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May 14, 2017 Letter/Email **(Draft)**

Mary Camp, President
Deer Creek Valley Natural Resources Conservation Association

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)
Deer Creek Valley Natural Resources Conservation Association

Serena Barry, Vice President
Deer Creek Valley Natural Resources Conservation Association

Subj: National Environmental Procedures Act's (NEPA) Procedural Requirements: Significant Cumulative Impacts

Dear Mary, Orville, & Serena:

This NEPA consultation letter addresses "Significant Cumulative Impacts" as one of NEPA's procedural requirements under Section 102. NEPA is our basic national charter for protection of the environment. It establishes policy, sets goals (Title I, Section 101 is best feeling), and provides means (Title I, 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 Section102(2)A - I).

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 102). CEQ also reviews and approves federal agencies' NEPA procedures (Appendix A2, 40 CFR 1507.3(b)(1)). The BLM National Environmental Policy Act Handbook, H-1790-1 is an example of a federal agency's NEPA procedures that CEQ reviewed and approved.

> 40 CFR 1507.3(b)(1)
> (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.

One of CEQ's NEPA procedural requirements authorities important to the public comes from the NEPA's "action-forcing" "shall" 102(2)(B) provision (Appendix A1).

> **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;

I am appreciative to the BLM for extending public EA scoping to the Deer Creek Valley Natural Resources Conservation Association (DCVNRCA) to include a "question and answer" meeting on EA procedural requirements. This is in line with a general observation that the 2008 BLM NEPA Handbook is significantly more user friendly than earlier versions, especially with the explanatory web links (i.e., when they are working). However, I am extremely frustrated that BLM did not reference its NEPA handbook in scoping for EAs **(true?)** as a resource to help "*facilitate public involvement in the federal decision-making process*." This was on of several purposes of the NEPA process (Appendix A2; CRS. 2005, p. 11):

- Inform federal agencies of what they must do to comply with the procedures and achieve the goals of NEPA;
- 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);
- Foster better decision making by helping public officials make decisions based on an understanding of the environmental consequences of their actions; and
- Facilitate public involvement in the federal decision-making process (emphasis added).

Even more important is a failure to comply with 40 CFR1506.6 Public Involvement: *"Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures*."

I am presently reviewing the NEPA BLM Handbook's procedural requirements of "Significant Cumulative Impacts." This preliminary review is a broad sweep of BLM's NEPA procedural requirements identified by six categories.

1 National Environmental Policy Act.
2. CEQ Regulations for Implementing the Procedural Provisions of the NEPA, 40 C.F.R. parts 1500-1508.
3. CEQ's *Forty Questions.*
4. USDI's Department Manual on NEPA (516 DM 1-7).
5. BLM National Environmental Policy Act Handbook H-1790-1.
6. Court Precedents.

1. National Environmental Policy Act (NEPA) (Appendix A1).

- (A) utilize a systematic, interdisciplinary approach 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;

- (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;

2. CEQ Regulations. Two Executive Orders (Appendix A2; Attachments 2 & 3) resulted in CEQ's NEPA regulations (Attachment 4). Example of a few applicable regulations follow (Appendix A2).

1. Executive Order 11514, Protection and Enhancement of Environmental Quality, signed by President Nixon, March 5, 1970.
2. Executive Order 11991, Relating to Protection and Enhancement of Environmental Quality, signed by President Carter, May 24, 1977.

- Sec. 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.
- Sec. 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.
- Sec. 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).
- Sec. 1506.6 Public involvement. Agencies shall: **(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures**.
- Sec. 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.
- Sec. 1508.25 Scope. Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Secs.1502.20 and 1508.28).
  (a) Actions which may be:
    1. Connected actions.
    2. Cumulative actions.
    3. Similar actions.
  (b) Alternatives, which include:
    1. No action alternative.

2. Other reasonable courses of actions.
3. Mitigation measures.

(c) Impacts, which may be:

1. Direct.
2. Indirect.
3. Cumulative.

- Sec. 1508.27 Significantly. **Significantly" as used in NEPA requires considerations of both context and intensity** (emphasis added).

3. CEQ's Forty Questions (Appendix A4)

- *Council on Environmental Quality Executive Office of the President Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* (CEQ. 1981).

The "Table of Contents" of "CEQ's Forty Questions" includes 40 questions and answers, as well as numerous sub-questions and answers. As examples, the following questions (36 - 40) and answers from "CEQ's Forty Questions" are the obvious 1981 questions and answers applicable to EAs, but I believe most of the other "CEQ's Forty Questions" are also applicable to EAs. The rationale is the 2008 BLM's evolved concept of analytical elements that are common to a NEPA analysis, regardless of whether they are for an EA or an EIS (BLM. 2008, "Handbook User's Guide" p. ix).

36. Environmental Assessments (EA).
37. Findings of No Significant Impact (FONSI).
38. Public Availability of EAs v. FONSIs.
39. Mitigation Measures Imposed in EAs and FONSIs.
40. Propriety of Issuing EA When Mitigation Reduces Impacts.

4. U.S. Department of the Interior's (USDI) Department Manual (DM) on NEPA (516 DM 1-7) (Appendix A4).

The USDI 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** (emphasis added) (Appendix A4).

A comprehensive review of the USDI DM for NEPA has not yet occurred.

5. BLM NEPA Handbook (Appendix A5).

The DCVNRCA's question to BLM at its April 13, 2017 scoping meeting, about *"cumulative impacts from private industrial logging, as well as cumulative impacts with regards to the Biscuit Fire and the Deer Creek Fire,"* can be reviewed in the BLM NEPA Handbook, Section 6.5.2 Defining the Scope of Analysis of the Proposed Action: Connected Actions, Cumulative Actions, Similar Actions, including Section 6.8.3 Cumulative Effects, and Section 7.3 Significance **(other sections?)**. I recommend that DCVNRCA keep its arguments/positions as written in the outstanding meeting minutes, and supplement these citizen scoping issues by referencing the known and potential sections in the BLM NEPA Handbook to support its positions. These scoping positions "for the record" can also later be used as criteria for EA evaluation (substantive) comments.

A comprehensive review of the BLM NEPA Handbook has been partially completed.

6. Court Precedents (Appendix A6)

A few examples for court precedents for NEPA significance follow (see Appendix A6 for more details).

- *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, Inc., 462 U.S. 87, 97, 100 (1983).
- *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996).*
- *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996).
- *Friends of Fiery Gizzard v. Farmers Home Administration*, 61 F.3d 501 (6th Cir. 1995).
- *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).
- *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973).
- *Kleppe v. Sierra Club, 427 U.S. 390, S. Ct. 2718, 49 L. Ed. 2d 576, 590 n. 21 (1976).*
- *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

I am interested in Valerie Fogleman's publication entitled, *Threshold Determinations Under the National Environmental Policy Act*[3], providing supplemental explanations for the BLM NEPA Handbook topics on significance (Attachment 6a - original, and Attachment 6b - selected information from Threshold Determinations on significance).

Since it was published in 1987, it will most probably have significant new court precedents that could have been included in its analysis of threshold determinations. Nevertheless, I find most of its concepts still valuable. I especially reference you to Chapter V. *Criteria for Determining the Significance of an Environmental Effect*. To aid the agencies in identifying those actions which may have significant environmental effects, the CEQ published a list of criteria. These criteria, based on CEQ's reading of NEPA case law have two divisions – context and intensity both of which must be considered in threshold determinations for "Significant Cumulative Impacts". In summary, Chapter V is about real world court opinions and precedents on CEQ's definition of Significantly (40 CFR § 1508.27. Significantly" as used in NEPA requires considerations of both context and intensity). The following information was provided about the author, Valerie Fogleman, in the threshold determinations article.

> "Visiting Instructor, University of Illinois College of Law. J.D. 1986, B.L.A. 1983 at Texas Tech University. This Article was written while the author was Natural Resources Law Fellow, Northwestern School of Law of Lewis and Clark College. Funding for the Article was provided by the Oregon Department of Land Conservation and Development with funds obtained from the National Oceanic and Atmospheric Administration, appropriated under the Coastal Zone Management Act of 1972."

I quick search of the web quickly found more about Fogleman (Attachment 6b). Her credentials are impressive. I found it coincidental that her article was written while the author was living in Oregon as a Natural Resources Law Fellow, Northwestern School of Law of Lewis and Clark College with funding for the article provided by the Oregon Department of Land Conservation and Development.

In summary, a peak at the BLM NEPA Handbook compliance criteria for "Significance" follows. For clarity and understanding, they all need explanations from "NEPA Experts" at the BLM Medford District Office.

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

- BLM NEPA Handbook Chapter 6. The NEPA Analysis chapter identifies the essential analytical elements that are common to NEPA analysis, regardless of **whether you are preparing an EA or an EIS** (BLM. 2008, p. ix).

- Facilitate Public Involvement. 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 (BLM. 2008, p. ix). [Has BLM facilitated public involvement in understanding its NEPA compliance requirements?]

- Web Guide. To assist BLM in carrying out its NEPA responsibilities, this Handbook includes references to documents contained in the **BLM NEPA Handbook Web Guide (Web Guide).** The Web Guide includes copies of official guidance, such as CEQ citations, and provides examples for your use in complying with the NEPA (BLM. 2008, p. ix). [The Web Guide is a failure].

- The CEQ regulations also require that agencies **"make diligent efforts to involve the public in preparing and implementing their NEPA procedures"** (40 CFR 1506.6(a); BLM. 2008, p. 2).

- NEPA's Legal Requirements. "We" (BLM) believe it [BLM NEPA Handbook] will help "you" (the reader) **help us in meeting the legal requirements of the NEPA** (BLM. 2008, p. 2).

- Choice of Alternatives Being Analyzed under the NEPA. 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** (BLM. 2008, p. 3).

  [What about the NSA alternative that the U.S. District Court eliminated within the context of a DCVNRCA appeal to U.S. Court of Appeals for the Ninth Circuit (*Deer Creek Valley Natural Resource Conservation Association v. BLM, and Murphy Company* (2014) when the BLM pulled the proposed action and voided the appeals court process? The DCVNRCA appeal presented the following issues:

  1. Whether the BLM **properly conducted pre-disturbance surveys** and managed all known sites for red tree voles in accordance with the Northwest Forest Plan and the Medford District Resource Management Plan, pursuant to FLPMA.
  2. Whether the BLM took a **hard look** at the environmental impacts of the Deer North Sale on red tree voles, pursuant to NEPA requirements.
  3. Whether the BLM properly considered **a reasonable range of alternatives**, including those offered by the public, prior to authorizing the Deer North Sale, pursuant to NEPA requirements.

  Is the U.S. District Court's opinion valid when BLM erased the opportunity for DCVNRCA to make its case before the court? For example, The BLM NEPA Handbook provides *"Address the following questions before using existing environmental analyses* (BLM. 2008, p. 21). Two of the four questions follow.

  • Do any of the existing analyses fully analyze the proposed actions, alternatives, and effects ?

• Are there new circumstances or information that have arisen since the original analysis was conducted?]

