1. CEQ NEPA Regulations

Council on Environmental Quality
Executive Office of the President

REGULATIONS

For Implementing The Procedural Provisions Of The

NATIONAL ENVIRONMENTAL POLICY ACT

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

§1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The 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. 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. 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.

§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; 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.

(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.

(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.

(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.

§1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all fed-

eral agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, 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). 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.

§1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§1502.2(c)), by means such as setting appropriate page limits (§§1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§1502.2(b)).

(d) Writing environmental impact statements in plain language (§1502.8).

(e) Following a clear format for environmental impact statements (§1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§1502.14 and 1502.15) and reducing emphasis on background material (§1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§1501.7).

(h) Summarizing the environmental impact statement (§1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§1502.4 and 1502.20).

(j) Incorporating by reference (§1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§1502.25).

(l) Requiring comments to be as specific as possible (§1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§1503.4(c)).

(n) Eliminating duplication with state and local procedures, by providing for joint preparation (§1506.2), and with other federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§1506.3).

(o) Combining environmental documents with other documents (§1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§1508.13).

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§1502.25).

(h) Eliminating duplication with state and local procedures by providing for joint preparation (§1506.2), and with other federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§1506.3).

(i) Combining environmental documents with other documents (§1506.4).

(j) Using accelerated procedures for proposals for legislation (§1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§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 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.

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 55992, Nov. 29, 1978, unless otherwise noted.

§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

and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§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 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 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 in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(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.

§1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in §1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§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 areawide 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.

§1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, state, or local agencies, including at least one federal agency, may act as joint lead agencies to prepare an environmental impact statement (§1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any federal agency, or any state or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency. A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which federal agency shall be the lead agency and which other federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in §1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b) (3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§1508.22) in the FEDERAL REGISTER except as provided in §1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected federal, state, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under §1507.3(c). An agency may give notice in accordance with §1506.6.

(2) Determine the scope (§1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in §1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§1502.7).

(2) Set time limits (§1501.8).

(3) Adopt procedures under §1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by §1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a federal agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

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 55994, Nov. 29, 1978, unless otherwise noted.

§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.

§1502.2 Implementation.

To achieve the purposes set forth in §1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§1508.11) are to be included in every recommendation or report.

On proposals (§1508.23).

For legislation and (§1508.17).

Other major federal actions (§1508.18).

Significantly (§1508.27).

Affecting (§§1508.3, 1508.8).

The quality of the human environment (§1508.14).

§1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad federal actions such as the adoption of new agency programs or regulations (§1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one

agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§1501.7), tiering (§1502.20), and other methods listed in §§1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable state or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§1501.7).

§1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of §1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§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 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.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of agencies, organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§1502.11 through 1502.18, in any appropriate format.

§1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the state(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA

under §1506.10). The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

§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.

§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.

§1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The description shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under §1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in §1502.14. It shall include discussions of:

(a) Direct effects and their significance (§1508.8).

(b) Indirect effects and their significance (§1508.8).

(c) Possible conflicts between the proposed action and the objectives of federal, regional, state, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See §1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under §1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under §1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in §1502.18(d) and unchanged statements as provided in §1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate federal, state or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft. If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or

environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§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]

§1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are

important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§1502.24 Methodology and scientific accuracy.

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

§1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING

Sec.

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 55997, Nov. 29, 1978, unless otherwise noted.

§1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate state and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed. Office of Management and Budget Circular A–95 (Revised), through its system of clearinghouses, provides a means of securing the views of state and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing state and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under §1506.10.

§1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmen-

tal standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in §1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

§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

Sec.

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: 43FR 55998, Nov. 29, 1978 unless otherwise noted.

§1504.1 Purpose.

(a) This part establishes procedures for referring to the Council federal interagency disagreements concerning proposed major federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council (hereafter "environmental referrals").

(c) Under section 102(2)(C) of the Act other federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

[43 FR 55998, Nov. 29, 1978]

§1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

[43 FR 55998, Nov. 29, 1978]

§1504.3 Procedure for referrals and response.

(a) A federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council, and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

[43 FR 55998, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.

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 55999, Nov. 29, 1978, unless otherwise noted.

§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. 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).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment

and assuring that the NEPA process corresponds with them.

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

(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.

(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. 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.

§1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A–95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

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 56000, Nov. 29, 1978, unless otherwise noted.

§1506.1 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.

(b) If any agency is considering an application from a non-federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for federal, state or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

§1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with state agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and state and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more federal agencies and one or more state or local agencies shall be joint lead agencies. Where state laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, federal agencies shall cooperate in fulfilling these requirements as well as those of federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into state or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved state or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§1506.3 Adoption.

(a) An agency may adopt a federal draft or final environmental impact statement or portion

thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

§1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§1506.5 Agency responsibility.

(a) Information. If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) Environmental assessments. If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) Environmental impact statements. Except as provided in §§1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under §1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(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.

(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.

(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.

(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.

§1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

§1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The

statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§1503.1 and 1506.10.

(i) A Congressional committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*) and the Wilderness Act (16 U.S.C. 1131 *et seq.*)).

(iii) Legislative approval is sought for federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (MC2252-A), 1200 Pennsylvania Ave., NW., Washington, DC 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and §1506.10.

§1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under §1505.2 by a federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this

section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see §1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under section 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

PART 1507—AGENCY COMPLIANCE

Sec.
1507.1 Compliance.
1507.2 Agency capability to comply.
1507.3 Agency procedures.

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.

§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.

§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:

(a) Fulfill the requirements of section 102(2)(A) of the Act to 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 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) 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. 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.

(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.

(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.

§1507.3 Agency procedures.

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

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

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

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

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

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

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assess-

ments 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.

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 56003, Nov. 29, 1978, unless otherwise noted.

§1508.1 Terminology.

The terminology of this part shall be uniform throughout the federal government.

§1508.2 Act.

"Act" means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as "NEPA."

§1508.3 Affecting.

"Affecting" means will or may have an effect on.

§1508.4 Categorical exclusion.

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§1508.5 Cooperating agency.

"Cooperating agency" means any federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved

in a proposal (or a reasonable alternative) for legislation or other major federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in §1501.6. A state or local agency of similar qualifications or, when the effects are on a reservation, an Indian tribe, may by agreement with the lead agency become a cooperating agency.

§1508.6 Council.

"Council" means the Council on Environmental Quality established by title II of the Act.

§1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

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

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

§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, and a listing of agencies and persons consulted.

§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).

§1508.11 Environmental impact statement.

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

§1508.12 Federal agency.

"Federal agency" means all agencies of the federal government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations states and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§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 there fore 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.

§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. 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.

§1508.15 Jurisdiction by law.

"Jurisdiction by law" means agency authority to approve, veto, or finance all or part of the proposal.

§1508.16 Lead agency.

"Lead agency" means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§1508.17 Legislation.

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§1508.18 Major federal action.

"Major federal action" includes actions with effects that may be major and which are potentially subject to federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative

uses of federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§1508.19 Matter.

"Matter" includes for purposes of Part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§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.

§1508.21 NEPA process.

"NEPA process" means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§1508.22 Notice of intent.

"Notice of intent" means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§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.

§1508.24 Referring agency.

"Referring agency" means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§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 (§§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 consequencies 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.

§1508.26 Special expertise.

"Special expertise" means statutory responsibility, agency mission, or related program experience.

§1508.27 Significantly.

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

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

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

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment. [43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§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, orpolicy 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.

Index to Parts 1500 Through 1508

Editorial Note: This listing is provided for information purposes only.
It is compiled and kept up-to-date by the Council on Environmental Quality.

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4(b), Sept. 13, 1982)

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

PURPOSE

Sec. 2 [42 USC § 4321].

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

Congressional Declaration of National Environmental Policy

Sec. 101 [42 USC § 4331].

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the federal government, in cooperation with state and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the federal government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate federal plans, functions, programs, and resources to the end that the Nation may —

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

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 —

(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, 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 by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible federal official shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

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

(i) the state agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible federal official furnishes guidance and participates in such preparation,

(iii) the responsible federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible federal official provides early notification to, and solicits the views of, any other state or any federal land management entity of any action or any alternative thereto which may have significant impacts upon such state or affected federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

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

(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;

(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 title II of this Act.

Sec. 103 [42 USC § 4333].

All agencies of the federal government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104 [42 USC § 4334].

Nothing in section 102 [42 USC § 4332] or 103 [42 USC § 4333] shall in any way affect the specific statutory obligations of any federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other federal or state agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other federal or state agency.

Sec. 105 [42 USC § 4335].

The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201 [42 USC § 4341].

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban an rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the federal government, the state and local governments, and nongovernmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202 [42 USC § 4342].

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who,

as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the federal government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203 [42 USC § 4343].

(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

(b) Notwithstanding section 1342 of Title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

Sec. 204 [42 USC § 4344].

It shall be the duty and function of the Council —

1. to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 [42 USC § 4341] of this title;
2. to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;
3. to review and appraise the various programs and activities of the federal government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;
4. to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;
5. to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;
6. to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;
7. to report at least once each year to the President on the state and condition of the environment; and
8. to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205 [42 USC § 4345].

In exercising its powers, functions, and duties under this Act, the Council shall —

1. consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, state and local governments and other groups, as it deems advisable; and
2. utilize, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication

of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206 [42 USC § 4346].

Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates [5 USC § 5313]. The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates [5 USC § 5315].

Sec. 207 [42 USC § 4346a].

The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the federal government, any state, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

Sec. 208 [42 USC § 4346b].

The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

Sec. 209 [42 USC § 4347].

There are authorized to be appropriated to carry out the provisions of this chapter not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

The Environmental Quality Improvement Act, as amended (Pub. L. No. 91- 224, Title II, April 3, 1970; Pub. L. No. 97-258, September 13, 1982; and Pub. L. No. 98-581, October 30, 1984.

42 USC § 4372.

(a) There is established in the Executive Office of the President an office to be known as the Office of Environmental Quality (hereafter in this chapter referred to as the "Office"). The Chairman of the Council on Environmental Quality established by Public Law 91-190 shall be the Director of the Office. There shall be in the Office a Deputy Director who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The compensation of the Deputy Director shall be fixed by the President at a rate not in excess of the annual rate of compensation payable to the Deputy Director of the Office of Management and Budget.

(c) The Director is authorized to employ such officers and employees (including experts and consultants) as may be necessary to enable the Office to carry out its functions; under this chapter and Public Law 91-190, except that he may employ no more than ten specialists and other experts without regard to the provisions of Title 5, governing appointments in the competitive service, and pay such specialists and experts without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but no such specialist or expert shall be paid at a rate in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of Title 5.

(d) In carrying out his functions the Director shall assist and advise the President on policies and programs of the federal government affecting environmental quality by —

1. providing the professional and administrative staff and support for the Council on Environmental Quality established by Public Law 91- 190;
2. assisting the federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the federal government, and those specific major projects designated by the President which do not require individual project authorization by Congress, which affect environmental quality;

3. reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources;

4. promoting the advancement of scientific knowledge of the effects of actions and technology on the environment and encouraging the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man;

5. assisting in coordinating among the federal departments and agencies those programs and activities which affect, protect, and improve environmental quality;

6. assisting the federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established throughout the federal government;

7. collecting, collating, analyzing, and interpreting data and information on environmental quality, ecological research, and evaluation.

(e) The Director is authorized to contract with public or private agencies, institutions, and organizations and with individuals without regard to section 3324(a) and (b) of Title 31 and section 5 of Title 41 in carrying out his functions.

42 USC § 4373.

Each Environmental Quality Report required by Public Law 91-190 shall, upon transmittal to Congress, be referred to each standing committee having jurisdiction over any part of the subject matter of the Report.

42 USC § 4374.

There are hereby authorized to be appropriated for the operations of the Office of Environmental Quality and the Council on Environmental Quality not to exceed the following sums for the following fiscal years which sums are in addition to those contained in Public Law 91- 190:

(a) $2,126,000 for the fiscal year ending September 30, 1979.

(b) $3,000,000 for the fiscal years ending September 30, 1980, and September 30, 1981.

(c) $44,000 for the fiscal years ending September 30, 1982, 1983, and 1984.

(d) $480,000 for each of the fiscal years ending September 30, 1985 and 1986.

42 USC § 4375.

(a) There is established an Office of Environmental Quality Management Fund (hereinafter referred to as the "Fund") to receive advance payments from other agencies or accounts that may be used solely to finance —

1. study contracts that are jointly sponsored by the Office and one or more other federal agencies; and

2. Federal interagency environmental projects (including task forces) in which the Office participates.

(b) Any study contract or project that is to be financed under subsection (a) of this section may be initiated only with the approval of the Director.

(c) The Director shall promulgate regulations setting forth policies and procedures for operation of the Fund.

