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May 4, 2017 Letter/Email

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Orville Camp, Author
Forest Farmers Handbook: A Guide to Natural Selection Forest Management (1984); *The Natural Selection Alternative Natural Selection Alternative for the Medford District BLM South Deer Landscape Management Project* (EA# OR110-05-10)
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Subj: National Environmental Procedures Act's (NEPA) Procedural Requirements

Dear Mary, Orville, & Serena:

This NEPA consultation letter is a broad sweep of BLM's NEPA procedural requirements. The following six category requirements starts with NEPA, the Act, followed by the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of the NEPA (Appendix A, Sections 1 & 2). It ends with court precedents. Except for the 1969 NEPA Act, the publication dates of the most recent versions are not verified.

1. National Environmental Policy Act (1969).
2. Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the NEPA, 40 C.F.R. parts 1500-1508 (1986: updated at different times, including 2011).
3. CEQ's Forty Questions (1981: probably updated)
4. U.S. Department of the Interior's (USDI) Department Manual (DM) on NEPA (516 DM 1-7). *Federal Register*, Vol. 73, No. 200, Wednesday October 15, 2008 (pages 61292 - 61323).
5. U.S. BLM National Environmental Policy Act Handbook H-1790 (2008).
6. Court Precedents.

NEPA is our basic national charter for protection of the environment. It establishes policy, sets goals (Section 101 is best feeling), and provides means (Section 102 is “**Shall**” powerful) for carrying out the policy. **Section 102(2) contains the federal agencies "action-forcing" provisions** (i.e., “**Shall**” implement the provisions of Section 102(2)A - I).

*Sec. 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) (Appendix A, Section 1).*

NEPA also established the Council on Environmental Quality (CEQ) within the Executive Office of the U.S. President to ensure that federal agencies meet their obligations under NEPA. The CEQ oversees NEPA implementation, principally through issuing guidance and interpreting regulations that implement NEPA's procedural requirements (i.e., Section 202). **CEQ also reviews and approves federal agencies' NEPA procedures** (Appendix A, Section 2, 40 CFR 1507.3(b)(1)) (e.g., **BLM National Environmental Policy Act Handbook, etc.**), approves alternative arrangements for compliance with NEPA for emergencies, and helps to resolve disputes between Federal agencies and with other governmental entities and members of the public. One of CEQ's authorities important to the public comes from the NEPA's "action-forcing" “**shall**” provision 102(2)(B) (Appendix A, Section 1).

*NEPA Section 102(2)(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;*

The CEQ guidance “makes it clear that many of the provisions of the CEQ Regulations which specifically refer to an Environmental Impact Statement (EIS) provide efficiencies that can also be use to prepare an Environmental Assessment (EA).” (Attachment 1, p. 1).¹

The above six sets of procedural requirements and precedents are in a hierarchy of law, and importance of understanding, and they must be considered together. However, NEPA is extremely complicated, and my consultations are “table talk.” Remember the camel –

“I know you believe you understand what you think I said, but I am not sure you realize that what you heard is not what I meant.”

I have not read a *A Citizen's Guide to the NEPA: Having Your Voice Heard*, but it is definitely on my reading list. I'm guessing it is not one of NEPA's procedural requirements, but a citizen's guide to anything is important to me (i.e., What do the NEPA procedural provisions mean?). This guide is based on research and consultations undertaken by the CEQ concerning the need for a “Citizen's Guide” to NEPA. Participants in NEPA regional roundtables held in 2003-2004 clearly voiced the need for an guide that provides an **explanation of NEPA, how it is implemented, and how people outside the Federal government — individual citizens, private sector applicants, members of organized groups, or representatives of Tribal, State,**

or local government agencies — can better participate in the assessment of environmental impacts conducted by Federal agencies.²

In summary, an individual's research can get buried in the thousands of federal agency views and NEPA procedural requirements and court precedents. However, my immediate focus for further consultations will be the BLM NEPA Handbook. Even with the BLM handbook, there will be the “grey” interpretations and brainstorming (i.e., all appendix consultations are preliminary and eager for revisions, and/or updates or supplements). Ultimately the final decisions are yours; don't trust me, trust yourself.