- Reviewing Existing Environmental Documents Review existing environmental documents and **answer the following questions to determine whether they adequately cover a proposed action currently under consideration** (BLM. 2008, p. 23):
  - Is the **range of alternatives analyzed in the existing NEPA document(s) appropriate** with respect to the new proposed action, given current environmental concerns, interests, and resource values (BLM. 2008, p. 23)?
  - **Is the existing analysis valid in light of any new information or circumstances**? Can you reasonably conclude that new information and new circumstances would not substantially change the analysis of the new proposed action (BLM. 2008, p. 23)?
  - **We recommend that your answers be substantive and detailed and contain specific citations to the existing EA or EIS** (see section 5.1.3, *Document the Review*). If you answer "yes" to all of the above questions, additional analysis will not be necessary. **If you answer "no" to any of the above questions, a new EA or EIS must be prepared (516 DM 11.6)**. However, it may still be appropriate to tier to or incorporate by reference from the existing EA or EIS or supplement the existing EIS (provided that the Federal action has not yet been implemented) (BLM. 2008, p. 23).

- The Role of the Purpose and Need Statement. **The purpose and need statement dictates the range of alternatives, because action alternatives are not "reasonable" if they do not respond to the purpose and need for the action** (see section **6.6.1, *Reasonable Alternatives***). The broader the purpose and need statement, the broader the range of alternatives that must be analyzed. The purpose and need statement will provide a framework for issue identification and will form the basis for the eventual rationale for selection of an alternative. **Generally**[?], the action alternatives will respond to the problem or opportunity described in the purpose and need statement, providing a basis for eventual selection of an alternative in a decision (BLM. 2008, p. 36) .

- 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. Begin considering cumulative impacts during the scoping process; **use scoping to begin identifying actions by others that may have a cumulative effect with the proposed action**, and identifying geographic and temporal boundaries, baselines and **thresholds**. Scoping also helps to begin identifying **incomplete or unavailable information and evaluating whether that information is essential to a reasoned choice among alternatives** (BLM. 2008, p. 38).

- Issues. 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** (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**. 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.

- Significant Environmental Issues and Alternatives. 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)**. Discussions of impacts are to be proportionate to their significance (40 CFR 1502.2(b)). (BLM. 2008, p. 4).

- Significance. **An example of court precedents involve significant impacts which according to the BLM NEPA Handbook apply to both EAs and EISs** (Chapter 7, Section 7.3 Significance (BLM. 2008, 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** 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.

- Defining Environmental Significance. 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. 2008, p. 54).

- Analyzing Effects. The effects analysis must demonstrate that the BLM took a **"hard look" at the impacts of the action** (Chapter 6, Section 6.8.1.2 "Analyzing Effects" BLM NEPA Handbook (H-1790-1), (BLM. 2008, 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** the analytical methodology sufficiently so that the reader can understand how the analysis was conducted and why the particular methodology was used (40 CFR 1502.24). This explanation **must include** a description of any limitations inherent in the methodology. If there is substantial dispute over models, methodology, or data, **you must recognize** the opposing viewpoint(s) **and explain the rationale for your choice of analysis** "(Chapter 6, Section 6.8.1.2 "Analyzing Effects" BLM NEPA Handbook (H-1790-1) (BLM. 2008, p. 55).

- NEPA Documents. Analytical documents to support Federal agency decision-making include EISs and EAs, but **neither are considered publications of scientific research subject to peer review**. You may choose to have your NEPA analysis reviewed by members of the scientific community as part of public review of the document. Such review may be desirable to improve the quality of the analysis or share information; this does not constitute formal peer-review (H-1790-1; BLM. 2008, p. 55).

- Substantive Comments. (BLM. 2008, p. 66) **Substantive 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.

  Comments that are not considered substantive include the following (H-1790-1; BLM. 2008, p. 66).
  - 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.

The review of the BLM NEPA Handbook compliance criteria for "Significance" was not completed at the time of this draft communication. I just ran out of time. Hopefully, the review criteria will serve to illustrate learning the BLM's ball park rules (BLM NEPA Handbook as one the six categories of BLM's NEPA procedural requirements.

I send this draft 63 page letter/email today, May 12, 2017. I intend to finalized it in the future after several "table talks." The bottom line, it does little good for me to get on the NEPA bicycle again as I will not be writing comments on NEPA documents for DCVNRCA or other organizations. The DCVNRCA must "ride" for its comments on NEPA documents are to be substantial and effective.

Sincerely,

Mike :) Mike Walker

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

Appendices

Appendix A. National Environmental Procedures Act's (NEPA) Procedural Requirements
Appendix A1. *National Environmental Policy Act* (1969).
Appendix A2. *Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the NEPA*, 40 C.F.R. parts 1500-1508 (July 30, 1979; updated several times, e.g., 1986, 2011, etc.).
Appendix A3. CEQ's *Forty Questions* (March 23, 1981)
Appendix A4. *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.
Appendix A5. *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[1]).
Appendix A6. Court Precedents.
Appendix B. National Environmental Procedures Act's (NEPA) Procedural Requirements: "Significant Cumulative Impacts" (From U.S. *BLM National Environmental Policy Act Handbook H-1790-1*: January 30, 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. Congressional Research Service (CRS), The Library of Congress. November 16, 2005. *The National Environmental Policy Act: Background and Implementation*. CRS Report for Congress.
3. Valerie M. Fogleman. 1987. *Threshold Determinations Under the National Environmental Policy Act*. 15 Boston College Environmental Affairs Law Review. 59.

Attachments

Attachment 1. *National Environmental Policy Act* (1969).
Attachment 2. *Executive Order 11514 – Protection and Enhancement of Environmental Quality*. March 5, 1970.
Attachment 3. *Executive Order 11991—Environmental Impact Statements*. May 24, 1977.
Attachment 4. *Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the NEPA*, 40 C.F.R. parts 1500-1508 (July 30, 1979; updated several times, e.g., 1986, 2011, etc.).
Attachment 5. CEQ's *Forty Questions* (March 23, 1981)
Attachment 6a. *Threshold Determinations Under the National Environmental Policy Act*. Fogleman 1987.
Attachment 6b. Selected Information From *Threshold Determinations Under the National Environmental Policy Act*. Fogleman 1987.
Attachment 7. *The National Environmental Policy Act: Background and Implementation*. CRS 2005.
Attachment 8. CEQ's *A Citizen's Guide to the NEPA_ Having Your Voice Heard*. 2007.
Attachment 9. *USDI Department Manual on NEPA (516 DM 1-7)*. October 15, 2008.
Attachment 10. *BLM National Environmental Policy Act Handbook H-1790-1*: January 30, 2008.
Attachment 11. *Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act*. CEQ 2012.

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

(All appendix consultations expect revisions, and/or updates or supplements)

Appendix A1	National Environmental Policy Act (1969).
Appendix A2.	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).
Appendix A3.	CEQ's Forty Questions (March 23, 1981)
Appendix A4.	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.
Appendix A5.	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[1]).
Appendix A6.	Court Precedents.

Appendix A1. National Environmental Policy Act (1969) (Attachment 1)

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; **[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)]**

42 U.S.C.
United States Code, 2011 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 55 - NATIONAL ENVIRONMENTAL POLICY
Sec. 4321 - Congressional declaration of purpose

42 U.S. Code § 4332 - Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

> 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 chapter, and (2) all agencies of the Federal Government shall—

(**A) utilize a systematic, interdisciplinary approach** 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, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, 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 by the responsible official on— **[42 U.S.C § 4332(2)(C)]**

> (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, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, . . .

(E) study, develop, and describe appropriate alternatives 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 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 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 in the planning and development of resource-oriented projects**; and

(I) Assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91–190, title I, §?102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424.)

Appendix A2. Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the NEPA, 40 C.F.R. parts 1500-1508 (Reprint 2005) (Attach. 4)
May 13, 2017

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, 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).

- 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)

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 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.

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 environ-mental 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 (Attachment 2)**.** 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 (Attachment 3)**.** 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 (Attachments 4; CRS. 2005. p. CRS 11):

- inform federal agencies of what they must do to comply with the procedures and achieve the goals of NEPA [40 CRF 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 CRF 1500.1(b)];
- foster better decision making by helping public officials make decisions based on an understanding of the environmental consequences of their actions [40 CRF 1500.1(c)]; and
- **facilitate public involvement in the federal decision-making process** (emphasis added) [40 CRF 1500.2(d)].

CEQ Regulations for Implementing the Procedural Provisions of the NEPA, 40 C.F.R. parts 1500-1508 (Attachment 4)

- Council on Environmental Quality, Executive Office of the President. 2005. *Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the NEPA, 40 C.F.R. parts 1500-1508.*

The CEQ 40 CFR 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)). 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.

The following sections of the CEQ 40 CFR parts 1500 -1508 regulations applicable to the subject of the "National Environmental Procedures Act's (NEPA) Procedural Requirements: Significant Cumulative Impacts," are preliminary, but a demonstration of the value of reviewing the CEQ regulations of BLM NEPA compliance issues.

PART 1500—PURPOSE, POLICY, AND MANDATE

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

Sec. 1500.1 Purpose. **(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment** (emphasis added). 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 regulations that follow implement section 102(2). **Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act** (emphasis added). The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA (emphasis added). Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. 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. These regulations provide the direction to achieve this purpose (emphasis added).

Sec. 1500.2 Policy. **Federal agencies shall to the fullest extent possible:**
(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.
(d) Encourage and facilitate public involvement in decisions (emphasis added) which affect the quality of the human environment.

Sec. 1500.3 Mandate. **Parts 1500 through 1508 of this title provide regulations applicable to and binding on all federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969** (emphasis added), as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq*.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq*.) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). **The regulations apply to the whole of section 102(2)** (emphasis added). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

Sec. 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.

PART 1501—NEPA AND AGENCY PLANNING

Sec. 1501.1 Purpose. The purposes of this part include:
(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.
(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.
(c) Providing for the swift and fair resolution of lead agency disputes.
(d) Identifying at an early stage the significant environmental issues deserving of study

1501.2 Apply NEPA early in the process. Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:
(a) Comply with the mandate of section **102(2)(A) to "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," as specified by §1507.2.
(b) **Identify environmental effects and values in adequate detail** (emphasis added) so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.
(c) **Study, develop, and describe appropriate alternatives to recommended courses of action** (emphasis added) in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided **by section 102(2)(E) of the Act** (emphasis added).

Sec. 1501.2(d) (emphasis added)
(d) Provide for cases where actions are planned by private applicants or other non-federal entities before federal involvement so that:
(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later federal action.
(2) The federal agency consults early with appropriate state and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.
(3) The federal agency commences its NEPA process at the earliest possible time.

§1501.4 Whether to prepare an environmental impact statement. In determining whether to prepare an environmental impact statement the federal agency shall:
(a) Determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal is one which:
(1) Normally requires an environmental impact statement, or **. . .**
(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).
(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).
(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.
(d) Commence the scoping process (§1501.7), if the agency will prepare an environmental impact statement.
(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.
(2) In certain limited circumstances, which the agency may cover in its procedures under §1507.3, the agency shall make the finding of no significant impact available for public review (including state and area wide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to §1507.3, or (ii) The nature of the proposed action is one without precedent.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec. 1502.1 Purpose. The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the federal government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by federal officials in conjunction with other relevant material to plan actions and make decisions.