THE CLEAN AIR ACT § 309*

§ 7609. Policy review

(a) The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administration, contained in any (1) legislation proposed by any federal department or agency, (2) newly authorized federal projects for construction and any major federal agency action (other than a project for construction) to which section 4332(2)(C) of the title applies, and (3) proposed regulations published by any department or agency of the federal government. Such written comment shall be made public at the conclusion of any such review.

(b) In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

*July 14, 1955, c. 360, § 309, as added December 31, 1970, Pub. L. 91-604 § 12(a), 42 U.S.C. § 7609 (1970).

Executive Order 11514—Protection and enhancement of environmental quality

Source: The provisions of Executive Order 11514 of Mar. 5, 1970, appear at 35 FR 4247, 3 CFR, 1966-1970, Comp., p. 902, unless otherwise noted.

By virtue of the authority vested in me as President of the United States and in furtherance of the purpose and policy of the National Environmental Policy Act of 1969 (Public Law No. 91-190, approved January 1, 1970), it is ordered as follows:

Section 1. *Policy.* The federal government shall provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life. Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals. The Council on Environmental Quality, through the Chairman, shall advise and assist the President in leading this national effort.

Sec. 2. *Responsibilities of federal agencies.* Consonant with Title I of the National Environmental Policy Act of 1969, hereafter referred to as the "Act", the heads of federal agencies shall:

(a) Monitor, evaluate, and control on a continuing basis their agencies' activities so as to protect and enhance the quality of the environment. Such activities shall include those directed to controlling pollution and enhancing the environment and those designed to accomplish other program objectives which may affect the quality of the environment. Agencies shall develop programs and measures to protect and enhance environmental quality and shall assess progress in meeting the specific objectives of such activities. Heads of agencies shall consult with appropriate federal, state and local agencies in carrying out their activities as they affect the quality of the environment.

(b) Develop procedures to ensure the fullest practicable provision of timely public information and understanding of federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. federal agencies shall also encourage state and local agencies to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment.

(c) Insure that information regarding existing or potential environmental problems and control methods developed as part of research, development, demonstration, test, or evaluation activities is made available to federal agencies, states, counties, municipalities, institutions, and other entities, as appropriate.

(d) Review their agencies' statutory authority, administrative regulations, policies, and procedures, including those relating to loans, grants,

contracts, leases, licenses, or permits, in order to identify any deficiencies or inconsistencies therein which prohibit or limit full compliance with the purposes and provisions of the Act. A report on this review and the corrective actions taken or planned, including such measures to be proposed to the President as may be necessary to bring their authority and policies into conformance with the intent, purposes, and procedures of the Act, shall be provided to the Council on Environmental Quality not later than September 1, 1970.

(e) Engage in exchange of data and research results, and cooperate with agencies of other governments to foster the purposes of the Act.

(f) Proceed, in coordination with other agencies, with actions required by section 102 of the Act.

(g) In carrying out their responsibilities under the Act and this Order, comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.

[Sec. 2 amended by Executive Order 11991 of May 24, 1977, 42 FR 26967, 3 CFR, 1977 Comp., p. 123]

Sec. 3. *Responsibilities of Council on Environmental Quality.* The Council on Environmental Quality shall:

(a) Evaluate existing and proposed policies and activities of the federal government directed to the control of pollution and the enhancement of the environment and to the accomplishment of other objectives which affect the quality of the environment. This shall include continuing review of procedures employed in the development and enforcement of federal standards affecting environmental quality. Based upon such evaluations the Council shall, where appropriate, recommend to the President policies and programs to achieve more effective protection and enhancement of environmental quality and shall, where appropriate, seek resolution of significant environmental issues.

(b) Recommend to the President and to the agencies priorities among programs designed for the control of pollution and for the enhancement of the environment.

(c) Determine the need for new policies and programs for dealing with environmental problems not being adequately addressed.

(d) Conduct, as it determines to be appropriate, public hearings or conferences on issues of environmental significance.

(e) Promote the development and use of indices and monitoring systems (1) to assess environmental conditions and trends, (2) to predict the environmental impact of proposed public and private actions, and (3) to determine the effectiveness of programs for protecting and enhancing environmental quality.

(f) Coordinate federal programs related to environmental quality.

(g) Advise and assist the President and the agencies in achieving international cooperation for dealing with environmental problems, under the foreign policy guidance of the Secretary of State.

(h) Issue regulations to federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)). Such regulations shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. They will be designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. They will require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses. The Council shall include in its regulations procedures (1) for the early preparation of environmental impact statements, and (2) for the referral to the Council of conflicts between agencies concerning the implementation of the National Environmental Policy Act of 1969, as amended, and Section 309 of the Clean Air Act, as amended, for the Council's recommendation as to their prompt resolution.

(i) Issue such other instructions to agencies, and request such reports and other information from them, as may be required to carry out the

Council's responsibilities under the Act. (j) Assist the President in preparing the annual Environmental Quality Report provided for in section 201 of the Act.

(k) Foster investigations, studies, surveys, research, and analyses relating to (i) ecological systems and environmental quality, (ii) the impact of new and changing technologies thereon, and (iii) means of preventing or reducing adverse effects from such technologies.

[Sec. 3 amended by Executive Order 11991 of May 24, 1977, 42 FR 26967, 3 CFR, 1977 Comp., p. 123]

Sec. 4. *Amendments of E.O. 11472.*

[Sec. 4 amends Executive Order 11472 of May 29, 1969, Chapter 40. The amendments have been incorporated into that order.]

NEPAnet:

http://ceq.eh.doe.gov/nepanet.htm

NEPAnet is the web site established to serve as a central repository for NEPA information. It provides access to NEPA, the regulations and procedures employed by federal agencies, CEQ guidance, and NEPA points of contact within the federal agencies, tribes and the states. The site also provides a mechanism for identifying potential participants (state, tribal, and local governments) and serves as a link to environ

mental resource information (statistical trends and tracking data). The NEPAnet site also interfaces with other federal agencies' sites by providing links to their environmental planning information sites. guidance, and NEPA points of contact within the federal agencies, tribes and the states. The site also provides a mechanism for identifying potential participants (state, tribal, and local governments) and serves as a link to environmental resource information (statistical trends and tracking data). The NEPAnet site also interfaces with other federal agencies' sites by providing links to their environmental planning information sites.

Access to environmental datasets is provided on the "environmental statistics" page of the NEPAnet web site which provides a compilation of environmental statistics and trends, complemented with hot-links – or passageways – to the data compiled by EPA, Interior, and other government agencies. In addition, the "environmental impact analysis data links" page of NEPAnet provides access to online environmental datasets and libraries compiled by the United States Geological Survey. For example, the USGS site provides access to data sets such as the National Wetlands Inventory maps and data, the USGS maps and data tables for water data stations in the US, as well as to libraries such as the largest known collection of on-line publications related to forestry research maintained by the Forest Service.

Sec. 1506.9 Filing requirements.

(a) Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities, EIS Filing Section, Ariel Rios Building (South Oval Lobby), Mail Code 2252-A, Room 7220, 1200 Pennsylvania Ave., NW., Washington, DC 20460. This address is for deliveries by US Postal Service (including USPS Express Mail).

(b) For deliveries in-person or by commercial express mail services, including Federal Express or UPS, the correct address is: US Environmental Protection Agency, Office of Federal Activities, EIS Filing Section, Ariel Rios Building (South Oval Lobby), Room 7220, 1200 Pennsylvania Avenue, NW., Washington, DC 20004.

(c) Statements shall be filed with the EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and Sec. 1506.10.

[70 FR 41148, July 18, 2005]

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2. CEQ 40 Most Asked Questions

46 Fed. Reg. 18026 (March 23, 1981)
As amended

COUNCIL ON ENVIRONMENTAL QUALITY

Executive Office of the President

Memorandum to Agencies:

Forty Most Asked Questions Concerning
CEQ's National Environmental Policy Act Regulations

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. In order efficiently to respond to public inquiries this memorandum is reprinted in this issue of the Federal Register.

Ref: 40 CFR Parts 1500 - 1508 (1987).

FOR FURTHER INFORMATION CONTACT:

General Counsel,
Council on Environmental Quality,
722 Jackson Place NW,
Washington, D.C. 20006;
(202)-395-5754.

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

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.

CEQ has also received numerous inquiries regarding the scoping process. CEQ hopes to issue written guidance on scoping later this year on the basis of its special study of scoping, which is nearing completion.

NICHOLAS C. YOST
General Counsel

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END NOTES

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.* 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).*

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. 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, 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.

7. **Difference Between Sections of EIS on Alternatives and Environmental Consequences.** What is the difference between the sections in the EIS on "alternatives" and "environmental consequences"? How do you avoid duplicating the discussion of alternatives in preparing these two sections?

A. The "alternatives" section is the heart of the EIS. This section rigorously explores and objectively evaluates all reasonable alternatives including the proposed action. *Section 1502.14.* It should include relevant comparisons on environmental and other grounds. The "environmental consequences" section of the EIS discusses the specific environmental impacts or effects of each of the alternatives including the proposed action. *Section 1502.16.* In order to avoid duplication between these two sections, most of the "alternatives" section should be devoted to describing and comparing the alternatives. Discussion of the environmental impacts of these alternatives should be limited to a concise descriptive summary of such impacts in a comparative form, including charts or tables, thus sharply defining the issues and providing a clear basis for choice among options. *Section 1502.14.* The "environmental consequences" section should be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives. It forms the analytic basis for the concise comparison in the "alternatives" section.

8. **Early Application of NEPA.** Section 1501.2(d) of the NEPA regulations requires agencies to provide for the early application of NEPA to cases where actions are planned by **private applicants** or **non-Federal entities** and are, at some stage, subject to federal approval of permits, loans, loan guarantees, insurance or other actions. What must and can agencies do to apply NEPA early in these cases?

A. Section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to ensure that environmental factors are considered at an early stage in the planning process and to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed.

Through early consultation, business applicants and approving agencies may gain better appreciation of each other's needs and foster a decisionmaking process which avoids later unexpected confrontations.

Federal agencies are required by Section 1507.3(b) to develop procedures to carry out Section 1501.2(d). The procedures should include an "outreach program", such as a means for

prospective applicants to conduct pre-application consultations with the lead and cooperating agencies. Applicants need to find out, in advance of project planning, what environmental studies or other information will be required, and what mitigation requirements are likely, in connection with the later federal NEPA process. Agencies should designate staff to advise potential applicants of the agency's NEPA information requirements and should publicize their pre-application procedures and information requirements in newsletters or other media used by potential applicants.

Complementing Section 1501.2(d), Section 1506.5(a) requires agencies to assist applicants by outlining the types of information required in those cases where the agency requires the applicant to submit environmental data for possible use by the agency in preparing an EIS.

Section 1506.5(b) allows agencies to authorize preparation of environmental assessments by applicants. Thus, the procedures should also include a means for anticipating and utilizing applicants' environmental studies or "early corporate environmental assessments" to fulfill some of the federal agency's NEPA obligations. However, in such cases the agency must still evaluate independently the environmental issues [46 FR 18029] and take responsibility for the environmental assessment.

These provisions are intended to encourage and enable private and other non-federal entities to build environmental considerations into their own planning processes in a way that facilitates the application of NEPA and avoids delay.

9. **Applicant Who Needs Other Permits.** To what extent must an agency inquire into whether an applicant for a federal permit, funding or other approval of a proposal will also need approval from another agency for the same proposal or some other related aspect of it?

A. Agencies must integrate the NEPA process into 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. Specifically, the agency must "provide for cases where actions are planned by . . . applicants," so that designated staff are available to advise potential applicants of studies or other information that will foreseeably be required for the later federal action; the agency shall consult with the applicant if the agency foresees its own involvement in the proposal; and it shall insure that the NEPA process commences at the earliest possible time. *Section 1501.2(d).* (See Question 8.)

The regulations emphasize agency cooperation early in the NEPA process. *Section 1501.6.* Section 1501.7 on "scoping" also provides that all affected Federal agencies are to be invited to participate in scoping the environmental issues and to identify the various environmental review and consultation requirements that may apply to the proposed action. Further, Section 1502.25(b) requires that the draft EIS list all the federal permits, licenses and other entitlements that are needed to implement the proposal.

These provisions create an affirmative obligation on federal agencies to inquire early, and to the maximum degree possible, to ascertain whether an applicant is or will be seeking other federal assistance or approval, or whether the applicant is waiting until a proposal has been substantially developed before requesting federal aid or approval.

Thus, a federal agency receiving a request for approval or assistance should determine whether the applicant has filed separate requests for federal approval or assistance with other federal agencies. Other federal agencies that are likely to become involved should then be contacted, and the NEPA process coordinated, to insure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions. The agency should inform the applicant that action on its application may be delayed unless it submits all other federal applications (where feasible to do so), so that all the relevant agencies can work together on the scoping process and preparation of the EIS.