Sincerely,

Mike :)



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

Miscellaneous p.s. 1. **Agency may not incorporate any material by reference unless the material is reasonably available for inspection** (emphasis added) by potentially interested persons within the time allowed for comment. There are many techniques available to make the referenced material readily available such as: placing the relevant material in an appendix; **providing a hyperlink that provides internet access to the materials** (emphasis added); and placing materials in local libraries or facilities accessible to the public (Attachment 1, p.13).¹

2. If an agency issues an EA for comment and the changes in response to comments are minor and limited to factual corrections and/or explanations of why the comments do not warrant further agency response, the agency may prepare a similar cover and errata sheet and use its draft EA as the final EA. When circulating draft EAs or EISs for public review and comment, **CEQ recommends that agencies facilitate public review and comment by also publishing the EISs and EAs, and subsequently the comments received, on agency websites** (emphasis added) (Attachment 1, p.14).¹

Appendices

- Appendix A. National Environmental Procedures Act's (NEPA) Procedural Requirements.
- Appendix B. Preliminary Topics of Interest From BLM National Environmental Policy Act Handbook H-1790-1 (April 24, 2008).

Footnotes

1. Council on Environmental Quality. March 6, 2012. *Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act*. Memo for Heads of Federal Departments and Agencies. Washington, D.C. 20503. https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf.
2. Council on Environmental Quality. 2007. *A Citizen's Guide to the NEPA: Having Your Voice Heard*. Washington, D.C. 20503. <https://energy.gov/nepa/downloads/citizens-guide-nepa-having-your-voice-heard-ceq-2007>

Appendix A. National Environmental Procedures Act's (NEPA) Procedural Requirements (All appendix consultations expect revisions, and/or updates or supplements)

1. National Environmental Policy Act (1969).
2. Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the NEPA, 40 C.F.R. parts 1500-1508 (July 1, 1986; updated at least 2011).
3. CEQ's Forty Questions (March 23, 1981)
4. U.S. Department of the Interior's (USDI) Department Manual (DM) on NEPA (516 DM 1-7). *Federal Register*, Vol. 73, No. 200, Wednesday October 15, 2008 (pages 61292 - 61323); March 18, 1980 #2244; Sept. 27, 1971 #1341; and Sept. 17, 1970 #1222.
5. 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, 2008¹).
6. Court Precedents.

1. 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.

Sec. 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;

(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;

(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 on --

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as

provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) (emphasis added) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

- (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
- (ii) the responsible Federal official furnishes guidance and participates in such preparation,
- (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
- (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than jurisdiction.

(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;

(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;

(G) make available (emphasis added) to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information (emphasis added) in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality (emphasis added) established by title II of this Act.

References (NEPA references are unending; a couple examples follow)

- The “*Action-Forcing*” *Requirements of NEPA and Ongoing Actions of the Federal Government*. Viewed May 3, 2017. <http://elr.info/sites/default/files/articles/34.10435.pdf>.

NEPA’s “action-forcing” devices are potentially applicable—§102(2)(C)’s environmental impact statement (EIS) requirement (with its significance threshold), §102(2)(E)’s environmental assessment (EA) requirement (which has no such threshold), and §102(1)’s requirement for agencies to act in accordance with the policies set out in NEPA (also with no significance threshold).

- NEPA.Gov. Viewed May 2, 2017. *National Environmental Policy Act*. <https://ceq.doe.gov/>.

The National Environmental Policy Act (NEPA) was enacted to: declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. Sec. 2 [42 U.S. Code § 4321]. NEPA is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act.

The Council on Environmental Quality NEPA established the Council on Environmental Quality (CEQ) within the Executive Office of the President to ensure that Federal agencies meet their obligations under NEPA. CEQ oversees NEPA implementation, principally through issuing guidance and interpreting regulations that implement NEPA's procedural requirements. CEQ also reviews and approves Federal agency NEPA procedures, approves alternative arrangements for compliance with NEPA for emergencies, and helps to resolve disputes between Federal agencies and with other governmental entities and members of the public. Today, CEQ is involved in tackling a wide range of environmental issues and setting forth a number of initiatives. One of CEQ's major responsibilities is to develop and recommend national policies to the President that promote the improvement of environmental quality and meet the Nation's goals.

- Pace Law School Library: Research Guides, Viewed May 2, 2017. *National Environmental Policy Act Legal Research: Overview*. <http://libraryguides.law.pace.edu/nepa>.

Under the procedural requirements of NEPA¹, federal governmental agencies are required to "use all practicable means" in order to achieve any of six environmental goals including: "approaching maximum attainable recycling, preserving cultural heritage, and achieving a balance between population and resource use."² In order to comply with NEPA's requirements federal agencies in the context of proposed "major federal actions" must prepare either an Environmental Assessment [EA] or an Environmental Impact Statement (EIS).³ The preparation of either of these documents does not guarantee any particular result except "that the agency take a “hard look” at the environmental consequences before taking a major action".⁴

1. Since the case of *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), NEPA has been interpreted as operating as a procedural statute.