Sec. 1500.2 Policy. Federal agencies shall to the fullest extent possible:
(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations. **(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. Environmental impact statements shall be concise, clear, and to the point, and shall be **supported by evidence that agencies have made the necessary environmental analyses** (emphasis added).
(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.
(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment (emphasis added) .
(e) Use the NEPA process to **identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment** (emphasis added).
(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

Sec. 1502.9 Draft, final, and supplemental statements. Except for proposals for legislation as provided in §1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.
(a) Draft environmental impact statements shall (emphasis added) be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

Sec. 1502.13 Purpose and need. The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

Sec. 1502.14 Alternatives including the proposed action. This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:
(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.
(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
(c) Include reasonable alternatives not within the jurisdiction of the lead agency.
(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

Sec. 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.
(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.
(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation. [51 FR 15625, Apr. 25, 1986]

PART 1503—COMMENTING

Sec. 1503.4 Response to comments. (a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:
(1) Modify alternatives including the proposed action.
(2) Develop and evaluate alternatives not previously given serious consideration by the agency.
(3) Supplement, improve, or modify its analyses.
(4) Make factual corrections.
(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.
(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.
(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§1502.19). The entire document with a new cover sheet shall be filed as the final statement (§1506.9).

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec. 1505.1 Agency decisionmaking procedures. **Agencies shall adopt procedures (§1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act** (emphasis added). Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1) (emphasis added) and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings (emphasis added).

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions (emphasis added).

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement (emphasis added). If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

(b) Designating the major decision points for the agency's principal programs likely to have a **significant effect on the human environment** (emphasis added) and assuring that the NEPA process corresponds with them.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec. 1506.1(a)(2) Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in §1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:
(1) Have an adverse environmental impact; or
(2) Limit the choice of reasonable alternatives (emphasis added).

Sec. 1506.6 Public involvement. Agencies shall:

(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.
(1) In all cases the agency shall mail notice to those who have requested it on an individual action.
(2) 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.
(3) In the case of an action with effects primarily of local concern 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. Criteria shall include whether there is:
(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing (emphasis added).
(2) 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).
(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 (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. 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.

PART 1507—AGENCY COMPLIANCE

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56002, Nov. 29, 1978, unless otherwise noted.

Sec. 1507.1 Compliance. **All agencies of the federal government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by §1507.3 to the requirements of other applicable laws** (emphasis added).

Sec. 1507.2 Agency capability to comply. **Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall** (emphasis added):

(a) Fulfill the requirements of section 102(2)(A) of the Act to **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 the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.
(b) **Identify methods and procedures required by section 102(2)(B)** (emphasis added) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.
(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.
(d) **Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources** (emphasis added). **This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements** (emphasis added).
(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects (emphasis added).
(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2 (emphasis added).

Sec. 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** (emphasis added). 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: (emphasis added)
(1) Those procedures required by §§1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4 (emphasis added).
(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 (emphasis added). 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.

PART 1508—TERMINOLOGY AND INDEX

Sec. 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.

Sec. 1508.8 Effects. "Effects" include:

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

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

Sec. 1508.9 Environmental assessment. "Environmental assessment":
(a) Means a concise public document for which a federal agency is responsible that serves to:
(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
(3) Facilitate preparation of a statement when one is necessary.
(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 (emphasis added), and a listing of agencies and persons consulted.

Sec. 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).

Sec. 1508.11 Environmental impact statement. "Environmental impact statement" means a detailed written statement as required by section 102(2)(C) of the Act.

Sec. 1508.13 Finding of no significant impact. "Finding of no significant impact" means a document by a federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

Sec. 1508.14 Human environment. "Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§1508.8).) **This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement** (emphasis added). When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

Sec. 1508.20 Mitigation. "Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

Sec. 1508.21 NEPA process. **"NEPA process" means all measures necessary for compliance with the requirements of section 2 and title I of NEPA** (emphasis added).

Sec. 1508.23 Proposal. "Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

Sec. 1508.25 Scope. Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Secs.1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

1. Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

2. Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

3. Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

1. No action alternative.
2. Other reasonable courses of actions.
3. Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

Sec. 1508.27 Significantly. Significantly" as used in NEPA requires considerations of both context and intensity:

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

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

1. Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
2. The degree to which the proposed action affects public health or safety.
3. Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
4. **The degree to which the effects on the quality of the human environment are likely to be highly controversial** (emphasis added).
5. The degree to which the **possible effects on the human environment are highly uncertain or involve unique or unknown risks** (emphasis added).
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** (emphasis added). Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
8. The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
9. The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
10. Whether the action threatens a violation of Federal, State, or local aw or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

Sec. 1508.28 Tiering. "Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis
at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

Appendix A3. CEQ's Forty Questions (March 23, 1981) (Attachment 5)

The full title of "CEQ's Forty Questions" is the following along with the background to the questions.

- ***Council on Environmental Quality Executive Office of the President Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations***. (CEQ. 1981)

Summary: The Council on Environmental Quality, as part of its oversight of implementation of the National Environmental Policy Act, held meetings in the ten Federal regions with Federal, State, and local officials to discuss administration of the implementing regulations. The forty most asked questions were compiled in a memorandum to agencies for the information of relevant officials.

March 16, 1981 MEMORANDUM FOR FEDERAL NEPA LIAISONS, FEDERAL, STATE, AND LOCAL OFFICIALS AND OTHER PERSONS INVOLVED IN THE NEPA PROCESS Subject: Questions and Answers About the NEPA Regulations (CEQ. 1981)**.**

During June and July of 1980 the Council on Environmental Quality, with the assistance and cooperation of EPA's EIS Coordinators from the ten EPA regions, held one-day meetings with federal, state and local officials in the ten EPA regional offices around the country. In addition, on July 10, 1980, CEQ conducted a similar meeting for the Washington, D.C. NEPA liaisons and persons involved in the NEPA process. At these meetings CEQ discussed (a) the results of its 1980 review of Draft EISs issued since the July 30, 1979 effective date of the NEPA regulations, (b) agency compliance with the Record of Decision requirements in Section 1505 of the NEPA regulations, and (c) CEQ's preliminary findings on how the scoping process is working. Participants at these meetings received copies of materials prepared by CEQ summarizing its oversight and findings.

These meetings also provided NEPA liaisons and other participants with an opportunity to ask questions about NEPA and the practical application of the NEPA regulations. A number of these questions were answered by CEQ representatives at the regional meetings. In response to the many requests from the agencies and other participants, CEQ has compiled forty of the most important or most frequently asked questions and their answers and reduced them to writing. The answers were prepared by the General Counsel of CEQ in consultation with the Office of Federal Activities of EPA. These answers, of course, do not impose any additional requirements beyond those of the NEPA regulations. This document does not represent new guidance under the NEPA regulations, but rather makes generally available to concerned agencies and private individuals the answers which CEQ has already given at the 1980 regional meetings. The answers also reflect the advice which the Council has given over the past two years to aid agency staff and consultants in their day-to-day application of NEPA and the regulations.

The “Table of Contents” of “CEQ’s Forty Questions” includes 40 questions and answers, as well as numerous sub-questions and answers (CEQ. 1981).

1. Range of Alternatives.
2. Alternatives Outside the Capability of Applicant or Jurisdiction of Agency.
3. No-Action Alternative.
4. Agency's Preferred Alternative.
5. Proposed Action v. Preferred Alternative.
6. Environmentally Preferable Alternative.
7. Difference Between Sections of EIS on Alternatives and Environmental Consequences.
8. Early Application of NEPA.
9. Applicant Who Needs Other Permits.
10. Limitations on Action During 30-Day Review Period for Final EIS.
11. Limitations on Actions by an Applicant During EIS Process.
12. Effective Date and Enforceability of the Regulations.
13. Use of Scoping Before Notice of Intent to Prepare EIS.
14. Rights and Responsibilities of Lead and Cooperating Agencies.
15. Commenting Responsibilities of EPA.
16. Third Party Contracts.
17. Disclosure Statement to Avoid Conflict of Interest.
18. Uncertainties About Indirect Effects of A Proposal.
19. Mitigation Measures.
20. Worst Case Analysis. [Withdrawn.]
21. Combining Environmental and Planning Documents.
22. State and Federal Agencies as Joint Lead Agencies.
23. Conflicts of Federal Proposal With Land Use Plans, Policies or Controls.
24. Environmental Impact Statements on Policies, Plans or Programs.
25. Appendices and Incorporation by Reference.
26. Index and Keyword Index in EISs.
27. List of Preparers.
28. Advance or Xerox Copies of EIS.
29. Responses to Comments.
30. Adoption of EISs.
31. Application of Regulations to Independent Regulatory Agencies.
32. Supplements to Old EISs.
33. Referrals.
34. Records of Decision.
35. Time Required for the NEPA Process.
36. Environmental Assessments (EA).
37. Findings of No Significant Impact (FONSI).
38. Public Availability of EAs v. FONSIs.
39. Mitigation Measures Imposed in EAs and FONSIs.
40. Propriety of Issuing EA When Mitigation Reduces Impacts.

The "CEQ's Forty Questions" are a treasure of explanations on different aspects of NEPA's procedural requirements. Most of the questions were written in 1981 and not revised. At that time there was a clear delineation between EIS requirements and EA requirements (i.e., most of the action was EISs). For example the Bureau of Land Management (BLM) NEPA Manual Handbook (H-1790-1) has an evolved concept of analytical elements that are common to a NEPA analysis [a few of them follow], regardless of whether they are for an environmental assessment (EA) or an environmental impact statement (EIS) (BLM. 2008, "Handbook User's Guide" p. ix).

> Following the introductory material in Chapter 1, Chapters 2 through 5 address the procedural determinations of whether a NEPA analysis is necessary and, if so, the degree to which it may be already covered in an existing NEPA document. **Chapter 6 identifies the essential analytical elements that are common to NEPA analysis, regardless of whether you are preparing an Environmental Assessment or an Environmental Impact Statement** (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 (BLM. 2008, "Handbook User's Guide" p. ix).
>
> **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).
>
> **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)** (BLM. 2008, p. 3).
>
> 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).
>
> > 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).

As examples, the following questions and answers from "CEQ's Forty Questions" are the obvious 1981 questions and answers applicable to EAs, but per above the author believes most of the other "CEQ's Forty Questions" are also applicable to EAs. The rationale is the 2008 BLM's evolved concept of analytical elements that are common to a NEPA analysis, regardless of whether they are for an EA or an EIS (BLM. 2008, "Handbook User's Guide" p. ix). Most of these other questions are not yet identified.

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

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

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

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

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

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

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

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

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

A. Section 1502.14(d) requires the alternatives analysis in the EIS to "include the alternative of no action." There are two distinct interpretations of "no action" that must be considered, depending on the nature of the proposal being evaluated. The first situation might involve an action such as updating a land management plan where ongoing

programs initiated under existing legislation and regulations will continue, even as new plans are developed. In these cases "no action" is "no change" from current management direction or level of management intensity. To construct an alternative that is based on no management at all would be a useless academic exercise. Therefore, the "no action" alternative may be thought of in terms of continuing with the present course of action until that action is changed. Consequently, projected impacts of alternative management schemes would be compared in the EIS to those impacts projected for the existing plan. In this case, alternatives would include management plans of both greater and lesser intensity, especially greater and lesser levels of resource development.