10a. **Limitations on Action During 30-Day Review Period for Final EIS.** What actions by agencies and/or applicants are allowed during EIS preparation and during the 30-day review period after publication of a final EIS?

A. No federal decision on the proposed action shall be made or recorded until at least 30 days after the publication by EPA of notice that the particular EIS has been filed with EPA. *Sections 1505.2 and 1506.10*. Section 1505.2 requires this decision to be stated in a public Record of Decision.

Until the agency issues its Record of Decision, no action by an agency or an applicant concerning the proposal shall be taken which would have an adverse environmental impact or limit the choice of reasonable alternatives. *Section 1506.1(a).* But this does not preclude preliminary planning or design work which is needed to support an application for permits or assistance. *Section 1506.1(d).*

When the impact statement in question is a program EIS, no major action concerning the program may be taken which may significantly affect the quality of the human environment, unless the particular action is justified independently of the program, is accompanied by its own adequate environmental impact statement and will not prejudice the ultimate decision on the program. *Section 1506.1(c).*

10b. Do these **limitations on action** (described in Question 10a) apply to **state or local agencies** that have statutorily delegated responsibility for preparation of environmental documents required by NEPA, for example, under the HUD Block Grant program?

A. Yes, these limitations do apply, without any variation from their application to federal agencies.

11. **Limitations on Actions by an Applicant During EIS Process.** What actions must a lead agency take during the NEPA process when it becomes aware that a non-federal applicant is about to take an action within the agency's jurisdiction that would either have an adverse environmental impact or limit the choice of reasonable alternatives (e.g., prematurely commit money or other resources towards the completion of the proposal)?

A. The federal agency must notify the applicant that the agency will take strong affirmative steps to insure that the objectives and procedures of NEPA are fulfilled. *Section 1506.1(b).* These steps could include seeking injunctive measures under NEPA, or the use of sanctions

available under either the agency's permitting authority or statutes setting forth the agency's statutory mission. For example, the agency might advise an applicant that if it takes such action the agency will not process its application.

12a. **Effective Date and Enforceability of the Regulations.** What actions are subject to the Council's new regulations, and what actions are grandfathered under the old guidelines?

A. The effective date of the Council's regulations was July 30, 1979 (except for certain HUD programs under the Housing and Community Development Act, 42 U.S.C. 5304(h), and certain state highway programs that qualify under Section 102(2)(D) of NEPA for which the regulations became effective on November 30, 1979). All the provisions of the regulations are binding as of that date, including those covering decisionmaking, public participation, referrals, limitations on actions, EIS supplements, etc. For example, a Record of Decision would be prepared even for decisions where the draft EIS was filed before July 30, 1979.

But in determining whether or not the new regulations apply to the preparation of a particular environmental document, the relevant factor is the date of filing of the draft of that document. Thus, the new regulations do not require the redrafting of an EIS or supplement if the draft EIS or supplement was filed before July 30, 1979. However, a supplement prepared after the effective date of the regulations for an EIS issued in final before the effective date of the regulations would be controlled by the regulations.

Even though agencies are not required to apply the regulations to an EIS or other document for which the draft was filed prior to July 30, 1979, the regulations encourage agencies to follow the regulations "to the fullest extent practicable," i.e., if it is feasible to do so, in preparing the final document. *Section 1506.12(a)*.

12b. Are **projects authorized by Congress before** the effective date of the Council's regulations grandfathered?

A. No. The date of Congressional authorization for a project is not determinative of whether the Council's regulations or former Guidelines apply to the particular proposal. No incomplete projects or proposals of any kind are grandfathered in whole or in part. Only certain environmental documents, for which the draft was issued before the effective date of the regulations, are grandfathered and [46 FR 18030] subject to the Council's former Guidelines.

12c. **Can a violation of the regulations give rise to a cause of action?**

A. While a trivial violation of the regulations would not give rise to an independent cause of action, such a cause of action would arise from a substantial violation of the regulations. *Section 1500.3.*

13. **Use of Scoping Before Notice of Intent to Prepare EIS.** Can the scoping process be used in connection with preparation of an **environmental assessment,** i.e., before both the decision to proceed with an EIS and publication of a notice of intent?

A. Yes. Scoping can be a useful tool for discovering alternatives to a proposal, or significant

impacts that may have been overlooked. In cases where an environmental assessment is being prepared to help an agency decide whether to prepare an EIS, useful information might result from early participation by other agencies and the public in a scoping process.

The regulations state that the scoping process is to be preceded by a Notice of Intent (NOI) to prepare an EIS. But that is only the minimum requirement. Scoping may be initiated earlier, as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively.

However, scoping that is done before the assessment, and in aid of its preparation, cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.

14a. **Rights and Responsibilities of Lead and Cooperating Agencies.** What are the respective rights and responsibilities of lead and cooperating agencies? What letters and memoranda must be prepared?

A. After a lead agency has been designated (Sec. 1501.5), that agency has the responsibility to solicit cooperation from other federal agencies that have jurisdiction by law or special expertise on any environmental issue that should be addressed in the EIS being prepared. Where appropriate, the lead agency should seek the cooperation of state or local agencies of similar qualifications. When the proposal may affect an Indian reservation, the agency should consult with the Indian tribe. *Section 1508.5.* The request for cooperation should come at the earliest possible time in the NEPA process.

After discussions with the candidate cooperating agencies, the lead agency and the cooperating agencies are to determine by letter or by memorandum which agencies will undertake cooperating responsibilities. To the extent possible at this stage, responsibilities for specific issues should be assigned. The allocation of responsibilities will be completed during scoping. *Section 1501.7(a)(4).*

Cooperating agencies must assume responsibility for the development of information and the preparation of environmental analyses at the request of the lead agency. *Section 1501.6(b)(3).* Cooperating agencies are now required by Section 1501.6 to devote staff resources that were normally primarily used to critique or comment on the Draft EIS after its preparation, much earlier in the NEPA process -- primarily at the scoping and Draft EIS preparation stages. If a cooperating agency determines that its resource limitations preclude any involvement, or the degree of involvement (amount of work) requested by the lead agency, it must so inform the lead agency in writing and submit a copy of this correspondence to the Council. *Section 1501.6(c).*

In other words, the potential cooperating agency must decide early if it is able to devote any of its resources to a particular proposal. For this reason the regulation states that an agency may reply to a request for cooperation that "other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental

impact statement." (Emphasis added). The regulation refers to the "action," rather than to the EIS, to clarify that the agency is taking itself out of all phases of the federal action, not just draft EIS preparation. This means that the agency has determined that it cannot be involved in the later stages of EIS review and comment, as well as decisionmaking on the proposed action. For this reason, cooperating agencies with jurisdiction by law (those which have permitting or other approval authority) cannot opt out entirely of the duty to cooperate on the EIS. See also Question 15, relating specifically to the responsibility of EPA.

14b. How are **disputes resolved between lead and cooperating agencies** concerning the scope and level of detail of analysis and the quality of data in impact statements?

A. Such disputes are resolved by the agencies themselves. A lead agency, of course, has the ultimate responsibility for the content of an EIS. But it is supposed to use the environmental analysis and recommendations of cooperating agencies with jurisdiction by law or special expertise to the maximum extent possible, consistent with its own responsibilities as lead agency. *Section 1501.6(a)(2).*

If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. Similarly, where cooperating agencies have their own decisions to make and they intend to adopt the environmental impact statement and base their decisions on it, one document should include all of the information necessary for the decisions by the cooperating agencies. Otherwise they may be forced to duplicate the EIS process by issuing a new, more complete EIS or Supplemental EIS, even though the original EIS could have sufficed if it had been properly done at the outset. Thus, both lead and cooperating agencies have a stake in producing a document of good quality. Cooperating agencies also have a duty to participate fully in the scoping process to ensure that the appropriate range of issues is determined early in the EIS process.

Because the EIS is not the Record of Decision, but instead constitutes the information and analysis on which to base a decision, disagreements about conclusions to be drawn from the EIS need not inhibit agencies from issuing a joint document, or adopting another agency's EIS, if the analysis is adequate. Thus, if each agency has its own "preferred alternative," both can be identified in the EIS. Similarly, a cooperating agency with jurisdiction by law may determine in its own ROD that alternative A is the environmentally preferable action, even though the lead agency has decided in its separate ROD that Alternative B is environmentally preferable.

14c. What are the specific responsibilities of federal and state **cooperating agencies to review draft EISs**?

A. Cooperating agencies (i.e., agencies with jurisdiction by law or special expertise) and agencies that are authorized to develop or enforce environmental standards, must comment on environmental impact statements within their jurisdiction, expertise or authority. *Sections 1503.2, 1508.5*. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should simply comment accordingly. Conversely, if the cooperating agency determines that a draft EIS is incomplete, inadequate or inaccurate, or it has other comments, it should promptly make such comments, conforming to the requirements

of specificity in section 1503.3.

14d. How is the lead agency to treat the comments of another agency with jurisdiction by law or special expertise which has **failed or refused to cooperate or participate in scoping or EIS preparation**?

A. A lead agency has the responsibility to respond to all substantive comments raising significant issues regarding a draft EIS. *Section 1503.4*. However, cooperating agencies are generally under an obligation to raise issues or otherwise participate in the EIS process during scoping and EIS preparation if they reasonably can do so. In practical terms, if a cooperating agency fails to cooperate at the outset, such as during scoping, it will find that its comments at a later stage will not be as persuasive to the lead agency.

15. **Commenting Responsibilities of EPA.** Are EPA's responsibilities to review and comment on the environmental effects of agency proposals under **Section 309 of the Clean Air Act** independent of its responsibility as a cooperating agency?

A. Yes. EPA has an obligation under Section 309 of the Clean Air Act to review and comment in writing on the environmental impact of any matter relating to the authority of the Administrator contained in proposed legislation, federal construction projects, other federal actions requiring EISs, and new regulations. *42 U.S.C. Sec. 7609.* This obligation is independent of its role as a cooperating agency under the NEPA regulations.

16. **Third Party Contracts.** What is meant by the term "third party contracts" in connection with the preparation of an EIS? See Section 1506.5(c). When can "third party contracts" be used?

A. As used by EPA and other agencies, the term "third party contract" refers to the preparation of EISs by contractors paid by the applicant. In the case of an EIS for a National Pollution Discharge Elimination System (NPDES) permit, the applicant, aware in the early planning stages of the proposed project of the need for an EIS, contracts directly with a consulting firm for its preparation. See 40 C.F.R. 6.604(g). The "third party" is EPA which, under Section 1506.5(c), must select the consulting firm, even though the applicant pays for the cost of preparing the EIS. The consulting firm is responsible to EPA for preparing an EIS that meets the requirements of the NEPA regulations and EPA's NEPA procedures. It is in the applicant's interest that the EIS comply with the law so that EPA can take prompt action on the NPDES permit application. The "third party contract" method under EPA's NEPA procedures is purely voluntary, though most applicants have found it helpful in expediting compliance with NEPA.

If a federal agency uses "third party contracting," the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with Section 1506.5(c). Federal procurement requirements do not apply to the agency because it incurs no obligations or costs under the contract, nor does the agency procure anything under the contract.

17a. **Disclosure Statement to Avoid Conflict of Interest.** If an EIS is prepared with the assistance of a consulting firm, the firm must execute a disclosure statement. What criteria

must the firm follow in determining whether it has any "financial or other interest in the outcome of the project" which would cause a conflict of interest?

A. Section 1506.5(c), which specifies that a consulting firm preparing an EIS must execute a disclosure statement, does not define "financial or other interest in the outcome of the project." The Council interprets this term broadly to cover any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients). For example, completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit. If a consulting firm is aware that it has such an interest in the decision on the proposal, it should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process.

When a consulting firm has been involved in developing initial data and plans for the project, but does not have any financial or other interest in the outcome of the decision, it need not be disqualified from preparing the EIS. However, a disclosure statement in the draft EIS should clearly state the scope and extent of the firm's prior involvement to expose any potential conflicts of interest that may exist.

17b. If the firm in fact has no promise of future work or other interest in the outcome of the proposal, **may the firm later bid** in competition with others for future work on the project if the proposed action is approved?

A. Yes.

18. **Uncertainties About Indirect Effects of A Proposal.** How should uncertainties about indirect effects of a proposal be addressed, for example, in cases of disposal of federal lands, when the identity or plans of future landowners is unknown?

A. The EIS must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are "reasonably foreseeable." *Section 1508.8(b).* In the example, if there is total uncertainty about the identity of future land owners or the nature of future land uses, then of course, the agency is not required to engage in speculation or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. The agency cannot ignore these uncertain, but probable, effects of its decisions.