2. William H. Rodgers, Jr. *Environmental Law* 802 (2d ed. 1994) (paraphrasing the six objectives set forth in National Environmental Policy Act of 1969, § 101(b), 42 U.S.C. § 4331(b) (2006))

3. Council on Environmental Quality, *A Citizen's Guide to the NEPA* 5 (2007).

4. [*Kleppe v. Sierra Club*, 427 U.S. 390, S. Ct. 2718, 49 L. Ed. 2d 576, 590 n. 21 (1976)]; *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983).

- Phipps, James M. January 1977. *Action Forcing Under NEPA: Beyond the Environmental Impact Statement*. Urban Law Annual; Journal of Urban and Contemporary Law, Vol. 14.
http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1620&context=law_urbanlaw.

Whenever agencies are excused from preparation of a complete EIS, it is likely that many of the policies established by NEPA will not be fully implemented. Additional duties are imposed on agencies under the remaining subparagraphs of section 102(2). Regardless of any limitations on review the courts read into subparagraph 102(2)(C), agency compliance may still be effectively challenged under subparagraphs 102(2)(A), (B), (D) and (G), independent of subparagraph 102(2)(C), thereby safeguarding the essential policies of the Act.

This Note will review the limitations under subparagraph 102(2)(C) that courts have imposed and will conduct a section-by-section analysis of the remaining action-forcing provisions of section 102(2). These provisions should allow development of alternative litigation strategies that may be used to promote full consideration and implementation of NEPA's policies in federal decision-making.

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

Relationship of BLM NEPA Handbook H-1790-1 (April 24, 2008) to the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the NEPA, 40 C.F.R. parts 1500-1508 (2011)

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); Appendix A). Agency procedures should therefore provide federal personnel with the direction they need to implement NEPA on a day-to-day basis. The procedures must also provide a clear and uncomplicated picture of what those outside the federal government must do to become involved in the environmental review process under NEPA. See CRQ, "*Agency Implementing Procedures Under CEQ's NEPA Regulations*" (Jan. 19, 1979), available at ceg.hss.doe.gov/nepa/regs/exec_11979.html [I spent 10 minutes here; all I found was — This site can't be reached; ceg.hss.doe.gov's server DNS address could not be found.] Some examples of agency NEPA implementing procedures are the Department of the Interior, "*Department Manual: Managing the NEPA Process--National Park Service*" (May 27, 2004), available at http://1206.131.241.18/app_dm/act_getfiles.cfm?relnum=3622 [I spend 5 minutes at this address which did not work] and the Department of the Interior, "*Departmental Manual: Managing the NEPA Process--Bureau of Land Management*" (May 8, 2008), available at http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3799. [I spent 30 minutes at Electronic Library of the Interior Policies (elips) and was unable to find the Department of the Interior, "Departmental Manual: Managing the NEPA Process--Bureau of Land Management" (May 8, 2008); I spent an hour at the National BLM Home Page, including Planning and NEPA, learning zero about NEPA documents like the USDI Department Manual on NEPA (516 DM 1-7) and the BLM National Environmental Policy Act Handbook H-1790. I spent 15 minutes on the BLM Medford District Office's Home Page, including NEPA documents without finding any procedural advice for how the public can get involved in understanding the process. You find the statement "As of October 1, 2015, the BLM now hosts all of our current and ongoing planning documents on the new ePlanning site." which sends you to National BLM Planning and NEPA which is worthless for identifying applicable NEPA procedural requirements]. These websites were helpful if the researched was trying to find a NEPA documents of the agency, but not NEPA procedural manuals, handbooks, or guidance.

The use of non-mandatory terminology such as "guidance," "recommend," "may," "should," and "can," is intended to describe CEQ policies and recommendations. The use of mandatory terminology such as "shall," "must," and "required" is intended to describe controlling requirements under NEPA and the CEQ Regulations.¹

1. Council on Environmental Quality. March 6, 2012. *Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act*. Memo for Heads of Federal Departments and Agencies. Washington, D.C. 20503. https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf.
2. Council on Environmental Quality. 2007. *A Citizen's Guide to the NEPA: Having Your Voice Heard*. Washington, D.C. 20503. <https://energy.gov/nepa/downloads/citizens-guide-nepa-having-your-voice-heard-ceq-2007>

Footnote 2 Explanation. This guide is based on research and consultations undertaken by the Council on Environmental Quality concerning the need for a Citizen's Guide to the National Environmental Policy Act (NEPA). Participants in NEPA Regional Roundtables held in 2003-2004 clearly voiced the need for an guide that provides an explanation of NEPA, how it is implemented, and how people outside the Federal government — individual citizens, private sector applicants, members of organized groups, or representatives of Tribal, State, or local government agencies — can better participate in the assessment of environmental impacts conducted by Federal agencies.