The second interpretation of "no action" is illustrated in instances involving federal decisions on proposals for projects. "No action" in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.
Where a choice of "no action" by the agency would result in predictable actions by others, this consequence of the "no action" alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

In light of the above, it is difficult to think of a situation where it would not be appropriate to address a "no action" alternative. Accordingly, the regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act. This analysis provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives. It is also an example of a reasonable alternative outside the jurisdiction of the agency which must be analyzed. *Section*

1502.14(c). See Question 2 above. Inclusion of such an analysis in the EIS is necessary to inform the Congress, the public, and the President as intended by NEPA. *Section 1500.1(a)*.

4a. Agency's Preferred Alternative. What is the "agency's preferred alternative"?
A. The "agency's preferred alternative" is the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The concept of the "agency's preferred alternative" is different from the "environmentally preferable alternative," although in some cases one alternative may be both. See Question 6 below. It is identified so that agencies and the public can understand the lead agency's orientation.

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

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

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

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

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

5a. Proposed Action v. Preferred Alternative. Is the "proposed action" the same thing as the "preferred alternative"?

A. The "proposed action" may be, but is not necessarily, the agency's "preferred alternative." The proposed action may be a proposal in its initial form before undergoing analysis in the EIS process. If the proposed action is [46 FR 18028] internally generated, such as preparing a land management plan, the proposed action might end up as the agency's preferred alternative. On the other hand the proposed action may be granting an application to a non-federal entity for a permit. The agency may or may not have a "preferred alternative" at the Draft EIS stage (see Question 4 above). In that case the agency may decide at the Final EIS stage, on the basis of the Draft EIS and the public and agency comments, that an alternative other than the proposed action is the agency's "preferred alternative."

5b. Is the analysis of the "proposed action" in an EIS to be treated differently from the analysis of alternatives?

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

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

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

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

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

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

[Obviously apply to EAs)

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

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

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

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

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

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

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

A. The FONSI is a document in which the agency briefly explains the reasons why an action will not have a significant effect on the human environment and, therefore, why an EIS will not be prepared. Section 1508.13. The finding itself need not be detailed, but must succinctly state the reasons for deciding that the action will have no significant environmental effects, and, if relevant, must show which factors were weighted most heavily in the determination. In addition to this statement, the FONSI must include, summarize, or attach and incorporate by reference, the environmental assessment.

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

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

38. Public Availability of EAs v. FONSIs. Must (EAs) and FONSIs be made public? If so, how should this be done?

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

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

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

A. Yes. In cases where an environmental assessment is the appropriate environmental document, there still may be mitigation measures or alternatives that would be desirable to consider and adopt even though the impacts of the proposal will not be "significant." **In such cases, the EA should include a discussion of these measures or alternatives to "assist [46 FR 18038] agency planning and decisionmaking" and to "aid an agency's compliance with [NEPA] when no environmental impact statement is necessary." Section 1501.3(b), 1508.9(a)(2)** (emphasis added). The appropriate mitigation measures can be imposed as enforceable permit conditions, or adopted as part of the agency final decision in the same manner mitigation measures are adopted in the formal Record of Decision that is required in EIS cases.

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

[N.B.: Courts have disagreed with CEQ's position in Question 40. The 1987-88 CEQ Annual Report stated that CEQ intended to issue additional guidance on this topic. Ed. note.]

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

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

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any

lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

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

ENDNOTES

The first endnote appeared in the original Federal Register. The other endnotes are for information only.

1. References throughout the document are to the Council on Environmental Quality's Regulations For Implementing The Procedural Provisions of the National Environmental Policy Act. 40 CFR Parts 1500-1508.
2. [46 FR 18027] indicates that the subsequent text may be cited to 48 Fed. Reg. 18027 (1981). Ed Note.
3. Q20 Worst Case Analysis was withdrawn by final rule issued at 51 Fed. Reg. 15618 (Apr. 25. 1986); textual errors corrected 51 F.R. p. 16,846 (May 7, 1986). The preamble to this rule is published at ELR Admin. Mat. 35055.

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. (Attachment 9)

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.

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), 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 (BLM. 2008, p. 2).

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

> [This web link like all web links to the BLM Planning and NEPA Library Web page does not work.]

In summary, a comprehensive review of the USDI DM on NEPA has yet to occur.

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, 2008) (Attachment 10)

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 were necessary to update the information and to reflect current NEPA guidance (2008).

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 – This is an issue for BLM compliance with CEQ's regulations on the purpose of the NEPA process as these numerous NEPA web links do not work (Attachments 4; CRS. 2005. p. CRS 11):

- inform federal agencies of what they must do to comply with the procedures and achieve the goals of NEPA [40 CRF 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 CRF 1500.1(b)];
- foster better decision making by helping public officials make decisions based on an understanding of the environmental consequences of their actions [40 CRF 1500.1(c)]; and
- **facilitate public involvement in the federal decision-making process** (emphasis added) [40 CRF 1500.2(d)].

The following are some sections of interest in the BLM NEPA Handbook for considering "Significant Cumulative Impacts" as one of NEPA's procedural requirements under Section 102 (see Appendix B for a comprehensive treatment).

6.5 PROPOSED ACTION
- *6.5.2 Defining the Scope of Analysis of the Proposed Action*
- 6.5.2.1 Connected Actions
- 6.5.2.2 Cumulative Actions
- 6.5.2.3 Similar Actions

6.8 ENVIRONMENTAL EFFECTS
- *6.8.1 Effects Analysis*
- 6.8.1.1 Defining Environmental Effects
- 6.8.1.2 Analyzing Effects
- *6.8.2 Direct and Indirect Effects*
- *6.8.3 Cumulative Effects*
- 6.8.3.1 Cumulative Effects Issues
- 6.8.3.2 Geographic Scope of the Cumulative Effects Analysis
- 6.8.3.3 Timeframe of the Cumulative Effects Analysis
- 6.8.3.4 Past, Present, and Reasonably Foreseeable Actions
- 6.8.3.5 Analyzing the Cumulative Effects
- *6.8.4 Mitigation and Residual Effects*

7.1 ACTIONS REQUIRING AN EA
7.2 ACTIONS REQUIRING AN EIS
7.3 SIGNIFICANCE

Appendix A6. **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 Sections 102(2)A - I).

NEPA 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) implement the nine provisions of Sections 102(2)A - I). Four of the NEPA 102(2) follow (i.e., (A), (B), (C), and (E)).

> **(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 . . .
>
> **(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;

Court Cases Defining "Significance." A few examples for court precedents for NEPA significance follow. The examples are not intended to reflect any priority of importance over cases not included.

- *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, Inc., 462 U.S. 87, 97, 100 (1983).
- *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996).*
- *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996).
- *Friends of Fiery Gizzard v. Farmers Home Administration*, 61 F.3d 501 (6th Cir. 1995).
- *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).
- *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973).
- *Kleppe v. Sierra Club, 427 U.S. 390, S. Ct. 2718, 49 L. Ed. 2d 576, 590 n. 21 (1976).*
- *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

***Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, Inc.,** 462 U.S. 87, 97, 100 (1983).

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983) is a United States Supreme Court decision which held that a Nuclear Regulatory Commission (NRC) rule that, during the licensing of nuclear power plants, the permanent storage of nuclear waste should be assumed to have no environmental impact was valid.

Almost since NEPA's enactment, the courts have played a prominent role in interpreting and, in effect, enforcing NEPA's requirements.[25] 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 clarified that NEPA has twin aims (CRS. 2005. p. CRS 9).

> First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. 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 ... 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 (CRS. 2005. p. CRS 9).

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."

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."

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."

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.

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.

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.*

Robertson v. Methow Valley Citizens Council**,** 490 U.S. 332 (1989).

This specification of NEPA's "twin aims" and the "hard look" requirement are often cited by both federal agencies and environmental advocates to articulate NEPA's mandate. In 1989, the U.S. Supreme Court 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)

NEPA in the Supreme Court: A history of defeat

- Green, Zachary. 2015. *NEPA in the Supreme Court: A history of defeat*. Submitted to the Graduate Faculty of North Carolina State University in partial fulfillment of the requirements for the Degree of Master of Environmental Assessment. Raleigh, North Carolina

Since its enactment in 1970, the National Environmental Policy Act (NEPA) has been the focus of seventeen Supreme Court cases. Government and industry have defeated environmental organizations in each of those seventeen cases. This begs the question "what does it take to defeat government/industry in the Supreme Court" on issues applicable to the Act. An analysis of the seventeen cases shows that the Supreme Court, relying only on the procedural aspects of NEPA, has favored government and industry due to government and industry's success at following procedures. The focus on the procedural mandate of the Act has diminished the substantive mandate into an afterthought. The crux of NEPA litigation revolves around the preparation of an Environmental Impact Statement (EIS), yet the results of that statement are only meant to inform, not dictate, an agency's decision to pursue an action. This focus essentially leaves agencies unaccountable for upholding the substantive element of NEPA and could undermine the Act's intent, allowing negative environmental consequences and limiting NEPA's full potential. Over time, the focal point of each case involved more and more intricate procedural requirements. This highlights government and industry effectiveness in following the steps of NEPA and suggests environmental organizations must rely more heavily on litigation involving the most technical procedural requirements in an effort to defeat government and industry at the Supreme Court level (Green. 2015. Abstract, p. 1).

Appendix B. National Environmental Procedures Act's (NEPA) Procedural Requirements: "Significant Cumulative Impacts"

From U.S. BLM National Environmental Policy Act Handbook H-1790-1: January 30, 2008

(All appendix consultations expect revisions, and/or updates or supplements)

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

BLM National Environmental Policy Act Handbook H-1790-1

Outline

The reader can observed from the outline of the “BLM NEPA Manual Handbook” that many NEPA requirements apply to both EAs and EISs (Chapters 1 -6).

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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), 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 (BLM. 2008, p. 2).

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

> [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**, and take actions that protect, restore, and enhance the environment" (40 CFR 1500.1(c)). Analysis and disclosure of the effects 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).

> 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).
>
> In summary, without an impact methodology and a demonstrated “hard look”, the EA’s impact sections does not meet the CEQ and BLM NEPA Handbook standards, and therefore, is not in compliance.

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 (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).

1.6 CONSISTENCY WITH OTHER AUTHORITIES (BLM. 2008, p. 8)

We recommend that you document your compliance with other authorities at the same time that you document NEPA compliance. These other authorities do not constitute NEPA requirements for analysis, but some contain specific direction about NEPA compliance. More generally, other authorities may be relevant during several steps of the NEPA process. For example, other laws, regulations, and policies may be useful to consider in formulating the purpose and need for action (see section **6.2, *Purpose and Need***), identifying issues for analysis (see section **6.4, *Issues***), formulating alternatives (see section **6.6, *Alternatives Development***), **IDENTIFYING ANY REGULATORY THRESHOLDS** (emphasis added) (see section **6.8.3.5, *Analyzing the Cumulative Effects***), and developing the rationale for decision selection (see sections **8.5.1, *Documenting the Decision*** and **9.7.1, *ROD Format***). **In addition, other laws and regulations may factor into the determination of whether effects are significant** (emphasis added) (see section **7.3, *Significance***) (BLM. 2008, p. 8).