19a. **Mitigation Measures.** What is the scope of mitigation measures that must be discussed?
A. The mitigation measures discussed in an EIS must cover the range of impacts of the proposal. The measures must include such things as design alternatives that would decrease

pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts. Mitigation measures must be considered even for impacts that by themselves would not be considered "significant." Once the proposal itself is considered as a whole to have significant effects, all of its specific effects on the environment (whether or not "significant") must be considered, and mitigation measures must be developed where it is feasible to do so. *Sections 1502.14(f), 1502.16(h), 1508.14.*

19b. How should an EIS treat the subject of available mitigation measures that are (1) **outside the jurisdiction** of the lead or cooperating agencies, or (2) **unlikely** to be adopted or enforced by the responsible agency?

A. All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would not be committed as part of the RODs of these agencies. *Sections 1502.16(h), 1505.2(c).* This will serve to [46 FR 18032] alert agencies or officials who can implement these extra measures, and will encourage them to do so. Because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation.

However, to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and the Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies. *Sections 1502.16(h), 1505.2.* If there is a history of nonenforcement or opposition to such measures, the EIS and Record of Decision should acknowledge such opposition or nonenforcement. If the necessary mitigation measures will not be ready for a long period of time, this fact, of course, should also be recognized.

20. **Worst Case Analysis**. [Withdrawn.]

21. **Combining Environmental and Planning Documents.** Where an EIS or an EA is combined with another project planning document (sometimes called **"piggybacking"**), to what degree may the EIS or EA refer to and rely upon information in the project document to satisfy NEPA's requirements?

A. Section 1502.25 of the regulations requires that draft EISs be prepared concurrently and integrated with environmental analyses and related surveys and studies required by other federal statutes. In addition, Section 1506.4 allows any environmental document prepared in compliance with NEPA to be combined with any other agency document to reduce duplication and paperwork. However, these provisions were not intended to authorize the preparation of a short summary or outline EIS, attached to a detailed project report or land use plan containing the required environmental impact data. In such circumstances, the reader would have to refer constantly to the detailed report to understand the environmental impacts and alternatives which should have been found in the EIS itself.

The EIS must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of the reasonable alternatives. *Section 1502.1*. But, as long as the EIS is clearly identified and is self-supporting, it can be physically included in or attached to the project report or land use plan, and may use attached report material as technical backup.

Forest Service environmental impact statements for forest management plans are handled in this manner. The EIS identifies the agency's preferred alternative, which is developed in detail as the proposed management plan. The detailed proposed plan accompanies the EIS through the review process, and the documents are appropriately cross-referenced. The proposed plan is useful for EIS readers as an example, to show how one choice of management options translates into effects on natural resources. This procedure permits initiation of the 90-day public review of proposed forest plans, which is required by the National Forest Management Act.

All the alternatives are discussed in the EIS, which can be read as an independent document. The details of the management plan are not repeated in the EIS, and vice versa. This is a reasonable functional separation of the documents: the EIS contains information relevant to the choice among alternatives; the plan is a detailed description of proposed management activities suitable for use by the land managers. This procedure provides for concurrent compliance with the public review requirements of both NEPA and the National Forest Management Act.

Under some circumstances, a project report or management plan may be totally merged with the EIS, and the one document labeled as both "EIS" and "management plan" or "project report." This may be reasonable where the documents are short, or where the EIS format and the regulations for clear, analytical EISs also satisfy the requirements for a project report.

22. **State and Federal Agencies as Joint Lead Agencies.** May state and federal agencies serve as joint lead agencies? If so, how do they resolve law, policy and resource conflicts under NEPA and the relevant state environmental policy act? How do they resolve differences in perspective where, for example, national and local needs may differ?

A. Under Section 1501.5(b), federal, state or local agencies, as long as they include at least one federal agency, may act as joint lead agencies to prepare an EIS. Section 1506.2 also strongly urges state and local agencies and the relevant federal agencies to cooperate fully with each other. This should cover joint research and studies, planning activities, public hearings, environmental assessments and the preparation of joint EISs under NEPA and the relevant "little NEPA" state laws, so that one document will satisfy both laws.

The regulations also recognize that certain inconsistencies may exist between the proposed federal action and any approved state or local plan or law. The joint document should discuss the extent to which the federal agency would reconcile its proposed action with such plan or law. *Section 1506.2(d).* (See Question 23).

Because there may be differences in perspective as well as conflicts among [46 FR 18033] federal, state and local goals for resources management, the Council has advised participating

agencies to adopt a flexible, cooperative approach. The joint EIS should reflect all of their interests and missions, clearly identified as such. The final document would then indicate how state and local interests have been accommodated, or would identify conflicts in goals (e.g., how a hydroelectric project, which might induce second home development, would require new land use controls). The EIS must contain a complete discussion of scope and purpose of the proposal, alternatives, and impacts so that the discussion is adequate to meet the needs of local, state and federal decisionmakers.

23a. **Conflicts of Federal Proposal With Land Use Plans, Policies or Controls.** How should an agency handle potential **conflicts** between a proposal and the objectives of Federal, state or local land use plans, policies and controls for the area concerned? See Sec. 1502.16(c).

A. The agency should first inquire of other agencies whether there are any potential conflicts. If there would be immediate conflicts, or if conflicts could arise in the future when the plans are finished (see Question 23(b) below), the EIS must acknowledge and describe the extent of those conflicts. If there are any possibilities of resolving the conflicts, these should be explained as well. The EIS should also evaluate the seriousness of the impact of the proposal on the land use plans and policies, and whether, or how much, the proposal will impair the effectiveness of land use control mechanisms for the area. Comments from officials of the affected area should be solicited early and should be carefully acknowledged and answered in the EIS.

23b. What constitutes a **"land use plan or policy"** for purposes of this discussion?

A. The term "land use plans," includes all types of formally adopted documents for land use planning, zoning and related regulatory requirements. Local general plans are included, even though they are subject to future change. Proposed plans should also be addressed if they have been formally proposed by the appropriate government body in a written form, and are being actively pursued by officials of the jurisdiction. Staged plans, which must go through phases of development such as the Water Resources Council's Level A, B and C planning process should also be included even though they are incomplete.

The term "policies" includes formally adopted statements of land use policy as embodied in laws or regulations. It also includes proposals for action such as the initiation of a planning process, or a formally adopted policy statement of the local, regional or state executive branch, even if it has not yet been formally adopted by the local, regional or state legislative body.

23c. What options are available for the decisionmaker when **conflicts with such plans** or policies are identified?

A. After identifying any potential land use conflicts, the decisionmaker must weigh the significance of the conflicts, among all the other environmental and non-environmental factors that must be considered in reaching a rational and balanced decision. Unless precluded by other law from causing or contributing to any inconsistency with the land use plans, policies or controls, the decisionmaker retains the authority to go forward with

the proposal, despite the potential conflict. In the Record of Decision, the decisionmaker must explain what the decision was, how it was made, and what mitigation measures are being imposed to lessen adverse environmental impacts of the proposal, among the other requirements of Section 1505.2. This provision would require the decisionmaker to explain any decision to override land use plans, policies or controls for the area.

24a. **Environmental Impact Statements on Policies, Plans or Programs.** When are EISs required on policies, plans or programs?

A. An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. *Section 1508.18*. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. *Section 1508.18*. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal "may exist in fact as well as by agency declaration that one exists." *Section 1508.23*.

24b. When is an **area-wide or overview EIS** appropriate?

A. The preparation of an area-wide or overview EIS may be particularly useful when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography. For example, when a variety of energy projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.

24c. What is the function of **tiering** in such cases?

A. Tiering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope or vice versa. In the example given in Question 24b, this would mean that an overview EIS would be prepared for all of the energy activities reasonably foreseeable in a particular geographic area or resulting from a particular development program. This impact statement would be followed by site-specific or project-specific EISs. The tiering process would make each EIS of greater use and meaning to the public as the plan or program develops, without duplication of the analysis prepared for the previous impact statement.

25a. **Appendices and Incorporation by Reference.** When is it appropriate to use appendices instead of including information in the body of an EIS?

A. The body of the EIS should be a succinct statement of all the information on environmental impacts and alternatives that the decisionmaker and the public need, in order to make the decision and to ascertain that every significant factor has been examined. The EIS must

explain or summarize methodologies of research and modeling, and the results of research that may have been conducted to analyze impacts and alternatives.

Lengthy technical discussions of modeling methodology, baseline studies, or other work are best reserved for the appendix. In other words, if only technically trained individuals are likely to understand a particular discussion then it should go in the appendix, and a plain language summary of the analysis and conclusions of that technical discussion should go in the text of the EIS.

The final statement must also contain the agency's responses to comments on the draft EIS. These responses will be primarily in the form of changes in the document itself, but specific answers to each significant comment should also be included. These specific responses may be placed in an appendix. If the comments are especially voluminous, summaries of the comments and responses will suffice. (See Question 29 regarding the level of detail required for responses to comments.)

25b. How does an **appendix** differ from **incorporation by reference?**

A. First, if at all possible, the appendix accompanies the EIS, whereas the material which is incorporated by reference does not accompany the EIS. Thus the appendix should contain information that reviewers will be likely to want to examine. The appendix should include material that pertains to preparation of a particular EIS. Research papers directly relevant to the proposal, lists of affected species, discussion of the methodology of models used in the analysis of impacts, extremely detailed responses to comments, or other information, would be placed in the appendix.

The appendix must be complete and available at the time the EIS is filed. Five copies of the appendix must be sent to EPA with five copies of the EIS for filing. If the appendix is too bulky to be circulated, it instead must be placed in conveniently accessible locations or furnished directly to commentors upon request. If it is not circulated with the EIS, the Notice of Availability published by EPA must so state, giving a telephone number to enable potential commentors to locate or request copies of the appendix promptly.

Material that is not directly related to preparation of the EIS should be incorporated by reference. This would include other EISs, research papers in the general literature, technical background papers or other material that someone with technical training could use to evaluate the analysis of the proposal. These must be made available, either by citing the literature, furnishing copies to central locations, or sending copies directly to commenters upon request.

Care must be taken in all cases to ensure that material incorporated by reference, and the occasional appendix that does not accompany the EIS, are in fact available for the full minimum public comment period.

26a. **Index and Keyword Index in EISs.** How detailed must an EIS index be?

A. The EIS index should have a level of detail sufficient to focus on areas of the EIS of

reasonable interest to any reader. It cannot be restricted to the most important topics. On the other hand, it need not identify every conceivable term or phrase in the EIS. If an agency believes that the reader is reasonably likely to be interested in a topic, it should be included.

26b. Is a **keyword index** required?

A. No. A keyword index is a relatively short list of descriptive terms that identifies the key concepts or subject areas in a document. For example it could consist of 20 terms which describe the most significant aspects of an EIS that a future researcher would need: type of proposal, type of impacts, type of environment, geographical area, sampling or modeling methodologies used. This technique permits the compilation of EIS data banks, by facilitating quick and inexpensive access to stored materials. While a keyword index is not required by the regulations, it could be a useful addition for several reasons. First, it can be useful as a quick index for reviewers of the EIS, helping to focus on areas of interest. Second, if an agency keeps a listing of the keyword indexes of the EISs it produces, the EIS preparers themselves will have quick access to similar research data and methodologies to aid their future EIS work. Third, a keyword index will be needed to make an EIS available to future researchers using EIS data banks that are being developed. Preparation of such an index now when the document is produced will save a later effort when the data banks become operational.

27a. **List of Preparers.** If a consultant is used in preparing an EIS, must the list of preparers identify members of the consulting firm as well as the agency NEPA staff who were primarily responsible?

A. Section 1502.17 requires identification of the names and qualifications of persons who were primarily responsible for preparing the EIS or significant background papers, including basic components of the statement. This means that members of a consulting firm preparing material that is to become part of the EIS must be identified. The EIS should identify these individuals even though the consultant's contribution may have been modified by the agency.

27b. Should agency staff involved in reviewing and editing the EIS also be included in the **list of preparers?**

A. Agency personnel who wrote basic components of the EIS or significant background papers must, of course, be identified. The EIS should also list the technical editors who reviewed or edited the statements.

27c. How much information should be included on each person listed?

A. The list of preparers should normally not exceed two pages. Therefore, agencies must determine which individuals had primary responsibility and need not identify individuals with minor involvement. The list of preparers should include a very brief identification of the individuals involved, their qualifications (expertise, professional disciplines) and the specific portion of the EIS for which they are responsible. This may be done in tabular form to cut down on length. A line or two for each person's qualifications should be sufficient.

28. **Advance or Xerox Copies of EIS.** May an agency file xerox copies of an EIS with EPA pending the completion of printing the document?

A. Xerox copies of an EIS may be filed with EPA prior to printing only if the xerox copies are simultaneously made available to other agencies and the public. Section 1506.9 of the regulations, which governs EIS filing, specifically requires Federal agencies to file EISs with EPA no earlier than the EIS is distributed to the public. However, this section does not prohibit xeroxing as a form of reproduction and distribution. When an agency chooses xeroxing as the reproduction method, the EIS must be clear and legible to permit ease of reading and ultimate microfiching of the EIS. Where color graphs are important to the EIS, they should be reproduced and circulated with the xeroxed copy.