40 C.F.R. § 1507.3(b)(1)

40 C.F.R. § 1507.3 Agency procedures. (a) Not later than eight months after publication of these regulations as finally adopted in the Federal Register, or five months after the establishment of an agency, whichever shall come later, 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. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the Federal Register for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

- (1) Those procedures required by §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.
- (2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in § 1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by § 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

3. **CEQ's Forty Questions (March 23, 1981)**
4. **U.S. Department of the Interior's (USDI) Department Manual (DM) on NEPA (516 DM 1-7). *Federal Register*, Vol. 73, No. 200, Wednesday October 15, 2008 (pages 61292 - 61323); March 18, 1980 #2244; Sept. 27, 1971 #1341; and Sept. 17, 1970 #1222. (File name: U.S.D.I Dept Manual on NEPA (516 DM 1-7) 2008)**

SUMMARY: The Department of the Interior (Department) is amending its regulations by adding a new part to codify its procedures for implementing the National Environmental Policy Act (NEPA), which are currently located in chapters 1–6 of Part 516 of the Departmental Manual (DM). This rule contains Departmental policies and procedures for compliance with NEPA, Executive Order (E.O.) 11514, E.O. 13352 and the Council on Environmental Quality's (CEQ) regulations (40 CFR Parts 1500–1508). Department officials will use this rule in conjunction with and supplementary to these authorities. The Department believes that codifying the procedures in regulations that are consistent with NEPA and the CEQ regulations will provide greater visibility to that which was previously contained in the DM and enhance cooperative conservation by highlighting opportunities for public engagement and input in the NEPA process.

The Department will continue to maintain Department's information and explanatory guidance pertaining to NEPA in the DM and Environmental Statement Memoranda (ESM) to assist bureaus in complying with NEPA. Bureau-specific NEPA procedures remain in 516 DM Chapters 8–15 and bureau guidance in explanatory and informational directives. Maintaining explanatory information in the Department's DM chapters and ESM, and bureau-specific explanatory and informational directives will facilitate timely responses to new ideas, new information, procedural interpretations, training needs, and editorial changes to assist field offices when implementing the NEPA process.

EFFECTIVE DATE: November 14, 2008.

The CEQ's Forty Questions are a treasure of explanations on different aspects of NEPA procedural requirements.

5. 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, 2008¹).

The handbook provides supplemental information, guidance, and examples to assure consistency with the Department of the Interior's Departmental Manual (DOI DM) and the Council on Environmental Quality (CEQ) NEPA regulations. The BLM NEPA Handbook (H-1790-1) was last updated October 25, 1988 and revisions are necessary to update the information and to reflect current NEPA guidance. The public can review the revised edition of the NEPA Handbook on the BLM Web site at <http://www.blm.gov>, on the left click on Information and then click on NEPA (Appendix B).

6. Court Precedents.

Court precedents can apply to any aspect of the **Section 102(2) contains "action-forcing" provisions** to make sure that federal agencies act according to the letter and spirit of the Act (i.e., **"Shall"** implement the provisions of Section 102(2)A - I).

An example of court precedents involve significant impacts with according to the BLM NEPA Handbook apply to both Eas and EISs (Chapter 7, Section 7.3 "Significance" BLM NEPA Handbook (H-1790-1), p. 70). 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. **Significance** (emphasis added) 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.

An EA or EIS 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; Chapter 6, Section 6.8.1.1 "Defining Environmental Effects" BLM NEPA Handbook (H-1790-1), p. 54).

The effects analysis must demonstrate that the BLM took a **"hard look" at the impacts of the action** (emphasis added) (Chapter 6, Section 6.8.1.2 "Analyzing Effects" BLM NEPA Handbook (H-1790-1), p. 55). 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."

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), p. 70).

Court Cases Defining “Significance.” A few examples for court precedents for NEPA significance follow.

- A. *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).
- B. *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973).
- C. *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996)
- D. *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996)
- E. *Friends of Fiery Gizzard v. Farmers Home Administration*, 61 F.3d 501 (6th Cir. 1995)
- F. *Kleppe v. Sierra Club*, 427 U.S. 390, S. Ct. 2718, 49 L. Ed. 2d 576, 590 n. 21 (1976).