The list of supplemental authorities contained in **Appendix 1, *Supplemental Authorities to be Considered***, is not exhaustive and will change over time. This list is not a checklist for NEPA compliance, but may be consulted when developing NEPA documents. See section **6.4, *Issues*** for additional guidance (BLM. 2008, p. 8).

CHAPTER 5—USING EXISTING ENVIRONMENTAL ANALYSES (BLM. 2008, pps. 21 - 32)

General
5.1 Determination of NEPA Adequacy
5.2 Incorporation by Reference and Tiering
5.3 Supplementing an EIS
5.4 Adopting Another Agency's NEPA Analyses

GENERAL (BLM. 2008, p. 21)

You may use existing environmental analyses to analyze effects associated with a proposed action, when doing so would build on work that has already been done (emphasis added), avoid redundancy, and provide a coherent and logical record of the analytical and decision-making process.

Address the following questions before using existing environmental analyses (BLM. 2008, p. 21):

- Have any relevant environmental analyses related to the proposed action been prepared (for example, LUP/EIS, programmatic EIS)?

- Who prepared or cooperated in the preparation of the analyses (i.e., the BLM or another agency)?

- **Do any of the existing analyses fully analyze the proposed actions, alternatives, and effects** (emphasis added)?

- **Are there new circumstances or information that have arisen since the original analysis was conducted** (emphasis added)?

The answers to these questions will determine the degree to which you might rely on the existing NEPA analyses. Use of existing analyses may range from considering them as the basis for decision-making (following a Determination of NEPA Adequacy (DNA) or adoption of another agency's NEPA analysis); using components of them (through tiering or incorporation by reference); or supplementing them with new analysis (BLM. 2008, p. 21).

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

Review existing environmental documents and **answer the following questions to determine whether they adequately cover a proposed action currently under consideration** (emphasis added) (BLM. 2008, p. 23):

- Is the new proposed action a feature of, or essentially similar to, an alternative analyzed in the existing NEPA document(s)? Is the project within the same analysis area, or if the project location is different, are the geographic and resource conditions sufficiently similar to those analyzed in the existing NEPA document(s)? If there are differences, can you explain why they are not substantial?

- Is the range of alternatives analyzed in the existing NEPA document(s) appropriate with respect to the new proposed action, given current environmental concerns, interests, and resource values?

- **Is the existing analysis valid in light of any new information or circumstances** (emphasis added) (such as rangeland health standard assessments, recent endangered species listings, **updated lists** (emphasis added) of BLM-sensitive species)? **Can you reasonably conclude that new information and new circumstances would not substantially change the analysis of the new proposed action?** (emphasis added)

- Are the direct, indirect, and cumulative effects that would result from implementation of the new proposed action similar (both quantitatively and qualitatively) to those analyzed in the existing NEPA document?

We recommend that your answers be substantive and detailed and contain specific citations to the existing EA or EIS (emphasis added) (see section **5.1.3, *Document the Review***). If you answer "yes" to all of the above questions, additional analysis will not be necessary. **If you answer "no" to any of the above questions, a new EA or EIS must be prepared (516 DM 11.6)** (emphasis added). However, it may still be appropriate to tier to or incorporate by reference from the existing EA or EIS or supplement the existing EIS (provided that the Federal action has not yet been implemented) (BLM. 2008, p. 23).

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).

Some actions may be appropriate to implement with either a DNA or CX. When the new proposed action is clearly a feature of an action analyzed in an existing NEPA document and the existing analysis remains valid, a DNA would generally be preferable to using a CX, because a DNA would rely on a NEPA analysis to support decision making (BLM. 2008, p. 24).

5.1.3 Document the Review (BLM. 2008, p. 24)

The DNA worksheet is not itself a NEPA document. The DNA worksheet documents the review to determine whether the existing NEPA documents can satisfy the NEPA requirements for the proposed action currently under consideration. The DNA worksheet can be found in **Appendix 8, *Worksheet [for] Determination of NEPA Adequacy (DNA)*** (BLM. 2008, p. 24).

When relying on an existing environmental analysis for a new proposed action, we recommend that you document the review using the DNA worksheet (BLM. 2008, p. 24).

When evaluating new circumstances or information prior to issuance of a decision, as described in section **5.1, *Determination of NEPA Adequacy***, you may document your review using the DNA worksheet or in other documents, such as decision documentation or responses to comments. The Web Guide contains examples of completed DNA worksheets (BLM. 2008, p. 24).

5.2 INCORPORATION BY REFERENCE AND TIERING (BLM. 2008, pps. 25 - 28)

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).

6.2.1 The Role of the Purpose and Need Statement (BLM. 2008, p. 36)

The purpose and need statement dictates the range of alternatives, because action alternatives are not "reasonable" if they do not respond to the purpose and need for the action (emphasis added) (see section **6.6.1, *Reasonable Alternatives***). The broader the purpose and need statement, the broader the range of alternatives that must be analyzed. The purpose and need statement will provide a framework for issue identification and will form the basis for the eventual rationale for selection of an alternative. **Generally** (emphasis added), the action alternatives will respond to the problem or opportunity described in the purpose and need statement, providing a basis for eventual selection of an alternative in a decision.

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).

6.5 PROPOSED ACTION (BLM. 2008, pps. 42 - 49)

The CEQ regulations state that a "proposal" exists at that stage in the development of an action when an agency subject to the NEPA has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated (40 CFR 1508.23). A "proposed action" may be described as a proposal for the BLM to authorize, recommend, or implement an action **to address a clear purpose and need** (emphasis added), and may be generated internally or externally (BLM. 2008, p. 42).

The Web Guide contains example descriptions of Proposed Actions (emphasis added) (BLM. 2008, p. 42).

6.5.1 Description of the Proposed Action (BLM. 2008, p. 43)

A detailed description of the proposed action at the outset of the analysis process is beneficial for many reasons. Clearly described proposed actions can result in (BLM. 2008, p. 43):

- more focused and meaningful public input.
- more focused and meaningful internal (BLM) participation.
- more complete identification of issues.
- development of reasonable alternatives.
- sound analysis and interpretation of effects.
- focused analysis.

- a sound and supportable decision.

6.5.1.1 Design Features of the Proposed Action (BLM. 2008, p. 44)

Design features are those specific means, measures or practices that make up the proposed action and alternatives. You may identify design features, especially those that would reduce or eliminate adverse effects after the initial formulation of alternatives, as the impact analysis is being conducted. In this situation, you may add these design features to the proposed action or alternatives. Standard operating procedures, stipulations, and best management practices are usually considered design features (BLM. 2008, p. 44).

Because the formulation of alternatives and the impact analysis is often an iterative process, you might not be able to identify the means, measures or practices until the impact analysis is completed. **If any means, measures, or practices are not incorporated into the proposed action or alternatives, they are considered mitigation measures** (emphasis added) (see section **6.8.4, *Mitigation and Residual Effects***) (BLM. 2008, p. 44).

6.5.2 Defining the Scope of Analysis of the Proposed Action (BLM. 2008, pps. 44 - 49)

After initial development of the proposed action, evaluate whether there are **connected or cumulative actions** (emphasis added) that you must consider in the same NEPA document (40 CFR 1508.25). In addition, evaluate whether there are **similar actions** (emphasis added) that you wish to discuss in a single NEPA document. The CEQ regulations refer only to an EIS in discussion of including connected, cumulative, and similar actions in a single EIS. **For an EA, we recommend that you consider connected or cumulative actions in the same EA, and similar actions may be discussed at your discretion** (emphasis added). **Considering connected or cumulative actions in a single EA is particularly important in the evaluation of significance** (emphasis added) (see section **7.3, *Significance***) (BLM. 2008, p. 44).

6.5.2.1 Connected Actions (BLM. 2008, pps. 45 - 48)

Connected actions are those actions that are "closely related" and "should be discussed" in the same NEPA document (emphasis added) (40 CFR 1508.25 (a)(1)). Actions are connected if they automatically trigger other actions that may require an EIS; cannot or will not proceed unless other actions are taken previously or simultaneously; or if the actions are interdependent parts of a larger action and depend upon the larger action for their justification (40 CFR 1508.25 (a)(i, ii, iii)). Connected actions are limited to actions that are currently proposed (ripe for decision). Actions that are not yet proposed are not connected actions, but **may need to be analyzed in cumulative effects analysis if they are reasonably foreseeable** (emphasis added) (BLM. 2008, p. 45).

If the connected action is also a proposed BLM action, we recommend that you include both actions as aspects of a broader "proposal" (40 CFR 1508.23), analyzed in a single NEPA document. You may either construct an integrated purpose and need statement for both the proposed action and the connected action, or you may present separate purpose and need statements for the proposed action and the connected action. Regardless of the structure of the purpose and need statement(s), you must develop alternatives and mitigation measures for both actions (40 CFR 1508.25(b)), and analyze the direct, indirect, and cumulative effects of both actions (40 CFR 1508.25(c)) (BLM. 2008, p. 45).

A **non-Federal action** (emphasis added) may be a connected action with a BLM proposed action. The consideration of a non-Federal connected action is limited in your NEPA analysis, because the NEPA process is focused on agency decision making (40 CFR 1500.1(c), 40 CFR 1508.18, 40 CFR 1508.23). Therefore, you are not required to include a non-Federal connected action together with a BLM proposed action as aspects of a broader proposal, analyzed in a single NEPA document. Proposals are limited to Federal actions (40 CFR 1508.23). You would not have to develop or present the purpose and need for the non-Federal action, and you are not required to consider alternatives available to the non-Federal party for its action. If there are effects on BLM managed resources, it may be useful to develop and suggest alternatives or mitigation for those non-Federal connected actions (see **section 6.8.4, *Mitigation and Residual Effects***) (BLM. 2008, p. 46).

As with a Federal connected action, you must, at a minimum, demonstrate that you have considered the **non-Federal connected action** (emphasis added) in the NEPA document for the proposed action (40 CFR 1508.25) (i.e., describe the connected action and its relationship to the proposed action, including the extent to which the connected action and its effects can be prevented or modified by BLM decision-making on the proposed action) (BLM. 2008, p. 46).

If the **connected non-Federal action** (emphasis added) and its effects can be prevented by BLM decision-making, then the effects of the non-Federal action are properly considered indirect effects of the BLM action and must be analyzed as effects of the BLM action (40 CFR 1508.7, 40 CFR 1508.25(c)) (BLM. 2008, p. 46).

If the **connected non-Federal action** cannot be prevented by BLM decision-making, but its effects can be modified by BLM-decision-making, then the changes in the effects of the connected non-Federal action must be analyzed as indirect effects of the BLM proposed action. **Effects of the non-Federal action that cannot be modified by BLM-decision-making may still need to be analyzed in the cumulative effects analysis for BLM action, if they have a cumulative effect together with the effects of the BLM action** (emphasis added) (see section **6.8.3 *Cumulative Effects***) (BLM. 2008, p. 47).