29a. **Responses to Comments.** What response must an agency provide to a comment on a draft EIS which states that the EIS's methodology is inadequate or inadequately explained? For example, what level of detail must an agency include in its response to a simple postcard comment making such an allegation?

A. Appropriate responses to comments are described in Section 1503.4. Normally the responses should result in changes in the text of the EIS, not simply a separate answer at the back of the document. But, in addition, the agency must state what its response was, and if the agency decides that no substantive response to a comment is necessary, it must explain briefly why.

An agency is not under an obligation to issue a lengthy reiteration of its methodology for any portion of an EIS if the only comment addressing the methodology is a simple complaint that the EIS methodology is inadequate. But agencies must respond to comments, however brief, which are specific in their criticism of agency methodology. For example, if a commentor on an EIS said that an agency's air quality dispersion analysis or methodology was inadequate, and the agency had included a discussion of that analysis in the EIS, little if anything need be added in response to such a comment. However, if the commenter said that the dispersion analysis was inadequate because of its use of a certain computational technique, or that a dispersion analysis was inadequately explained because computational techniques were not included or referenced, then the agency would have to respond in a substantive and meaningful way to such a comment. If a number of comments are identical or very similar, agencies may group the comments and prepare a single answer for each group. Comments may be summarized if they are especially voluminous. The comments or summaries must be attached to the EIS regardless of whether the agency believes they merit individual discussion in the body of the final EIS.

29b. How must an agency respond to a comment on a draft EIS that raises a **new alternative not previously considered** in the draft EIS?

A. This question might arise in several possible situations. First, a commenter on a draft EIS may indicate that there is a possible alternative which, in the agency's view, is not a reasonable alternative. *Section 1502.14(a).* If that is the case, the agency must explain why the comment does not warrant further agency response, citing authorities or reasons that support the agency's position and, if appropriate, indicate those circumstances which would trigger agency

reappraisal or further response. *Section 1503.4(a).* For example, a commentor on a draft EIS on a coal fired power plant may suggest the alternative of using synthetic fuel. The agency may reject the alternative with a brief discussion (with authorities) of the unavailability of synthetic fuel within the time frame necessary to meet the need and purpose of the proposed facility.

A second possibility is that an agency may receive a comment indicating that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits, or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS. For example, a commenter on a draft EIS on a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures, including the purchase and setaside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation of one of the alternatives discussed in the draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a commenter on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest, and urge that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of constructing 2,000, 4,000, or 6,000 units. A commentor on the draft EIS might urge the consideration of constructing 5,000 units utilizing a different configuration of buildings. This alternative is within the spectrum of alternatives already considered, and, therefore, could be addressed in the final EIS.

A fourth possibility is that a commenter points out an alternative which is not a variation of the proposal or of any alternative discussed in the draft impact statement, and is a reasonable alternative that warrants serious agency response. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commenter on a draft EIS on a nuclear power plant might suggest that a reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations.)

If the new alternative was not raised by the commentor during scoping, but could have been,

commenters may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the agency. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the agency must address it in a supplemental draft EIS. The agency is, in any case, ultimately responsible for preparing an adequate EIS that considers all alternatives.

30. **Adoption of EISs.** When a cooperating agency with jurisdiction by law intends to adopt a lead agency's EIS and it is not satisfied with the adequacy of the document, may the cooperating agency adopt only the part of the EIS with which it is satisfied? If so, would a cooperating agency with jurisdiction by law have to prepare a separate EIS or EIS supplement covering the areas of disagreement with the lead agency?

A. Generally, a cooperating agency may adopt a lead agency's EIS without recirculating it if it concludes that its NEPA requirements and its comments and suggestions have been satisfied. *Section 1506.3(a), (c).* If necessary, a cooperating agency may adopt only a portion of the lead agency's EIS and may reject that part of the EIS with which it disagrees, stating publicly why it did so. *Section 1506.3(a).*

A cooperating agency with jurisidiction by law (e.g., an agency with independent legal responsibilities with respect to the proposal) has an independent legal obligation to comply with NEPA. Therefore, if the cooperating agency determines that the EIS is wrong or inadequate, it must prepare a supplement to the EIS, replacing or adding any needed information, and must circulate the supplement as a draft for public and agency review and comment. A final supplemental EIS would be required before the agency could take action. The adopted portions of the lead agency EIS should be circulated with the supplement. *Section 1506.3(b).* A cooperating agency with jurisdiction by law will have to prepare its own Record of Decision for its action, in which it must explain how it reached its conclusions. Each agency should explain how and why its conclusions differ, if that is the case, from those of other agencies which issued their Records of Decision earlier. An agency that did not cooperate in preparation of an EIS may also adopt an EIS or portion thereof. But this would arise only in rare instances, because an agency adopting an EIS for use in its own decision normally would have been a cooperating agency. If the proposed action for which the EIS was prepared is substantially the same as the proposed action of the adopting agency, the EIS may be adopted as long as it is recirculated as a final EIS and the agency announces what it is doing. This would be followed by the 30-day review period and issuance of a Record of Decision by the adopting agency. If the proposed action by the adopting agency is not substantially the same as that in [46 FR 18036] the EIS (i.e., if an EIS on one action is being adapted for use in a decision on another action), the EIS would be treated as a draft and circulated for the normal public comment period and other procedures. *Section 1506.3(b).*

31a. **Application of Regulations to Independent Regulatory Agencies.** Do the Council's NEPA regulations apply to independent regulatory agencies like the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission?

A. The statutory requirements of NEPA's Section 102 apply to "all agencies of the federal government." The NEPA regulations implement the procedural provisions of NEPA as set

forth in NEPA's Section 102(2) for all agencies of the federal government. The NEPA regulations apply to independent regulatory agencies, however, they do not direct independent regulatory agencies or other agencies to make decisions in any particular way or in a way inconsistent with an agency's statutory charter. *Sections 1500.3, 1500.6, 1507.1, and 1507.3.*

31b. Can an Executive Branch agency like the Department of the Interior **adopt an EIS** prepared by an independent regulatory agency such as FERC?

A. If an independent regulatory agency such as FERC has prepared an EIS in connection with its approval of a proposed project, an Executive Branch agency (e.g., the Bureau of Land Management in the Department of the Interior) may, in accordance with Section 1506.3, adopt the EIS or a portion thereof for its use in considering the same proposal. In such a case the EIS must, to the satisfaction of the adopting agency, meet the standards for an adequate statement under the NEPA regulations (including scope and quality of analysis of alternatives) and must satisfy the adopting agency's comments and suggestions. If the independent regulatory agency fails to comply with the NEPA regulations, the cooperating or adopting agency may find that it is unable to adopt the EIS, thus forcing the preparation of a new EIS or EIS Supplement for the same action. The NEPA regulations were made applicable to all federal agencies in order to avoid this result, and to achieve uniform application and efficiency of the NEPA process.

32. **Supplements to Old EISs.** Under what circumstances do old EISs have to be supplemented before taking action on a proposal?

A. As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.

If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. *Section 1502.9(c).*

33a. **Referrals.** When must a referral of an interagency disagreement be made to the Council?

A. The Council's referral procedure is a pre-decision referral process for interagency disagreements. Hence, Section 1504.3 requires that a referring agency must deliver its referral to the Council not later than 25 days after publication by EPA of notice that the final EIS is available (unless the lead agency grants an extension of time under Section 1504.3(b)).

33b. May a **referral** be made after this issuance of a Record of Decision?

A. No, except for cases where agencies provide an internal appeal procedure which permits simultaneous filing of the final EIS and the record of decision (ROD). *Section 1506.10(b)(2).* Otherwise, as stated above, the process is a pre-decision referral process. Referrals must be

made within 25 days after the notice of availability of the final EIS, whereas the final decision (ROD) may not be made or filed until after 30 days from the notice of availability of the EIS. *Sections 1504.3(b), 1506.10(b).* If a lead agency has granted an extension of time for another agency to take action on a referral, the ROD may not be issued until the extension has expired.

34a. **Records of Decision.** Must Records of Decision (RODs) be made public? How should they be made available?

A. Under the regulations, agencies must prepare a "concise public record of decision," which contains the elements specified in Section 1505.2. This public record may be integrated into any other decision record prepared by the agency, or it may be separate if decision documents are not normally made public. The Record of Decision is intended by the Council to be an environmental document (even though it is not explicitly mentioned in the definition of "environmental document" in Section 1508.10). Therefore, it must be made available to the public through appropriate public notice as required by Section 1506.6(b). However, there is no specific requirement for publication of the ROD itself, either in the Federal Register or elsewhere.

34b. May the **summary section** in the final Environmental Impact Statement substitute for or constitute an agency's Record of Decision?

A. No. An environmental impact statement is supposed to inform the decisionmaker before the decision is made. *Sections 1502.1, 1505.2.* The Council's regulations provide for a 30-day period after notice is published that the final EIS has been filed with EPA before the agency may take final action. During that period, in addition to the agency's own internal final review, the public and other agencies can comment on the final EIS prior to the agency's final action on the proposal. In addition, the Council's regulations make clear that the requirements for the summary in an EIS are not the same as the requirements for a ROD. *Sections 1502.12 and 1505.2.*

34c. What provisions should **Records of Decision** contain pertaining to **mitigation and monitoring**?

A. Lead agencies "shall include appropriate conditions [including mitigation measures and monitoring and enforcement programs] in grants, permits or other approvals" and shall "condition funding of actions on mitigation." *Section 1505.3.* Any such measures that are adopted must be explained and committed in the ROD.

The reasonable alternative mitigation measures and monitoring programs should have been addressed in the draft and final EIS. The discussion of mitigation and monitoring in a Record of Decision must be more detailed than a general statement that mitigation is being required, but not so detailed as to duplicate discussion of mitigation in the EIS. The Record of Decision should contain a concise summary identification of the mitigation measures which the agency has committed itself to adopt.

The Record of Decision must also state whether all practicable mitigation measures have

been adopted, and if not, why not. *Section 1505.2(c).* The Record of Decision must identify the mitigation measures and monitoring and enforcement programs that have been selected and plainly indicate that they are adopted as part of the agency's decision. If the proposed action is the issuance of a permit or other approval, the specific details of the mitigation measures shall then be included as appropriate conditions in whatever grants, permits, funding or other approvals are being made by the federal agency. *Section 1505.3 (a), (b).* If the proposal is to be carried out by the [46 FR 18037] federal agency itself, the Record of Decision should delineate the mitigation and monitoring measures in sufficient detail to constitute an enforceable commitment, or incorporate by reference the portions of the EIS that do so.

34d. What is the **enforceability of a Record of Decision?**

A. Pursuant to generally recognized principles of federal administrative law, agencies will be held accountable for preparing Records of Decision that conform to the decisions actually made and for carrying out the actions set forth in the Records of Decision. This is based on the principle that an agency must comply with its own decisions and regulations once they are adopted. Thus, the terms of a Record of Decision are enforceable by agencies and private parties. A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein.

35. **Time Required for the NEPA Process.** How long should the NEPA process take to complete?

A. When an EIS is required, the process obviously will take longer than when an EA is the only document prepared. But the Council's NEPA regulations encourage streamlined review, adoption of deadlines, elimination of duplicative work, eliciting suggested alternatives and other comments early through scoping, cooperation among agencies, and consultation with applicants during project planning. The Council has advised agencies that under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process. For most major actions, this period is well within the planning time that is needed in any event, apart from NEPA.

The time required for the preparation of program EISs may be greater. The Council also recognizes that some projects will entail difficult long-term planning and/or the acquisition of certain data which of necessity will require more time for the preparation of the EIS. Indeed, some proposals should be given more time for the thoughtful preparation of an EIS and development of a decision which fulfills NEPA's substantive goals.

For cases in which only an environmental assessment will be prepared, the NEPA process should take no more than 3 months, and in many cases substantially less, as part of the normal analysis and approval process for the action.

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.

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).* 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.*

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.

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3. NEPA – Statutory Language

Laws and Executive Orders

Laws
Executive Orders

The NEPA Statute

The National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4(b), Sept. 13, 1982)

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

Purpose

Sec. 2 [42 USC § 4321].

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331].
(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

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 --

(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, 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 by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

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

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

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

(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;

(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 title II of this Act.

Sec. 103 [42 USC § 4333].

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104 [42 USC § 4334].

Nothing in section 102 [42 USC **§** 4332] or 103 [42 USC **§** 4333] shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105 [42 USC § 4335].

The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201 [42 USC § 4341].

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban an rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202 [42 USC § 4342].

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203 [42 USC § 4343].

(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

(b) Notwithstanding section 1342 of Title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

Sec. 204 [42 USC § 4344].

