen's Guide to the NEPA: Having Your Voice Heard
(CEQ. 2007, pps. 21-27)

- 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.

Public Comment Periods (CEQ. 2007, p. 26) **Agencies are required to make efforts to provide meaningful public involvement in their NEPA processes** (emphasis added).[54] Citizens involved in the process should ensure that they know how agencies will inform the public that an action is proposed and the NEPA process is beginning (via Federal Register, newspapers, direct mailing, etc.); that certain documents are available; and that preliminary determinations have been made on the possible environmental effects of the proposal (e.g., what level of analysis the agency will initially undertake).

Agencies solicit different levels of involvement when they prepare an EA versus an EIS (emphasis added). In preparing an EIS, agencies are likely to have public meetings and are required to have a 45 day comment period after the draft EIS is made available. In the case of an agency preparing an EA, the CEQ regulations require the agency to involve the public to the extent practicable, **but each agency has its own guidelines about how to involve the public for EAs** (emphasis added) [Author note. BLM NEPA Handbook treats EA and EIS closer to the same in terms of analysis and public involvement]. **In any case, citizens are entitled to receive "environmental documents", such as EAs, involved in the NEPA process** (emphasis added).[55]

In terms of a specific agency, required public comment periods associated with an EA or an EIS can be found in its NEPA implementing procedures. In some cases, the draft EIS that an agency prepares may be extremely long. In such cases, an agency may grant, requests to extend the comment period to ensure enough time for the public and other agencies to review and comment.

Citizens who want to raise issues with the agency should do so at the earliest possible stage in the process. Agencies are much more likely to evaluate a new alternative or address a concern if it is raised in a timely manner [Author note. BLM NEPA Handbook treats EA and EIS closer to the same in terms of analysis and public involvement]. And the Supreme Court has held in two NEPA cases that if a person or organization expects courts to address an issue, such as evaluating a particular alternative, the issue must have been raised to the agency at a point in the administrative process when it can be meaningfully considered unless the issue involves a flaw in the agency's analysis that is so obvious that there is no need for a commentator to point it out specifically.

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54. CEQ NEPA Regulations, 40 C.F.R. §§ 1501.4(b), 1506.6(b).
55. CEQ NEPA Regulations, 40 C.F.R. §§ 1506.6, 1508.10.

- 40 CFR 1501.4(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).
- 40 CFR 1506.6(b). Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

- 40 CFR 1506.6 Public Involvement (see main letter at topic of "Diligent Efforts to Involve the Public by EA and EIS ID Teams.").
- 40 CFR 1508.10 Environmental document. "Environmental document" includes the documents specified in §1508.9 (environmental assessment), §1508.11 (environmental impact statement), §1508.13 (finding of no significant impact), and §1508.22 (notice of intent).

How To Comment (CEQ. 2007, p. 27) Comments may be the most important contribution from citizens. Accordingly, comments should be clear, concise, and **relevant to the analysis of the proposed action** (emphasis added). Take the time to organize thoughts and edit the document submitted.[56] As a general rule, **the tone of the comments should be polite and respectful** (emphasis added). Those reviewing comments are public servants tasked with a job, and they deserve the same respect and professional treatment that you and other citizens expect in return. Comments that are solution oriented and provide specific examples will be more effective than those that simply oppose the proposed project. Comments that contribute to developing alternatives that address the purpose and need for the action are also effective. They are particularly helpful early in the NEPA process and should be made, if at all possible, during scoping, to ensure that reasonable alternatives can be analyzed and considered early in the process.

In drafting comments, try to focus on the purpose and need of the proposed action, the proposed alternatives, the assessment of the environmental impacts of those alternatives, and the proposed mitigation. It also helps to be aware of what other types of issues the decisionmaker is considering in relationship to the proposed action.

Commenting is not a form of "voting" on an alternative. The number of negative comments an agency receives does not prevent an action from moving forward. Numerous comments that repeat the same basic message of support or opposition will typically be responded to collectively. In addition, general comments that state an action will have "significant environmental effects" will not help an agency make a better decision unless the relevant causes and environmental effects are explained.

Finally, remember that decisionmakers also receive other information and data such as operational and technical information related to implementing an action that they will have to consider when making a final decision.

Footnote 56. **There are many reference books for how to research issues, review documents, and write comments. One in particular is "The Art of Commenting" by Elizabeth Mullin from the Environmental Law Institute** (emphasis added) (Mullin, Elizabeth D. 2000. The Art of Commenting: How to Influence Environmental Decisionmaking with Effective Comments, Environmental Law Institute. Washington, DC). Another useful reference for those involved in commenting on transportation projects is the American Association of State Highway and Transportation Official's (AASHTO) Practitioner's Handbook 05-Utilizing Community Advisory Committees for NEPA Studies, December, 2006, available at *http://environment.transportation.org* or available through AASHTO's Center for Environmental Excellence by calling (202) 624-3635.

[MAKING YOUR VOICE HEARD
"The Art of Commenting" by Elizabeth Mullin from the Environmental Law Institute
http://eli-ocean.org/wp-content/blogs.dir/2/files/Making-Your-Voice-Heard.pdf]

Appendix E. The Hard Look and Bald Conclusions

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).

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.
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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:

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(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. . . .