If the non-Federal action cannot be prevented by BLM decision-making and its effects cannot be modified by BLM decision-making, the effects of the non-Federal action may still need to be analyzed in the cumulative effects analysis for BLM action, if they have a cumulative effect together with the effects of the BLM action (see section **6.8.3 *Cumulative Effects***). While analysis of the effects of these non-Federal actions provides context for the analysis of the BLM action, their consideration in the determination of the significance of the BLM action is limited (see section **7.3, *Significance***) (BLM. 2008, p. 47).

6.6 ALTERNATIVES DEVELOPMENT (BLM. 2008, pps. 49 - 52)

6.6.1 Reasonable Alternatives (BLM. 2008, pps. 49 - 50)

The NEPA directs the BLM to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;…" (NEPA Sec102(2)(E)). **[42 U.S.C § 4332(2)(E)]**

The range of alternatives explores alternative means of meeting the purpose and need for the action. As stated in section **6.2.1, *The Role of the Purpose and Need Statement***, the purpose and need statement helps define the range of alternatives. The broader the purpose and need statement, **the broader the range of alternatives that must be analyzed. You must analyze those alternatives necessary to permit a reasoned choice (40 CFR 1502.14)** (emphasis added; 40 CFR 1502.14 for EISs). For some proposals there may exist a very large or even an infinite number of possible reasonable alternatives. When there are potentially a very large number of alternatives, you must analyze only a reasonable number to cover the full spectrum of alternatives (see Question 1b, CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*). When working with cooperating agencies, your range of alternatives may need to reflect the decision space and authority of other agencies, if decisions are being made by more than one agency.

In determining the alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative. **"Reasonable alternatives include those that are *practical or feasible* from the technical and economic standpoint and using common sense, rather than simply *desirable* from the standpoint of the applicant."** (emphasis added) (Question 2a, CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*). You can only define whether an alternative is "reasonable" in reference to the purpose and need for the action. See **Chapter 8, *Preparing an Environmental Assessment*** and **Chapter 9, *Preparing an Environmental Impact Statement*** for discussion of reasonable alternatives for an EA and EIS. For externally generated action, the range of alternatives will typically include at least denying the request (No Action); approving the request as the proponent proposed; or approving the request with changes BLM makes to the proponent's proposal.

For example,

An EIS for an oil field development project has a purpose and need which (in abbreviated form) is to determine whether to permit oil exploration and development within the project area consistent with existing leases and to develop practices for oil development consistent with the land use plan. The EIS would typically analyze at least the following alternatives:

- *No Action, which would entail no new drilling beyond what is currently permitted;*
- *The proponent's proposal for field development; and*
- *The proponent's proposal with additional or different design features recommended by the BLM to reduce environmental effects. This alternative would include design features that differ from the proponent's proposal, such as alternative well locations, alternative access routes, additional timing or spacing constraints, offsite mitigation, different methods for treating produced water, horizontal well drilling, or other technologies.*

In some situations it may be appropriate for you to analyze a proposed action or alternative that may be outside the BLM's jurisdiction (emphasis added) (Question 2b, CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*). Such circumstances would be exceptional and probably limited to the broadest, most programmatic EISs that would involve multiple agencies. For most actions, we recommend that the purpose and need statement be constructed to reflect the discretion available to the BLM, consistent with existing decisions and statutory and regulatory requirements; thus, alternatives not within BLM jurisdiction would not be "reasonable."

Note: **Though not required, a manager may elect to analyze in detail an alternative that might otherwise be eliminated to assist in planning or decision-making** (emphasis added). In such cases, explain in the NEPA document why you are electing to analyze the alternative in detail.

6.6.1.1 Developing Alternatives Under The Healthy Forests Restoration Act (BLM. 2008, p. 51)

The Healthy Forests Restoration Act of 2003 (HFRA) (P.L. 108-148) contains provisions for expedited environmental analysis of projects implemented under its authority. For authorized projects (see HFRA Section 102 to determine which projects are authorized), HFRA allows fewer alternatives to be analyzed compared with that which CEQ regulations prescribe.

For areas within the wildland–urban interface and within 1.5 miles of the boundary of an at-risk community (emphasis added) (as defined in Section 101 of HFRA), you are not required to analyze any alternative to the proposed action, with one exception: if the at-risk community has adopted a Community Wildfire Protection Plan and the proposed action does not implement the recommendations in the plan regarding the general location and basic method of treatments, you are required to analyze the recommendations in the plan as an alternative to the proposed action. For areas within the wildland–urban interface, but farther than 1.5 miles from the boundary of an at-risk community, you are not required to analyze more than the proposed action and one additional action alternative.

For the two previous scenarios, you are not required to present a separate section called the "No Action alternative." However, you must document the current and future state of the environment in the absence of the proposed action. This constitutes consideration of a No Action Alternative. Document this in your purpose and need section (HFRA 104(d)).

For authorized HFRA projects in all other areas, the analysis must describe the proposed action, a No Action alternative, and an additional action alternative, if one is proposed during the scoping or collaboration process.

Additional information on HFRA can be obtained from the Healthy Forests Initiative and Healthy Forests Restoration Act Interim Field Guide, February 2004.

6.6.2 No Action Alternative (BLM. 2008, pps. 51 - 52)

The CEQ regulations direct that EISs describe the No Action alternative (40 CFR 1502.14(d)). HFRA, however, removes this regulatory requirement for actions taken under its authority (see section **6.6.1.1, *Developing Alternatives Under the HFRA***). **The No Action alternative is the only alternative that must be analyzed in an EIS that does not respond to the purpose and need for the action** (emphasis added).

The No Action alternative provides a useful baseline for comparison of environmental effects (including cumulative effects) and demonstrates the consequences of not meeting the need for the action (see sections **8.3.4.2**, ***Alternatives in an EA,*** and **9.2.7.1**, ***Reasonable Alternatives for an EIS*** for discussion of the No Action alternative for EAs and EISs).

The description of the No Action alternative depends on the type of action proposed:

– **For land use planning actions:** The No Action alternative is to continue to implement the management direction in the land use plan (i.e., the land use plan as written). Any other management approach should be treated as an action alternative. If, for example, plan evaluation identifies that implementation has not been in accordance with the management direction in the land use plan, you may consider continued non-conforming implementation as an action alternative, if it is a reasonable alternative (see section **6.1.1, *Reasonable Alternatives***).

– **For internally generated implementation actions:** the No Action alternative is not to take the action.
– **For externally generated proposals or applications**: the No Action alternative is generally to reject the proposal or deny the application. (The sole exception to this is for renewal of a grazing permit, for which the No Action alternative is to issue a new permit with the same terms and conditions as the expiring permit). The analysis of the No Action alternative must only analyze what is reasonably foreseeable if the application is denied (see Question 3, CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*).

The No Action alternative may constitute a benchmark at one end of the spectrum of alternatives. Therefore, defining the No Action alternative might require reference to the action alternatives that will be analyzed. A No Action alternative that is outside of BLM jurisdiction or contrary to law or regulation might be useful to consider as a baseline for comparison. *For example, when revising an LUP that has been implemented and subsequently found legally inadequate, analysis of continued management under that existing LUP might provide useful comparison in the analysis of the action alternatives in the revised LUP.* The Web Guide provides some examples of No Action alternatives.

6.6.3 Alternatives Considered but Eliminated From Detailed Analysis

If you consider alternatives during the EIS process but opt not to analyze them in detail, you must identify those alternatives and briefly explain why you eliminated them from detailed analysis (40 CFR 1502.14). Explain why you eliminated an alternative proposed by the public or another agency from detailed analysis. We recommend you do the same in an EA. See the Web Guide for examples of "alternatives considered but eliminated from detailed analysis."

You may eliminate an action alternative from detailed analysis if:

• it is ineffective (it would not respond to the purpose and need).
• it is technically or economically infeasible (consider whether implementation of the alternative is likely given past and current practice and technology; this does not require cost-benefit analysis or speculation about an applicant's costs and profits).
• it is inconsistent with the basic policy objectives for the management of the area (such as, not in conformance with the LUP).
• its implementation is remote or speculative.
• it is substantially similar in design to an alternative that is analyzed.
• it would have substantially similar effects to an alternative that is analyzed.

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.

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 <u>reasonably foreseeable actions</u>** (emphasis added) . This interaction may be:

- <u>additive</u>: the effects of the actions add together to make up the cumulative effect.
- <u>countervailing</u>: the effects of some actions balance or mitigate the effects of other actions.
- <u>synergistic</u>: 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 <u>thresholds</u>. Describe how the incremental effect of the proposed action and each alternative relates to any <u>relevant thresholds</u>** (emphasis added).

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

Mitigation includes specific means, measures or practices that would reduce or eliminate effects of the proposed action or alternatives. Mitigation measures can be applied to reduce or eliminate adverse effects to biological, physical, or socioeconomic resources. Mitigation may be used to reduce or avoid adverse impacts, whether or not they are significant in nature. Measures or practices should only be termed mitigation measures if they have not been incorporated into the proposed action or alternatives. If mitigation measures are incorporated into the proposed action or alternatives, they are called design features, not mitigation measures (see section **6.5.1.1, *Design Features of the Proposed Action***). You must describe the mitigation measures that you are adopting in your decision documentation. Monitoring is required to ensure the implementation of these measures (40 CFR 1505.2(c)) (see section **10.1, *Purposes of and Requirements for Monitoring***).

Mitigation measures are those measures that could reduce or avoid adverse impacts and have not been incorporated into the proposed action or an alternative.

Mitigation can include (40 CFR 1508.20):
• Avoiding the impact altogether by not taking a certain action or parts of an action.
• Minimizing impact by limiting the degree of magnitude of the action and its implementation
• Rectifying the impact by repairing, rehabilitation, or restoring the affected environment.
• Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
• Compensating for the impact by replacing or providing substitute resources or environments."

In an EIS, all "relevant, reasonable mitigation measures that could improve the project are to be identified," even if they are outside the jurisdiction of the agency (see Question 19b, CEQ*, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*). When presenting mitigation measures not within the BLM's jurisdiction, it is particularly beneficial to work with other agencies (see **Chapter 12, Cooperating Agencies, Joint Lead Agencies, and Advisory Committees**).

Socioeconomic impacts are usually indirect and largely fall on communities and local government institutions, by definition located outside BLM-managed lands. While some mitigation strategies are within the BLM's control, (such as regulating the pace of mineral exploration and development to minimize rapid, disruptive social change), most mitigation strategies require action by other government entities—typically cities, counties, and State agencies. In supporting local and State efforts to mitigate socioeconomic impacts, you "may provide information and other assistance, sanction local activities, encourage community and project proponent agreements, and cooperate with responsible officials to the fullest extent feasible" (BLM Handbook of Socio-Economic Mitigation, IV-2).

You may need to identify mitigation measures that would reduce or eliminate the effects of a non-Federal action when it is a connected action to the BLM proposed action (emphasis added) (see section **6.8.2.1.1, *Connected Non-Federal Actions***). **For such non-Federal actions** (emphasis added), the relevant, reasonable mitigation measures are likely to include mitigation measures that would be carried out by other Federal, State or local regulatory agencies or tribes. Identifying mitigation outside of BLM jurisdiction serves to alert the other agencies that can implement the mitigation. In describing mitigation under the authority of another government agency, you must discuss the probability of the other agency implementing the mitigation measures (see Question 19b, CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*).