It shall be the duty and function of the Council --

to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 [42 USC **§** 4341] of this title;

to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

to report at least once each year to the President on the state and condition of the environment; and

to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205 [42 USC § 4345].

n exercising its powers, functions, and duties under this Act, the Council shall --

consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

utilize, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206 [42 USC § 4346].

Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates [5 USC **§** 5313]. The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates [5 USC **§** 5315].

Sec. 207 [42 USC § 4346a].

The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

Sec. 208 [42 USC § 4346b].

The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

Sec. 209 [42 USC § 4347].

There are authorized to be appropriated to carry out the provisions of this chapter not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

The Environmental Quality Improvement Act, as amended (Pub. L. No. 91- 224, Title II, April 3, 1970; Pub. L. No. 97-258, September 13, 1982; and Pub. L. No. 98-581, October 30, 1984.

42 USC § 4372.

(a) There is established in the Executive Office of the President an office to be known as the Office of Environmental Quality (hereafter in this chapter referred to as the "Office"). The Chairman of the Council on Environmental Quality established by Public Law 91-190 shall be the Director of the Office. There shall be in the Office a Deputy Director who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The compensation of the Deputy Director shall be fixed by the President at a rate not in excess of the annual rate of compensation payable to the Deputy Director of the Office of Management and Budget.

(c) The Director is authorized to employ such officers and employees (including experts and consultants) as may be necessary to enable the Office to carry out its functions ;under this chapter and Public Law 91-190, except that he may employ no more than ten specialists and other experts without regard to the provisions of Title 5, governing appointments in the competitive service, and pay such specialists and experts without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but no such specialist or expert shall be paid at a rate in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of Title 5.

(d) In carrying out his functions the Director shall assist and advise the President on policies and programs of the Federal Government affecting environmental quality by --

providing the professional and administrative staff and support for the Council on Environmental Quality established by Public Law 91- 190;

assisting the Federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the Federal Government, and those specific major projects designated by the President which do not require individual project authorization by Congress, which affect environmental quality;

reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources;

promoting the advancement of scientific knowledge of the effects of actions and technology on the environment and encouraging the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man;

assisting in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality;

assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established throughout the Federal Government;

collecting, collating, analyzing, and interpreting data and information on environmental quality, ecological research, and evaluation.

(e) The Director is authorized to contract with public or private agencies, institutions, and organizations and with individuals without regard to section 3324(a) and (b) of Title 31 and section 5 of Title 41 in carrying out his functions.

42 USC § 4373. Each Environmental Quality Report required by Public Law 91-190 shall, upon transmittal to Congress, be referred to each standing committee having jurisdiction over any part of the subject matter of the Report.

42 USC § 4374. There are hereby authorized to be appropriated for the operations of the Office of Environmental Quality and the Council on Environmental Quality not to exceed the following sums for the following fiscal years which sums are in addition to those contained in Public Law 91- 190:

(a) $2,126,000 for the fiscal year ending September 30, 1979.

(b) $3,000,000 for the fiscal years ending September 30, 1980, and September 30, 1981.

(c) $44,000 for the fiscal years ending September 30, 1982, 1983, and 1984.

(d) $480,000 for each of the fiscal years ending September 30, 1985 and 1986.

42 USC § 4375.

(a) There is established an Office of Environmental Quality Management Fund (hereinafter referred to as the "Fund") to receive advance payments from other agencies or accounts that may be used solely to finance --

study contracts that are jointly sponsored by the Office and one or more other Federal agencies; and

Federal interagency environmental projects (including task forces) in which the Office participates.

(b) Any study contract or project that is to be financed under subsection (a) of this section may be initiated only with the approval of the Director.

(c) The Director shall promulgate regulations setting forth policies and procedures for operation of the Fund.

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4. AASHTO NEPA Process Overview

Center for Environmental Excellence by AASHTO
One Stop Source of Environmental Information for Transportation Professionals

NEPA Process

Overview

This section provides a brief overview of the National Environmental Policy Act review process as it relates to transportation. Topics include the following:

Background

The National Environmental Policy Act (NEPA) was signed into law on January 1, 1970. The Act establishes national environmental policy and goals for the protection, maintenance, and enhancement of the environment and it provides a process for implementing these goals within the federal agencies. NEPA requires federal agencies to consider the potential environmental consequences of their proposals, to consult with other interested agencies, to document the analysis, and to make this information available to the public for comment before the implementation of the proposals. The complete text of the law may be accessed online at NEPAnet.

NEPA is only applicable to federal actions, including projects and programs entirely or partially financed by federal agencies and that require a federal permit or other regulatory decision. Activities that do not require a commitment of federal funds, such as approvals of access controls (*e.g.*, a new interchange) or approval of an airport layout plan, are also federal actions. NEPA does not apply when actions by a state or local government or private entity do not require federal review. In addition, agency inaction, or refusal to take action, is not an action that is subject to NEPA.

While NEPA established the basic framework for integrating environmental considerations into Federal decisionmaking, it did not provide the details of the process for which it would be accomplished. Federal implementation of NEPA became the charge of the Council on Environmental Quality (CEQ), which interpreted the law and addressed NEPA's action-forcing provisions in the form of regulations and guidance. In 1978, CEQ issued Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR §§ 1500 -1508). In 1980, CEQ issued the guidance document, Forty Most Asked Questions on the CEQ Regulations. Since that time, CEQ has issued additional guidance and other information covering a variety of issues relevant to the NEPA process. This information is available at NEPAnet.

To address the NEPA responsibilities established by CEQ, the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) issued regulations (23 CFR § 771), Environmental Impact and Related Procedures. The FHWA guidance complementing the regulations was issued in the form of a Technical Advisory (T.6640.8A), Guidance for Preparing and Processing Environmental and Section 4(f) Documents. The Technical Advisory provides detailed information on the contents and processing of environmental documents. Additional guidance and information on the NEPA process and other environmental requirements are found in the FHWA Environmental Review Toolkit and on FHWA's SAFETEA-LU Environmental Review Provisions website.

More details about the NEPA process and transportation are available on this web page and on the FHWA NEPA Project Development Web site. Also see FHWA's Re:NEPA Community of Practice website. For airport and rail projects, see FAA's NEPA Implementing Instructions for Airport Projects and FRA's Procedures for Considering Environmental Impacts.

For more information on transportation project delivery and environmental streamlining, please link to Project Delivery/Streamlining section of this website.

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The NEPA Process

NEPA directs federal agencies, when planning projects or issuing permits, to conduct environmental reviews to consider the potential impacts on the environment by their proposed actions.

For transportation projects, NEPA requires the FHWA and other transportation agencies to consider potential impacts to the social and natural environment. In addition to evaluating the potential environmental effects, FHWA must take into account the transportation needs of the public in reaching a decision that is in the best overall public interest. (23 USC 109(h))

The NEPA statute and implementing regulations set forth a process to evaluate potential impacts as well as requirements for documentation of decisions resulting from that process. The key elements of the process include determining the project's purpose and need and the range of alternatives to be considered; determining potential environmental impacts; coordinating with relevant agencies; involving the public; determining mitigation for unavoidable impacts; and documentation of the analysis and decisions through an environmental impact statement, an environmental assessment, or a categorical exclusion supported by the administrative record.

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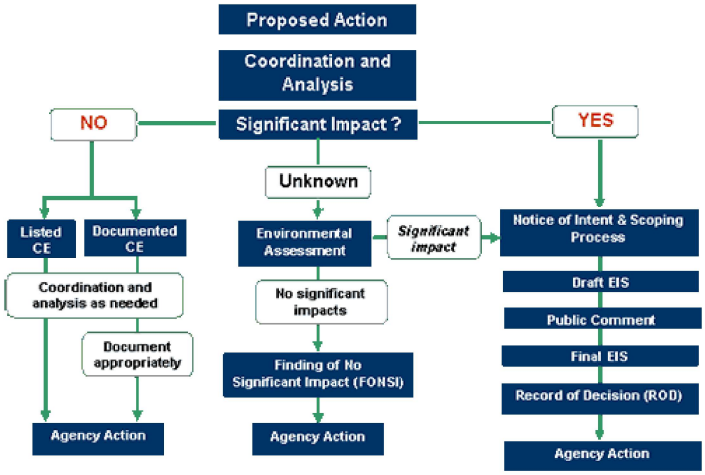
NEPA Process and Documentation Options

There are three processing and environmental documentation options under NEPA, depending on whether or not an undertaking significantly affects the environment. These three options include: categorical exclusion (CE); environmental assessment (EA); and environmental impact statement (EIS). The process for environmental documentation under NEPA is summarized in the chart below:



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Categorical Exclusions

Under NEPA, transportation projects that do not individually or cumulatively have significant environmental effects are classified as categorical exclusions (CEs). The purpose of a CE is to reduce paperwork and delay by providing a compliance mechanism where an EA or EIS is not obviously necessary. Research has indicated that approximately 92 percent of the projects processed by state transportation agencies and the FHWA are CEs.

Each individual federal agency has regulations that implement NEPA. The CEQ regulations require these agencies' regulations to include a list of specific classes or types of actions that qualify as CEs.

FHWA's and FTA's NEPA regulations, titled Environmental Impact and Related Procedures, include two general types of CEs. Regulations at 23 CFR 771.117(c) provide a listing of 20 types of common highway- and transit-related actions found to meet CEQ's CE requirements. Experience has shown that these actions never or almost never cause significant environmental impacts. These actions normally do not require any further NEPA approvals by FHWA or FTA.

The FHWA/FTA regulations at 23 CFR 771(d) list another 12 examples of actions that may be considered CEs, if approved by FHWA/FTA. The regulations state that this list is not all-inclusive. 23 CFR 771.117(d) allows additional actions that are found to meet CEQ's CE requirements to be designated as CEs upon the submission of documentation to FHWA or FTA which demonstrates that the specific conditions or criteria for those CEs are satisfied and that significant environmental impacts will not result.

The CEQ regulations require an agency's regulations to provide for unusual circumstances under which a normally excluded action may have a significant effect. In cases of unusual circumstances, appropriate environmental studies are needed to determine if a CE classification is appropriate. FHWA and FTA define these unusual circumstances as:

- Significant environmental impacts
- Substantial controversy on environmental grounds
- Significant impact on Section 4(f) and Section 106 properties
- Inconsistencies with any Federal, State, or local environmental requirements

On April 4, 2006, FHWA released guidance on state assumption of responsibility for Categorical Exclusions for transportation projects under NEPA. The assumption of responsibility was authorized under Section 6004 of the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The guidance documents include a Transmittal Memo, Template Memorandum of Understanding, Memorandum of Understanding Guidance, FHWA Questions and Answers on the Implementation of SAFETEA-LU Section 6004, and a Memorandum of Understanding Federal Register Notice Template.

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Environmental Assessments

Where the significance of environmental impacts are unknown, a federal agency may prepare an environmental assessment (EA) to determine whether or not an environmental impact statement (EIS) is necessary (i.e. the action would significantly affect the environment.) If the answer is no, the agency issues a finding of no significant impact (FONSI). The FONSI may address measures that an agency will take to reduce (mitigate) potentially significant impacts. If it is determined that the environmental consequences of a proposed federal undertaking are significant, an EIS will then be prepared.

Approximately seven percent of state DOT projects are processed with EAs. An EA is a concise public document designed to provide sufficient evidence and analysis to assist in determining the significance of the environmental impacts of a transportation project proposal. An EA may also facilitate the preparation of an EIS when one is necessary. EA documents typically include brief discussions of the need for the proposal; evaluation of any alternatives to the proposal, environmental impacts of the proposed action and the alternatives, and a listing of agencies and persons consulted during the preparation of the EA.

FHWA and FTA must approve an EA before it is made available to the public. EAs do not need to be circulated, but they must be made available to the public through notices of availability in local, state, or regional clearinghouses, newspapers and other means. Depending on the FHWA-approved state public involvement procedures, a public hearing may or may not be required. A 30-day review period is required but may be reduced in rare circumstances. After public comments are received and considered, a determination of the significance of the impacts is made. If after completing the EA it is evident that the proposed action will have no significant impact on the environment, a finding of no significant impact (FONSI) is prepared and no EIS is required. If at any point in the process it is evident that there may be a significant environmental impact, the first steps to preparing an EIS are immediately taken.

A FONSI is a document that briefly explains why the project will have not have significant impacts (i.e., it explains why no EIS is being prepared). The FONSI must include the EA modified to reflect all applicable comments and responses (or incorporate it by reference) or include a summary of it and must note any other documents related to the EA. If not done in the EA, the FONSI must include the selected alternative. No formal public circulation of the FONSI is required, but the state clearinghouse must be notified of the availability of the FONSI. In addition, FHWA recommends that the public be notified through notices in local newspapers.