A. *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973)

FACTS: Challenge to a General Services Administration (GSA) EA for construction of a jail and other facilities in New York City. GSA issued an EA which described a number of environmental impacts and concluded that the project was not an action significantly affecting the quality of the human environment.

FINDINGS: 1. Determination of whether an EIS was required turns on meaning of "significantly." Almost every major federal action, no matter how limited in scope, has some adverse effect on the human environment. Congress could have decided that every major federal action should be the subject of an EIS, but by adding "significantly" Congress required that the agency find a greater environmental impact would occur than from "any major federal action."

2. CEQ guidelines suggest that an EIS should be prepared where the impacts are controversial, referring not to the amount of public opposition, but to where there is a substantial dispute as to the size, nature, or effect of the major federal action.

3. Court said that in deciding whether a major federal action will "significantly" affect the environment, an agency should be required to review the proposed action in light of 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 the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results.

4. Agencies in doubtful cases will prepare EISs rather than risk the delay and expense of protracted litigation on what is "significant."

5. Agencies must affirmatively develop a reviewable environmental record for the purposes of a threshold determination under § 102(2)(C). Before a threshold determination of significance is made, the 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.

B. *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973)

FACTS: Plaintiffs challenged a proposed low and moderate income apartment project in Houston, Texas, arguing that the Department of Housing and Urban Development (HUD) was barred from funding the project because the agency had failed to prepare an EIS.

FINDINGS: The court concluded that HUD was not required to file an EIS covering the proposed apartment project. According to the court, the plaintiffs "have raised no environmental factors, either beneficial or adverse, that were not considered by HUD before it concluded that this apartment project would produce no significant environmental impact." Id. at 426.

Having made that ruling, the court went on to address the plaintiffs' claim that HUD's determination of "significance" improperly focused only on adverse environmental impacts, contrary to the CEQ Guidelines:

"[Plaintiffs] argue that NEPA requires that an agency file an environmental impact statement if any significant environmental effects, whether adverse or beneficial, are forecast. Thus, they argue, by considering only adverse effects HUD in effect did but one-half the proper investigation. We think this contention raises serious questions about the adequacy of the investigatory basis underlying the HUD decision not to file an environmental impact statement." Id. at 426-27 (emphasis in original).

Without amplification or example, the court expressed its view that "[a] close reading of Section 102(2)(C) in its entirety discloses that Congress was not only concerned with just adverse effects but with all potential environmental effects that affect the quality of the human environment." Id. at 427 (emphasis in original). Despite this, the court agreed that the project in question was not a major federal action significantly affecting the quality of the human environment.

C. *Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996)*

FACTS: Plaintiffs challenged the Secretary of the Interior's decision under the Endangered Species Act (ESA) to designate critical habitat for a threatened or endangered species without complying with NEPA.

FINDINGS: Holding that NEPA does not apply to such designations, the court found that ESA procedures have displaced NEPA requirements and that ESA furthers the goals of NEPA without requiring an EIS. Apart from its interpretation of ESA, the court also concluded that "NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment." 48 F.3d at 1505. To clarify this point, the court held that

"If the purpose of NEPA is to protect the physical environment, and the purpose of preparing an EIS is to alert agencies and the public to potential adverse consequences to the land, sea or air, then an EIS is unnecessary when the action at issue does not alter the natural, untouched physical environment at all."

D. *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996)*

FACTS: Similar to Douglas County, plaintiffs challenged a critical habitat designation that had been made without compliance with NEPA.

FINDINGS: The court specifically referenced and disagreed with the Douglas County decision from the 9th Circuit and held that ESA procedures did not displace NEPA requirements, that there were "actual impact flows from the critical habitat designation," and that compliance with NEPA will further the goals of ESA.

With respect to its factual conclusion that there could be impacts from the critical habitat designation, the court reiterated plaintiffs' claim that the proposed designation "will prevent continued governmental flood control efforts, thereby significantly affecting nearby farms and ranches, other privately owned land, local economies and public roadways and bridges." The court characterized these impacts as "immediate and the consequences could be disastrous." Further, the court stated that:

"While the protection of species through preservation of habitat may be an environmentally beneficial goal, Secretarial action under ESA is not inevitably beneficial or immune to improvement by compliance with NEPA procedure...The short- and long-term effects of the proposed governmental action (and even the governmental action prohibited under the ESA designation) are often unknown or, more importantly, initially thought to be beneficial, but after closer analysis determined to be environmentally harmful."