For an action analyzed in an EA, mitigation can be used to reduce the effects of an action below the threshold of significance, avoiding the need to prepare an EIS (see section **7.1, *Actions Requiring an EA***).

During impact analysis, analyze the impacts of the proposed action (including design features) and with all mitigation measures (if any) applied, as well as any further impacts caused by the mitigation measures themselves. Address the anticipated effectiveness of these mitigation measures in reducing or avoiding adverse impacts in your analysis. Describe the residual effects of any adverse impacts that remain after mitigation measures have been applied.

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.

> *"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**:
> > **(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** (emphasis added).
> > **(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 EA and FONSI or draft EIS (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:

- 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 8, Preparing an Environmental Assessment (BLM. 2008, pps. 75 - 86)

8.1 Preparing to Write an Environmental Assessment (EA)
8.2 Public Involvement
8.3 EA Format
8.4 Determination of Significance
8.5 The Decision Record
8.6 Implementation

GENERAL (BLM. 2008, p. 75)

An **environmental assessment** is a tool for determining the "significance" of environmental impacts; it provides a basis for rational decision making.

The steps for performing an EA-level analysis follow the NEPA analysis steps laid out in **Chapter 6, *NEPA Analysis***. This chapter builds on the foundation laid in Chapter 6 and provides specific direction and guidance for preparing an EA. **Chapter 8, *Preparing an Environmental Assessment*** also addresses the transition steps necessary to shift to preparation of an EIS when an EA process identifies significant effects or the likelihood of significant effects (see section **8.4.1, *Significant Impacts – Transitioning from an EA to an EIS***).

8.1 PREPARING TO WRITE AN ENVIRONMENTAL ASSESSMENT (EA) (BLM. 2008, pps. 75 - 76)

An EA is intended to be a concise public document that provides sufficient evidence and analysis for determining the significance of effects from a proposed action (40 CFR 1508.9) and that serves as a basis for reasoned choice. Based upon the EA analysis, either an EIS or a FONSI will be prepared (emphasis added).

The CEQ has advised agencies to keep EAs to no more than approximately 10-15 pages (Question 36a, CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*). Concise and well-written documents foster effective communications with the public and informed decision-making. This handbook was developed to assist in streamlining NEPA documents while retaining their informative character, and provides suggestions and tools for preparing concise EAs.

You may reduce the length of the EA by **thoughtful crafting of the purpose and need for action; developing a proposed action that specifically addresses the purpose and need; and maintaining focus on the relevant issues** (emphasis added). Consistent focus on the issues associated with the proposed action will help you identify reasonable alternatives and potential effects. Other streamlining techniques include the use of tiering and incorporation by reference (see section ***5.2, Incorporation by Reference and Tiering***).

A longer EA may be appropriate when a proposal is so complex that a concise document cannot meet the goals of 40 CFR 1508.9 or when it is extremely difficult to determine whether the proposal could have significant environmental effects. **Carefully consider complex proposals and the criteria for when an EIS may be appropriate** (emphasis added) (see **Chapter 7, *Determining Whether an EA or an EIS is Appropriate***), rather than proceeding with a lengthy EA just to avoid the EIS process.

8.2 PUBLIC INVOLVEMENT (BLM. 2008, p. 76)

You must have some form of public involvement in the preparation of all EAs. The CEQ regulations do not require agencies to make EAs available for public comment and review. In certain limited circumstances, agencies are required to make FONSIs available for public review (40 CFR 1501.4(e)(2) (see section **8.4.2, *The Finding of No Significant Impact (FONSI)***). The CEQ regulations direct agencies to encourage and facilitate public involvement in the NEPA process to the fullest extent possible (40 CFR 1500.2(d), 40 CFR 1506.6). This means that while some public involvement is required in the preparation of an EA, you have the discretion to determine how much, and what kind of involvement works best for each individual EA. For preparation of an EA, public involvement may

include any of the following: external scoping, public notification before or during preparation of an EA, public meetings, or public review and comment of the completed EA and unsigned FONSI. The type of public involvement is at the discretion of the decision-maker. When you need to prepare many EAs for similar projects in a short timeframe, it may be helpful to prepare a programmatic EA to cover those projects and to facilitate focused public involvement.

Before and during the preparation of the EA, be very thoughtful about the level of public involvement that may be necessary with respect both to the decision to be made and the analysis of the environmental consequences of that decision. As discussed in section **6.9, *Public Involvement and Responding to Comments***, consider providing for public involvement very early in the process. It is helpful to prepare a public involvement strategy that allows you to adjust the amount and nature of public participation throughout the analysis process. In the strategy, identify the objectives for public involvement to assist in determining the need for, level and nature of that involvement.

Internal scoping, while not considered public involvement, is used to set the stage for external scoping if the decision-maker determines that it is necessary. Internal and external scoping are introduced in section **6.3, *Scoping*** and discussed in more detail in section **8.3.3, *Scoping and Issues***. Internal scoping is integral to the preparation of all environmental assessments.

In addition to public involvement in the preparation of EAs, you must notify the public of the availability of a completed EA and FONSI (40 CFR 1506.6(b)). In addition, some FONSIs must be made available for a 30-day public review, as described in section **8.4.2, *The Finding of No Significant Impact (FONSI)***. In situations that do not require public review of the FONSI, the unsigned FONSI and completed EA may be released for public review at the decision-maker's discretion. Section **8.4.2, *The Finding of No Significant Impact (FONSI)*** discusses the preparation of FONSIs and provides information regarding their release for public review.

8.3 EA FORMAT (BLM. 2008, p. 77)

The CEQ regulations state that an EA must contain brief discussions of the need for the proposal, the alternatives considered, the environmental effects of the proposed action and alternatives, and a listing of agencies and persons consulted (40 CFR 1508.9 (b)). Also, the BLM requires certain information in the EA, and there may be particular program-specific requirements for an EA. Refer to the Web Guide for a current description of program-specific requirements related to EAs. Content and format requirements for EA-level LUP amendments can be found in the BLM's Land Use Planning Handbook H-1601-1.
We recommend that you organize an EA so that the flow of information is logical and easy to follow. The following recommended EA format is intended to present the analytical information in a manner that both informs decision-making and enhances general reader understanding of the proposal, the analysis process, and the results. This recommended format is provided in outline form in **Appendix 9, *Recommended EA Format.***

8.3.1 Introduction (BLM. 2008, p. 77)

Provide the following identifying information at the beginning of an EA, or in the introduction:

- **Title, EA number, and type of project.** Consult the appropriate State, District, or Field Office guidance regarding the assignment of EA numbers.
- **Location of proposal.** Identify the general location of the proposed action (details of the location are in the proposed action). Use maps where appropriate to assist in identifying the specific location of the proposed action.
- **Name and location of preparing office.**
- **Identify the subject function code, lease, serial, or case file number** (where applicable). Identify, for example, the right-of way case file number, the application for a permit to drill identifier, etc.
- **Applicant name** (where applicable). The applicant's address may also be included. (Note: Applicant name and address may be protected under the *Privacy Act*: refer to program-specific guidance and the exemptions under the *Freedom of Information Act*, which is referenced in the Web Guide).

The EA introduction also typically includes background information that provides context for the purpose and need statement.

8.3.2 Purpose and Need for Action and Decision to be Made (BLM. 2008, p. 77)

As discussed in section **6.2.1, *The Role of the Purpose and Need Statement,*** the purpose and need statement frames the range of alternatives. We recommend that you develop the purpose and need statement very early in the NEPA process and include it in scoping.

We recommend including a section in the EA that describes the "Decision to be Made." Describing the decision to be made clearly spells out the BLM's decision space and the focus of the NEPA analysis; in addition, it may serve as a vehicle for describing the nature of other decisions that will be made by other entities in order to implement the proposed action and any alternatives. Refer to the discussion and examples in section **6.2.1, *The Decision to be Made***.

8.3.3 Scoping and Issues (BLM. 2008, p. 78)

The topics of internal and external scoping are introduced in section **6.3, *Scoping***. Internal scoping, as discussed, is used to formulate the purpose and need; identify connected, similar and cumulative actions associated with the proposal; begin preparations for the cumulative effects analysis; determine the appropriate level of documentation; and prepare a public participation strategy. While external scoping for EAs is optional (40 CFR 1501.7), the benefits of external scoping for an EA are essentially the same as for an EIS, as discussed in section **6.3.2, *External Scoping***.

When evaluating the need for scoping, consider factors such as: the size or scale of the proposed action; whether the proposal is routine or unique; who might be interested or affected; and whether or not external scoping has been conducted for similar projects and what the results have been. It is up to the decision-maker to determine the need for and level of scoping to be conducted. We recommend that you document in the EA your rationale for determining whether or not to conduct external scoping. If you conduct external scoping, document the scoping process, the comments received, and the issues identified and how they were addressed in the EA. If you receive numerous comments, a summary of the comments may suffice for the EA; however, be sure to retain the comments and to document their disposition in the administrative record. See sections **8.3.7, *Tribes, Individuals, Organizations, or Agencies Consulted***, and **8.5.1, *Documenting the Decision*,** for additional discussions regarding public involvement and managing comments.

Regardless of the level of scoping conducted, we recommend that you identify and document issues associated with the proposed action (see sections **6.3, *Scoping*** and **6.4, *Issues***). As discussed in section **6.4.1, *Identifying Issues for Analysis***, you do not need to analyze all issues identified in the scoping process. Analyze an issue if its analysis will help in making a reasoned choice among alternatives, or if it is, or may be, related to a potentially significant effect. In addition, the decision-maker may elect to analyze other issues to assist in planning or decision-making. In such cases explain in the EA why you are electing to identify the issue for analysis.

8.3.4 Proposed Action and Alternatives (BLM. 2008, p. 78)

You must describe the proposed action and alternatives considered, if any (40 CFR 1508.9(b)) (see sections **6.5, *Proposed Action*** and **6.6, *Alternative Development***). Illustrations and maps can be used to help describe the proposed action and alternatives. The sub-sections below provide detailed guidance for how to describe the proposed action and how to develop and describe appropriate alternatives.

8.3.4.1 Description of the Proposed Action (BLM. 2008, p. 78)

Provide a description of the proposed action (see section **6.5, *Proposed Action*** for guidance). Generally describe the relationship between the purpose and need and the proposed action. To identify potential connected and cumulative actions that may need to be included with the proposed action, refer to sections ***6.5.2.1, Connected Actions and 6.5.2.2, Cumulative Actions***. Be sure to include design features specific to the proposed action (see section **6.5.1.1, *Design Features of the Proposed Action***).

8.3.4.2 Alternatives in an EA (BLM. 2008, pps. 79 - 80)

EAs shall "…include brief discussions…of alternatives as required by FLPMA section 102(2)(E),…" (40 CFR 1508.9(b)). Section 102(2)(E) of the NEPA provides that agencies of the Federal Government shall "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." (emphasis added)

Although the regulation at 40 CFR 1508.9(b) makes no specific mention of the No Action alternative with respect to EAs, the CEQ has interpreted the regulations generally to require some consideration of a No Action alternative in an EA. The CEQ has issued guidance stating: "you may contrast the impacts of the proposed action and alternatives with the current condition and expected future condition in the absence of the project. This constitutes consideration of a no-action alternative as well as demonstrating the need for the project." (CEQ Memorandum to Federal NEPA Contacts: Emergency Actions and NEPA (September 8, 2005), CEQ Memorandum to Secretary of Agriculture and Secretary of Interior: Guidance for Environmental Assessments of Forest Health Projects (December 9, 2002)). Therefore, at a minimum, your EA must include documentation of the current and future state of the environment in the absence of the proposed action. This discussion does not need to be a separate section called "No Action Alternative," but can be part of the environmental effects section of the EA to show the change in effects brought about by the proposed action or alternatives. Examples of how to do this can be found on the web guide.