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Environmental Impact Statements

NEPA requires federal agencies to prepare environmental impact statements (EISs) when there is a proposal for a major federal action that significantly affects the quality of the human environment. Currently, only a very small number of projects processed by state transportation agencies require EISs. An EIS includes a detailed evaluation of the proposed action and alternatives. The public, other federal agencies and outside parties may provide input into the preparation of an EIS and then comment on the draft EIS when it is completed. After a final EIS is prepared and at the time of its decision, a federal agency will prepare a public record of its decision addressing how the findings of the EIS, including consideration of alternatives, were incorporated into the agency's decision-making process. The purpose of an EIS is to serve as a tool to promote environmentally sensitive decisionmaking. To accomplish that goal, the document should:

- Inform the decision maker of the environmental effects of an agency action;
- Make agencies consider alternative ways of taking actions that would avoid or minimize adverse impacts; and
- Inform the public.

An EIS should also:

- Be analytic rather than encyclopedic;
- Be clear, concise and to the point;
- Discuss briefly, non-important issues; and
- Incorporate material by reference.

The key steps in the EIS process are completed in the following order:

- Notice of Intent (NOI),
- Scoping,
- Draft EIS,
- Final EIS,
- Record of Decision (ROD).

Notice of Intent and Scoping

The Notice of Intent (NOI) to prepare an EIS is published in the *Federal Register* by the lead Federal agency. The purposes of the NOI are to notify and involve all agencies and individuals about the proposed action and to identify the issues that should be analyzed and eliminate from study those that are not important to the decision. The content of a NOI typically consists of a brief description of the proposed action, possible alternatives, and the proposed scoping process. Scoping is an early and open process involving the public and other federal, state, and local agencies, as well as Indian tribes, for determining the scope of issues to be addressed in the EIS, identifying alternatives, and identifying the significant issues relating to the project. *(i.e.,* to narrow the focus of the analysis).

FHWA's Technical Advisory (T.6640.8A), Guidance for Preparing and Processing Environmental and Section 4(f) Documents provides additional guidance on the preparation of the NOI and on the scoping process.

Draft EIS and Final EIS

The draft EIS provides a detailed description of the proposal, the purpose and need, reasonable alternatives, the affected environment, and presents an analysis of the anticipated beneficial and adverse environmental effects of the alternatives. If there is a preferred alternative, it can be identified at the draft EIS stage and it must be identified at the final EIS stage. Once the draft EIS is prepared and it is approved, agencies must:

- Circulate it to all relevant federal, state, and local agencies,
- Make available to the public,
- Submit the document to the Environmental Protection Agency for publishing the notice of availability of the draft EIS for public comment in the *Federal Register* and

The usual comment period on a draft EIS is not less than 45 days and no more than 60 days, and unless (1) a different period is set by agreement of the lead agency, project sponsor, and all participating agencies, or (2) the deadline is extended by the lead agency “for good cause.” All dates are measured from the date of public notice by EPA in the *Federal Register*.

Following a formal comment period and receipt of comments from the public and other agencies, the final EIS is prepared. The final EIS includes responses to any issues raised by the comments on the draft EIS. Based on analysis and comments, the final EIS must identify the preferred alternative even if it is already identified in the draft EIS. After responding to comments, the agency must circulate the final EIS for review. Agencies cannot make a final decision until 30 days after the final EIS is filed. *Record of Decision (ROD)*

The ROD is the final step in the EIS process and may not be issued sooner than 30 days after the approved final EIS is distributed nor 90 days after the draft EIS is circulated. RODs are not required for EAs. The ROD is a concise document that:

- states the decision (i.e., identifies the selected alternative).
- presents the basis for the decision.
- identifies all other alternatives considered and summarizes why they were not selected.
- identifies the environmentally preferable alternative and, if applicable, why it was not chosen.
- lists and identifies all environmental commitments made in the EIS.
- adopts and summarize a monitoring and enforcement program, if applicable, for any mitigation.

A ROD is published in accordance with an agency's regulations. It can be revised if a different alternative is selected that was previously fully evaluated in final EIS, or if there are substantial changes to mitigation measures or findings. A revised ROD should be distributed to all recipients of the final EIS.

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Reevaluations and Supplemental EISs

Reevaluations

A reevaluation is an analysis of any changes in a proposed action, affected environment, anticipated impacts, and mitigation measures at specific times in the project development process. The purpose of a reevaluation is to determine whether an approved environmental document or CE designation remains valid and to determine whether significant changes require preparation of a supplemental or new environmental document. Formal documentation of the reevaluation process on the validity of the approved EIS, FONSI or CE designation is not necessary in all cases, but consultation with FHWA is required before major approvals (*e.g.,* right-of-way authorization or construction authorization). In cases of a draft EIS, where a final EIS has not been issued and where no action to advance the project has occurred in the last three years, 23 CFR 771.129 requires a written reevaluation of the determination that the original document is still valid and formalizes the consultation between FHWA and a state DOT. A final EIS is considered valid up to three years following the last major approval. If no action to advance a project has occurred in the last three years, a written reevaluation is required. Project-specific issues related to reevaluation should be referred to the appropriate FHWA division office.

Supplemental EISs A draft EIS or final EIS may be supplemented if the reevaluation of the EIS reveals that:

- There are significant changes in the proposed action that are relevant to the environmental concerns, or
- There are significant new circumstances that are relevant to the proposed action or its impacts, or
- There is significant new information that is relevant to the proposed action or its impacts.

An agency is not required to develop a new or supplemental EIS every time it receives new information or a change is made regarding a project. For example, a supplemental EIS is *not* required if changes or new information/circumstances do not result in previously unidentified significant adverse impacts or if they reduce the adverse environmental impacts without additional new significant impacts. The format of a supplemental EIS is flexible (*i.e.*, it does not have to follow the standard CEQ format for EISs). Generally, a supplemental EIS will:

- Tell why a supplemental EIS was prepared;
- Summarize or reference the valid part of original EIS; and
- Evaluate changes/new impacts.

Early coordination with involved agencies and the public is essential, although scoping is not required. A supplemental EIS of limited scope does not necessarily rescind previous project approvals or affect project activities. On the other hand, a supplemental EIS of major scope will require suspension of some or all project activities.

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Key Components of the NEPA Process

Purpose and Need

The purpose and need discussion is one of the most important parts of any NEPA process and should, therefore, be clear and well documented. It should be a full and honest explanation of why an agency is considering an action. The purpose and need is a statement of the problem and evidence that supports that the problem exists.

Some common needs included in a purpose and need discussion are transportation demand, safety, legislative direction, urban transportation plan consistency, modal interrelationships, system linkage, and the condition of an existing facility.

Since the purpose and need discussion is essential to the development of the range of alternatives, it should include a clear statement of identified objectives that the proposed action is intended to achieve for improving transportation conditions. Some goals in a purpose and need discussion may include: achieving an objective in a transportation plan; supporting local land use and growth objectives, or serving national defense or security needs.

The lead agencies are responsible for the development of the proposed action's purpose and need discussion. In developing the statement of purpose and need, in the case of an EIS, the lead agencies must provide opportunities for the involvement of participating agencies and the public and must consider the input provided by these groups. After considering this input, the lead agencies decide the project's purpose and need. Per guidance issued by CEQ, which was affirmed by Congress in its conference report on SAFETEA-LU, other Federal agencies should afford substantial deference to FHWA's or FTA's purpose and need for a proposed transportation action.

Additional information is available on FHWA's Environmental Review Toolkit web page under NEPA and Transportation Decisionmaking, Elements of Purpose and Need. Also see FHWA and FTA's 2003 Guidance on Purpose and Need and the AASHTO Practitioner's Handbook, Defining the Purpose and Need and Determining the Range of Alternatives for Transportation Projects.

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Alternatives Analysis

The alternatives analysis describes the process that was used to develop, evaluate, and eliminate potential alternatives based on the purpose and need of the project. In accordance with the requirements of 23 CFR 771.111(f), project alternatives must connect logical termini, have independent utility, and not restrict the consideration of future transportation alternatives. The analysis of alternatives is a basic requirement of NEPA. It explains to the public the options that are available to the agency in addressing the problem identified in the purpose and need. Federal agencies are not required to consider every potential alternative; however, they are responsible for developing the full range of alternatives. In the case of an EIS, the lead agencies must provide opportunities for the involvement of participating agencies and the public in developing the alternatives and must consider the input provided by these groups. After considering this input, the lead agencies will decide the range of alternatives for analysis. The alternatives section of an EIS should present the environmental impacts of a proposed action and all reasonable alternatives at a comparable level of detail and in comparative form to give the decisionmaker a clear basis for choice among options. The "no-build" alternative is included as a benchmark against which the impacts of other alternatives can be compared. If there is a preferred alternative, an agency can identify it at the draft EIS stage and must identify it at the final EIS stage and the basis for that decision. SAFETEA-LU allows the preferred alternative in an EIS to be developed to a higher level of detail than the other alternatives in order to facilitate the development of mitigation measures or facilitate concurrent compliance with other applicable environmental laws.

Additional information is available on FHWA's Environmental Review Toolkit web page under NEPA and Transportation Decisionmaking, Development and Evaluation of Alternatives.

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Impacts and Mitigation

NEPA requires consideration of the direct, indirect, and cumulative impacts of a proposed action and its alternatives on the environment. Direct effects are those that are caused by the action and occur at the same time and place. Indirect effects are those that are caused by the action and occur later or farther away (off-site) but are still reasonably foreseeable. Cumulative impacts are defined as the impact on the environment that 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. Additional information is available on the Indirect Effects and Cumulative Impacts topic of this website. Potential measures to mitigate adverse environmental effects also must be considered. Section 1508.20 of CEQ's Regulations defines mitigation as including:

- Avoiding the impact altogether by not taking a certain action or parts of an action.
- Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- Rectifying the impact by repairing, rehabilitating, 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.

Typically, in cases of an EIS, the draft EIS describes options for mitigation, while the final EIS includes the decisions on what mitigation would be implemented.

Additional information is available on FHWA's Environmental Review Toolkit under NEPA and Transportation Decisionmaking, Environmental Impacts and Mitigation.

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Interagency Coordination

The NEPA process includes requirements for interagency coordination and cooperation and public participation in planning and project development decisionmaking. CEQ's Regulations introduced the concepts of "lead agency" and "cooperating agency" to help streamline the environmental process; eliminate duplication in Federal, state, and local procedures; and integrate NEPA requirements with other Federal environmental review and consultation requirements. A lead agency (40 CFR 1508.16) is defined as the agency preparing or having taken primary responsibility for preparing the EIS and for supervising the NEPA process. The U.S. DOT is designated as the lead agency for the environmental review process for any highway or transit project requiring U.S. DOT approval. FHWA is the federal lead agency in the NEPA process for highway projects requiring FHWA approval. FTA fulfills that role for transit projects. A cooperating agency (40 CFR 1508.5) is an agency with jurisdiction by law or special expertise on any environmental issues that the EIS discusses.

The direct recipient of federal funds for a project must serve as a joint lead agency. For FHWA, the state DOT is typically the direct recipient of project funds and, therefore, must serve as a joint lead agency along with FHWA. For FTA, the local transit agency typically is the direct recipient of project funds, and therefore serves as a joint lead agency along with FTA. In addition to the required lead agencies, other Federal, state, or local governmental entities, may act as joint lead agencies, at the discretion of the required lead agencies, in accordance with CEQ Regulations. Private entities, either acting as sponsors or co-sponsors of projects, *cannot* serve as joint lead agencies, and their role is limited to providing environmental or engineering studies and commenting on environmental documents.

The lead federal agency works cooperatively with other federal and state agencies during the environmental review process. Lead agency responsibilities in the NEPA process include, where applicable, inviting cooperating agencies, scoping, providing project information, conducting field reviews, developing consensus among a wide range of stakeholders with diverse interests, resolving conflict, and ensuring that issues are addressed and decisions are fully explained in the environmental document.

The concept of "cooperating agencies" is a mechanism designed to address agencies' concerns early in the NEPA process and avert late disagreements. Cooperating agencies are agencies with jurisdiction by law over a project and/or special expertise on environmental issues that the EIS discusses. These agencies include, but are not limited to:

- U.S. Army Corps of Engineers [Section 10/404 Permits]
- U.S. Fish and Wildlife Service
- U.S. Environmental Protection Agency
- National Park Service [Section 6(f)]
- U.S. Coast Guard [Section 9 Permits]
- Advisory Council on Historic Preservation [Historic/Archaeological Sites]
- State and local agencies
- Indian Tribes

Cooperating agency responsibilities include participating in scoping, attending joint field reviews, and providing meaningful and early input to issues of concern. SAFETEA-LU created a new category of "participating agencies" to allow more agencies a formal role and rights in the environmental review process. Federal state, tribal, regional, and local government agencies that may have an interest in the project should be invited to serve as participating agencies. Nongovernmental organizations and private entities cannot serve as participating agencies. All cooperating agencies are participating agencies, but not all participating agencies are cooperating agencies. SAFETEA-LU also required that the lead agencies establish a plan for coordinating public and agency participation and comment during the environmental review process. These new requirements are discussed in more detail in the subsection below titled SAFETEA-LU Environmental Review Provisions.