E. *Friends of Fiery Gizzard v. Farmers Home Administration, 61 F.3d 501 (6th Cir. 1995)*

FACTS: The Farmers Home Administration had prepared an EA for the funding of a water impoundment and treatment project in Tracy City, Tennessee. On the basis of the EA, the agency concluded that the project would have no significant environmental impacts. However, the agency also concluded that "[t]he project will have a positive impact on the living environment of the residents of the area" because they would be "provided with a dependable, sanitary water supply." Id. at 503, quoting the environmental assessment. Plaintiffs sued, claiming that the existence of "significant" beneficial impacts required the preparation of an EIS.

FINDINGS: Affirming the lower court decision, the court held that if an agency reasonably concludes on the basis of an environmental assessment that the project will have no significant adverse environmental consequences, an EIS is not required. Id. at 504-505. The court based its conclusion on its reading of NEPA and the CEQ regulations.

1. One of the central purposes of NEPA is to "promote efforts which will stimulate the health and welfare of man" (citing U.S.C. § 4321). The health and welfare of the residents of Tracy City will not be "stimulated" by the delays and costs associated with the preparation of an EIS "that would not even arguably be required were it not for the project's positive impact on health and welfare." Id. at 505.

2. The CEQ regulations implementing NEPA direct federal agencies to make the NEPA process more useful to decisionmakers and the public, to reduce paperwork and the accumulation of extraneous background data, and to emphasize real environmental issues and alternatives (citing 40 CFR § 1500.2(b)). "It was in keeping with this philosophy that the environmental assessment process was devised to screen projects where the preparation of an expensive and time-consuming environmental impact statement would serve no useful purpose."

3. However, the court did differentiate between projects where the only "significant" impacts were beneficial ones (the Fiery Gizzard case) and projects where there were "significant" beneficial and adverse impacts, that "on balance" the impacts were beneficial:

"This is not to say, of course, that the benefits of the project would justify a finding of no significant impact if the project would also produce significant adverse effects. Where such adverse effects can be predicted, and the agency is in the position of having to balance the adverse effects against the projected benefits, the matter must, under NEPA, be decided in light of an environmental impact statement."

F. *Kleppe v. Sierra Club, 427 U.S. 390, S. Ct. 2718, 49 L. Ed. 2d 576, 590 n. 21 (1976).*

The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences (emphasis added); it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.

Appendix B. Preliminary Topics of Interest
From BLM National Environmental Policy Act Handbook H-1790-1 (April 24, 2008)
(All appendix consultations expect revisions, and/or updates or supplements)

The handbook provides supplemental information, guidance, and examples to assure consistency with the Department of the Interior's Departmental Manual (DOI DM) and the Council on Environmental Quality (CEQ) NEPA regulations. The BLM NEPA Handbook (H-1790-1) was last updated October 25, 1988 and revisions are necessary to update the information and to reflect current NEPA guidance. The public can review the revised edition of the NEPA Handbook on the BLM Web site at <http://www.blm.gov>, on the left click on Information and then click on NEPA.

Note that the Web Guide links will be functional at a later date (emphasis added). The handbook will be mailed to those who indicate that they want a hard copy or compact disk. The handbook is based upon current regulation, policy, and procedures.

The handbook revisions focus on helping the BLM improve analysis to support decision making. The revisions to the NEPA Handbook are also designed to make the NEPA process more efficient, avoiding redundant or unnecessary documentation. The revisions include updates to clarify definitions and incorporate new Departmental requirements.

The following preliminary topics of interest are quotes from the "Table of Contents" page of the 2008 BLM NEPA Handbook (H-1790-1). Section 6.8.1.2 "Analyzing Effects" is the only example of including text. This was done because understanding the "must" requirements of the BLM NEPA Handbook is critical (must in this handbook means "shall").

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). 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**.

HANDBOOK USER'S GUIDE

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- 6.5.1 *Description of the Proposed Action*
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- 6.6.1 *Reasonable Alternatives*
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6.8 ENVIRONMENTAL EFFECTS

- 6.8.1 *Effects Analysis*
- 6.8.1.1 Defining Environmental Effects

6.8.1.2 Analyzing Effects The effects analysis must demonstrate that the BLM took a “hard look” at the impacts of the action. 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:

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.

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

6.8.3 Cumulative Effects

6.8.3.1 Cumulative Effects Issues

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7.2 ACTIONS REQUIRING AN EIS

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