You may analyze the No Action alternative with the same level of treatment as the proposed action and any action alternatives, if this will assist in your decision-making. In such cases, it may be clearer to provide this analysis in a separate analysis of the No Action alternative in an environmental effects section. Including such a separate analysis may provide a useful context for comparing environmental effects of the various alternatives, and demonstrates the consequences of not meeting the need for the action.

You must consider alternatives if there are unresolved conflicts concerning alternative uses of available resources (40 CFR 1508.9(b)) (emphasis added). There are no unresolved conflicts concerning alternative uses of available resources if consensus has been established about the proposed action based on input from interested parties, or there are no reasonable alternatives to the proposed action that would be substantially different in design or effects. **(However, the analysis of effects may result in new issues that require development and consideration of another alternative)** (emphasis added).

Consensus about the proposed action may be established by conducting scoping for the proposed action, but it may also be possible to establish consensus through other means of public involvement. For example, scoping and/or public comments on a programmatic NEPA document may provide a basis for concluding that there is consensus about a subsequent specific action that is tiered to the programmatic document. Document the basis for concluding that there is consensus about a proposed action and identify the interested parties that participated in the consensus-building process.

Many conflicts concerning alternative uses of available resources are resolved in existing land use plan (LUP) and other programmatic decisions. Such programmatic decisions often establish "basic policy objectives for management of the area," which may ultimately limit the "reasonable" alternatives to a proposed action to implement an LUP or programmatic decision (see section **6.6.1, *Reasonable Alternatives***). **The purpose and need statement for implementation actions may be constructed in the context of the existing LUP or programmatic decisions; thus, alternatives that are not in conformance typically will not be "reasonable."** (emphasis added). **However,**

some proposed actions and alternatives will intentionally not be in conformance with the LUP because the intent is to amend or revise LUP direction; hence the alternatives are reasonable to analyze (emphasis added).

If alternatives relevant to the proposed action have been described and analyzed in a previous environmental document, it may be sufficient to incorporate by reference the description and analysis from the previous document (see section **5.2, *Incorporation by Reference and Tiering***). In addition, you may use tiering to reduce the range of alternatives (see section **5.2, *Incorporation by Reference and Tiering***, for further discussion of tiering).

In addition, for EAs, you need only analyze alternatives that would have a lesser effect than the proposed action (emphasis added; [??]). However, be cautious in dismissing an alternative from analysis in an EA because it would have a "greater effect." For many management actions, characterizing the overall effects of alternatives as "lesser" or "greater" will be difficult, because alternatives will often have lesser effects on some resources and greater effects on other resources when compared to the proposed action.

For projects proposed under the Healthy Forests Restoration Act of 2003 (HFRA) (P.L. 108-148), refer to specific guidance regarding analysis of alternatives in section **6.6.1, *Reasonable Alternatives,*** as it provides guidance different from that included in this section.

While analysis of alternatives is not always required in EAs, a decision-maker may choose to analyze alternatives in detail to assist in identifying trade-offs or in decision-making and planning. In such cases, explain in the EA why you are electing to analyze the alternative in detail.

8.3.4.2.1 Alternatives Considered but Eliminated from Detailed Analysis (BLM. 2008, p. 80)

We recommend that the EA contain a description of alternatives to the proposed action that were considered but not analyzed in detail. Include alternatives that were recommended by members of the public or agencies but dismissed from detailed analysis after preliminary investigation. Document the reasons for dismissing an alternative in the EA (see section **6.6.3, *Alternatives Considered but Eliminated from Detailed Analysis*** for additional discussion).

8.3.4.3 Conformance (BLM. 2008, p. 81)

8.3.5 Affected Environment (BLM. 2008, p. 81)

8.3.6 Environmental Effects (BLM. 2008, p. 81)

The EA must describe and provide the analysis of environmental effects of the proposed action and each alternative analyzed in detail (40 CFR 1508.9(b)). An issue identified through internal or external scoping must be analyzed if analysis is necessary to:

- make a reasoned choice among alternatives (if any), or
- determine the significance of effects (see section **6.8, *Environmental Effects***).

The effects analysis must address direct, indirect and cumulative effects related to each issue (see section **6.8, *Environmental Effects***). Tiering to a broader NEPA analysis may limit the need for analysis, especially cumulative effects analysis (see section **6.8.3, *Cumulative Effects***).

Discussion of impacts may either be organized by alternative with impact topics as subheadings or by impact topic with alternatives as subheadings. Generally, if impacts to a particular resource for one alternative are the same as another alternative, make reference to that section in the EA rather than repeating the information.

The EA must also identify and analyze mitigation measures, if any, which may be taken to avoid or reduce potentially significant effects (see Question 39, CEQ*, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*). You must describe and analyze the anticipated effectiveness of mitigation measures and any direct, indirect, and cumulative effects that remain after the application of all mitigation measures—that is,

residual effects. Although described and analyzed in the body of the EA, the mitigation measures that will be implemented are explicitly adopted in the decision record. Refer to section **6.8.4, *Mitigation and Residual Effects*** for additional information regarding mitigation measures.

8.3.7 Tribes, Individuals, Organizations, or Agencies Consulted (BLM. 2008, p. 82)

8.3.8 List of Preparers (BLM. 2008, p. 82)

DETERMINATION OF SIGNIFICANCE (BLM. 2008, pps. 82 - 84)

Based upon the analysis, provide a determination as to whether or not the selected alternative will have significant environmental effects (see section **7.3, *Significance***). This determination yields different results, as outlined below.

8.4.1 Significant Impacts -Transitioning from an EA to an EIS (BLM. 2008, p. 82)

If you determine that the effects of the alternative you wish to select are significant, you cannot approve the action unless it is either analyzed in an EIS or modified to avoid significant effects.
In the event that you determine an EIS is necessary, draw the EA preparations to a close (retain all documents). You must publish in the *Federal Register* a Notice of Intent (NOI) to prepare an EIS (refer to section **13.1, *Publishing Notices in the Federal Register***). You may integrate the information assembled and analysis completed for the EA into the EIS and use it for scoping for the EIS. Information related to how and when scoping was conducted for the EA, the results, and any comments received can still be very helpful. However, the scoping for the EA does not take the place of the scoping required after publication of the NOI for the EIS unless a public notice for scoping for the EA said that preparation of an EIS was a possibility and that comments would still be considered (see Question 13, CEQ*, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*).

When transitioning to an EIS, organize materials used for the EA so that pertinent portions may be integrated into the EIS. As discussed above, information about the scoping process and issues, contact lists used for scoping, and comments received may be especially helpful. Discussions from the EA of the purpose and need, proposed action and alternatives may streamline the initiation of the EIS process. Descriptions of the affected environment and the analyses of effects, including assumptions and methodologies, may also be directly incorporated into the EIS.

8.4.2 The Finding of No Significant Impact (FONSI) (BLM. 2008, pps. 83 - 84)

The FONSI is a document that explains the reasons why an action will not have a significant effect on the human environment and, why, therefore, an EIS will not be required (40 CFR 1508.13). The FONSI must succinctly state the reasons for deciding that the action will have no significant environmental effects (40 CFR 1508.13, Question 37a, CEQ*, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*). The FONSI need only provide a basis for the conclusion that the selected alternative(s) will have no significant effect. Alternatives that are not selected but may have significant effects do not trigger the preparation of an EIS nor do they have to be described in the FONSI. We recommend that the FONSI address the relevant context and intensity factors described in section **7.3, *Significance***.

There are two situations when a FONSI is prepared:

- EA analysis shows that the action would have no significant effects.
- EA analysis shows that the action would have no significant effects beyond those already analyzed in an EIS to which the EA is tiered (see section **5.2.2, *Tiering***). You may find that your action has significant effects and still reach a FONSI, provided that those significant effects were fully analyzed in the EIS to which your EA tiered (see section **5.2.2, *Tiering***). In this case, we recommend that you state in the FONSI that there are no significant impacts beyond those analyzed in the EIS to which this EA is tiered.

The EA must be attached to the FONSI or incorporated by reference into the FONSI (40 CFR 1508.13, Question 37a, CEQ*, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*). The FONSI must

note any other relevant environmental documents related to the findings, and must be signed and dated by the decision-maker (40 CFR 1501.7(a)(5) 40 CFR 1508.13). The FONSI is not the authorizing document for the action: the decision record is the authorizing document.

Some FONSIs must be made available for a 30-day public review before the determination of whether to prepare an EIS (40 CFR 1501.4 (e)(2); also see 40 CFR 1501.4 (e)(1)). Public review is necessary if or when:

- the proposal is a borderline case, (such as when there is a reasonable argument for preparation of an EIS)
- 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
- there is either scientific or public controversy over the effects of the proposal
- it involves a proposal that is similar to one that normally requires preparation of an EIS

You must also allow a period of public review of the FONSI if the proposed action is construction in a wetland or would be located in a floodplain. (Question 37b, CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981*, citing E.O. 11990, sec. 2(b) and E.O. 11988, sec. 2(a)(4)).

In addition, the decision-maker may decide to release the unsigned FONSI and EA for public review and comment even if the proposal does not meet the criteria described above. Consider the complexity of the project and issues, as well as the level of public interest, in determining the length of review and comment period. Releasing the documents for public review and comment is typically done to allow the public, agencies and tribes the opportunity to respond to the analysis of impacts and to further long-term collaborative efforts.

If you release the EA and FONSI for public review, we recommend that you not sign the FONSI until the public review is completed and any necessary changes made to the EA. Include a discussion of comments received on the EA and FONSI and their disposition in the decision record (see **8.5.1, *Documenting the Decision***).

The FONSI is signed before issuance of the decision record. The FONSI must not be combined with the EA or decision record, although these may be attached to each other (516 DM 2.3(C)).

No format requirement exists for a FONSI; however, a suggested format and examples are provided in the Web Guide.

8.5 THE DECISION RECORD (BLM. 2008, pps. 84 - 86)

8.5.1 Documenting the Decision (BLM. 2008, p. 84)

8.5.2 Terminating the EA Process (BLM. 2008, p. 86)

8.6 IMPLEMENTATION (BLM. 2008, p. 86)

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Future Research Publications

- Precedents from Deer Creek Valley Natural Resources Conservation Association's briefs applicable to current BLM timber sale EA.
- For a legally oriented overview of NEPA requirements, see CRS Report RS20621, *Overview of NEPA Requirements*, by Pamela Baldwin.
- Almost since NEPA's enactment, the courts have played a prominent role in interpreting and, in effect, enforcing NEPA's requirements – For an analysis of legal issues, consult the American Law Division of CRS.