Additional information is available on FHWA's Environmental Review Toolkit under NEPA and Transportation Decisionmaking, Interagency Coordination.

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Public Involvement

Handled correctly, scoping and public participation in the NEPA process will improve acceptance of the decision and, at minimum, provide the decisionmaker with the best information possible for making a decision. The amount and type of public involvement will vary depending on the complexity and degree of controversy involved in a project. It is very helpful to obtain public input on a range of issues, including scoping; purpose and need; alternative development; effects analysis; making the decision; and implementation. SAFETEA-LU requires that the lead agencies establish a plan for coordinating public and agency participation and comment during the environmental review process. Coordination plans are discussed further in the subsection titled SAFETEA-LU Environmental Review Provisions.

AASHTO Practitioner's Handbook 05—Utilizing Community Advisory Committees for NEPA Studies (December 2006) suggests a Citizen Advisory Committee as a public participation technique that can be employed to gain stakeholder feedback, identify and resolve local concerns, and build community support during the pre-NEPA and NEPA decision-making processes.

Additional information is available on FHWA's Environmental Review Toolkit under NEPA and Transportation Decisionmaking, Public Involvement.

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Comments

The draft EIS must summarize the scoping process, the results of any meetings that have been held, and any comments received during preliminary coordination. Between the draft EIS and the final EIS, the state DOT and FHWA must consider and respond to all substantive comments received on the draft EIS, including those from public hearings.

Comments received after the close of the comment due date should be considered, if at all possible. The final EIS should note that the comments were filed late but were treated consistent with NEPA. Courts have ruled that the views of the cooperating agencies regarding the environmental impacts of a project are entitled to deference from the lead agency. However, this does not mean that the comments of such agencies must be substituted for reasonable, good faith judgments of the lead agency. The ultimate decision under NEPA rests with the lead agency. The administrative record for the final EIS must include copies of the comments received and the agency's responses. If the EIS was changed in response to comments, these changes should be referenced in the responses.

AASHTO Practitioner's Handbook 02—Responding to Comments on an Environmental Impact Statement, contains more information about this topic.

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Flexibility in NEPA Document Formats

The traditional format for EIS documents is described in CEQ regulations (40 CFR 1502) and in FHWA's Technical Advisory T 6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents (TA). In 2006, a joint work group of AASHTO, the American Council of Engineering Companies, and FHWA issued a report aimed at improving the quality of NEPA documents. Addressing concerns that NEPA documents had become too lengthy and complicated, the report stressed that EISs should be clear, concise, and easy to understand. The report, Improving the Quality of Environmental Documents, outlined the following "core principles" for quality NEPA documents:

- Principle 1: Tell the story of the project so that the reader can easily understand the purpose and need for the project, how each alternative would meet the project goals, and the strengths and weaknesses associated with each alternative.
- Principle 2: Keep the document as brief as possible, using clear, concise writing; an easy-to-use format; effective graphics and visual elements; and discussion of issues and impacts in proportion to their significance.
- Principle 3: Ensure that the document meets all legal requirements in a way that is easy to follow for regulators and technical reviewers.

The report also stressed that "effective use of the scoping process is integral to the successful implementation of these core principles. The scoping process involves inviting participation; coordinating with the public and agencies; determining the scope of the project and study area; identifying important issues versus minor issues; allocating assignments; and determining specific activities and their timing." The report offered the following "blueprint" for organization of EIS documents:

- Document Summary
- Main Body
  - Purpose and Need
  - Alternatives Considered
  - Environmental Resources, Impacts, and Mitigation
  - Public Comments and Agency Coordination
  - Section 4(f) Chapter
  - Comparison and Selection of Alternatives
- Appendices and Technical Reports

Quality NEPA documents "should have content as well as format focused to 'tell the project story' to multiple audiences," the report said. "Documents should use a variety of techniques to communicate complex issues, moving away from jargon and acronyms. And while the document should be concise, it also should communicate strong, well-grounded findings. Quality NEPA documents also should highlight project-related environmental benefits, as well as impacts." For more information, link to Improving the Quality of Environmental Documents.

In a July memorandum, FHWA endorsed this approach as consistent with FHWA guidance and CEQ regulations. The agency urged practitioners take advantage of the regulations' flexibility and improve the effectiveness of NEPA documents:

"Different formats are allowed by the CEQ regulation and the TA within certain parameters established at 40 CFR 1502.10. What is more important than the way an EIS document is organized is that it convey, in reasonable and understandable terms, the substance of project purpose and need, the alternatives considered, the affected environment and environmental consequences of the action. We encourage you to consider ways to improve the effectiveness of the NEPA documents prepared in your state, including the use of different formats or alternative approaches to making documents easier to read, while demonstrating compliance with NEPA and other applicable environmental laws that satisfy the needs and expectations of our partners and stakeholders." (FHWA Memorandum: Improving the Quality of Environmental Documents, July 31, 2006)

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The SAFETEA-LU Environmental Review Provisions

On August 10, 2005, President George W. Bush signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) established new procedures that must be followed when preparing an EIS for a highway, transit, or multimodal projects. These changes are aimed at improving and streamlining the environmental review process for these transportation projects. These changes, however, came with some additional steps and requirements.

The term "environmental review process" means the project development process followed when preparing a NEPA document for a transportation project. In addition to NEPA requirements, the term also includes the process for compliance with, and completion of, any environmental permit, approval, review, or study required for the transportation project under any Federal law. Some of the other Federal environmental laws, such as Section 4(f) of the Department of Transportation Act, are within the purview of USDOT, and some, such as Section 404 permitting, are under the authority of other Federal agencies.

This process is mandatory for EISs, but is optional for EAs. All highway and transit EISs for which the Notice of Intent was published on or after August 11, 2005 must follow the new review process while highway and transit EISs for which a Notice of Intent was published before August 11, 2005 may continue as "grandfathered" under prior law.

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Participating Agencies

SAFETEA-LU updates the environmental review process to include a new category of "participating agencies" that have an interest in the project. Participating agencies are discussed in more detail in the subsection titled Interagency Coordination.

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Environmental Review Process Project Initiation

Project initiation is an extra step that SAFETEA-LU inserted into the process for EISs. To initiate the environmental review process, SAFETEA-LU requires that a project sponsor notify USDOT that it is ready to proceed with the evaluation of impacts and alternatives. This letter should describe the type of work, termini, length, and general location of the proposed project.

The notification must also identify expected issues so that participating agencies can be identified and it must provide a list of any other Federal approvals (*e.g.,* Section 404 permits) anticipated to be necessary for the proposed project, to the extent that such approvals are known at the outset. The notice also should indicate the time frame within which the environmental review process should be started.

The notification would normally occur before the publication of the notice of intent in the *Federal Register* and may even occur within the transportation planning process, if an appropriate level of project information is available.

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Coordination Plan

SAFETEA-LU requires that the lead agencies establish a plan for coordinating public and agency participation and comment during the environmental review process. It also requires that the participating agencies and the public have the opportunity to comment on the purpose and need and range of alternatives for a project.

The coordination plan should outline (1) how the lead agencies have divided the responsibilities for compliance with the various aspects of the environmental review process, such as the issuance of invitations to participating agencies, and (2) how the lead agencies will provide the opportunities for input from the public and other agencies, in accordance with applicable laws, regulations, and policies. The plan also should identify coordination points, such as:

- Notice of intent publication and scoping activities.
- Development of purpose and need.
- Identification of the range of alternatives.
- Collaboration on methodologies.
- Completion of the draft EIS.
- Identification of the preferred alternative and the level of design detail.
- Completion of the final EIS.
- Completion of the ROD.
- Completion of permits, licenses, or approvals after the ROD.

Because key elements of the coordination plan (such as a project schedule) may be setting expectations that require a commitment of resources by the participating agencies, the coordination plan must be shared with the public and with participating agencies so that they know what to expect and so that any disputes are resolved as early as possible.

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Limitation on Lawsuits

SAFETEA-LU established a 180-day time limit on legal challenges to Federal agency approvals for projects. Transportation agencies see this as adding a needed element of certainty that projects will not be challenged as a way to delay projects after environmental permits and decisions have been reached.

The 180-day clock starts with publication of a notice in the *Federal Register* that a permit, license, or approval action is final. Previously, notices regarding Record of Decisions (RODs) and Findings of No Significant Impact (FONSIs) were not published in the *Federal Register*.

FHWA publishes notices for most EIS projects and many EA projects. FHWA does not expect statute of limitations notices to be used for projects that are CEs. FHWA encourages the inclusion of a statement summarizing the statute of limitations provision in NEPA documents.

If no statute of limitations notice is published, the period for filing claims is not shortened from what is provided by other parts of Federal law. If other Federal laws do not specify a statute of limitations, then a 6-year claims period applies.

More information on SAFETEA-LU environmental provisions and their implementation is available in FHWA's SAFETEA-LU Environmental Review Process Final Guidance, issued in November 2006, and in the SAFETEA-LU section of this website.

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Links to NEPA-Related Laws, Regulations, Guidance, and Executive Orders

Federal NEPA Laws, Regulations, and Guidance

- NEPAnet
- NEPA Statute
- Statute for Clean Air Act, Section 309
- Executive Orders
- Regulations for Implementing NEPA from CEQ
- Procedures for Implementing NEPA from Federal Agencies
- CEQ Guidance
- Federal Agency NEPA Web Sites
- Federal NEPA Contacts
- State Information
- Tribal Information
- Executive Order 13274: Environmental Stewardship and Transportation Infrastructure Reviews (September 2002)
- Forty Most Asked Questions on the CEQ Regulations (March 16, 1981)
- CEQ Memorandum for Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (January 30, 2002)
- CEQ Guidance on the Consideration of Past Actions in Cumulative Effects Analysis (June 24 2005)
- Considering Cumulative Effects Under the National Environmental Policy Act (November 1997)

FHWA/FTA Regulations, Policy, and Guidance

- Amendments to Environmental Impact and Related Procedures, Final Rule (23 CFR 771) (March 24, 2009)
- Environmental Impact and Related Procedures (23 CFR 771) (October 16, 2001)
- 23 CFR 771-Preamble to the Regulation (August 28, 1987)
- Guidance for Preparing and Processing Environmental and Section 4(f) Documents FHWA Technical Advisory T.6640.8A (October 30, 1987)

SAFETEA-LU

- Surface Transportation Project Delivery Pilot Program Final Rule (SAFETEAâ€'LU Section 6005) (February 12, 2007)
- SAFETEA-LU Environmental Review Process Final Guidance (SAFETEAâ€'LU Section 6002) (Nov. 15, 2006)
- State Assumption of Responsibility for Categorical Exclusions Transmittal Memo, Template Memorandum of Understanding, Memorandum of Understanding Guidance, FHWA Questions and Answers on the Implementation of SAFETEA-LU Section 6004, and a Memorandum of Understanding Federal Register Notice Template (April 4, 2006)

Improving the Quality of Environmental Documents

- Improving the Quality of Environmental Documents (AASHTO and ACEC in cooperation with FHWA) (May 2006)
- FHWA Memorandum on Improving the Quality of NEPA Documents (July 31, 2006)

Logical Termini

- The Development of Logical Project Termini (November 5, 1993)

Purpose and Need

- FHWA/FTA Interim Guidance on Purpose and Need, (August 21, 2003)
- The Importance of Purpose and Need in Environmental Documents (September 18, 1990)

Indirect and Cumulative Impacts

- Questions and Answers Regarding the Consideration of Indirect and Cumulative Impacts in the NEPA Process
- Secondary and Cumulative Impact Assessment in the Highway Project Development Process--NEPA and Transportation Decisionmaking (April 1992)

Prior Concurrence

- Guidance on FHWA Prior Concurrence Procedures for EISs (October 5, 2001)

Reevaluations

- Re-evaluation of Environmental Documents—DRAFT (May 30, 2006)

Tiering

- Tiering of EISs (September 18, 2001)

Design-Build Contracting

- Design-Build Contracting Final Rule (Feb. 12, 2007) (Allows Design/Build Contracts Before Completion of NEPA)

Linking Planning and NEPA

- Statewide Transportation Planning; Metropolitan Transportation Planning; Final Rule (Feb. 14, 2007) (includes updated version of FHWA Guidance on Linking Planning and NEPA as an Appendix)
- Integration of Planning and NEPA Processes (February 22, 2005) (FHWA and FTA Guidance)

FAA Policy, & Guidance

- FAA's NEPA Implementing Instructions for Airport Projects (Order 5050.4B) (April 2006)

FRA Policy & Guidance

- FRA's Procedures for Considering Environmental Impacts (May 26, 1999)

EPA Policy & Guidance

- Environmental Impact Statement (EIS) Filing System Guidance (March 7, 1989)
- Statute for Clean Air Act, Section 309

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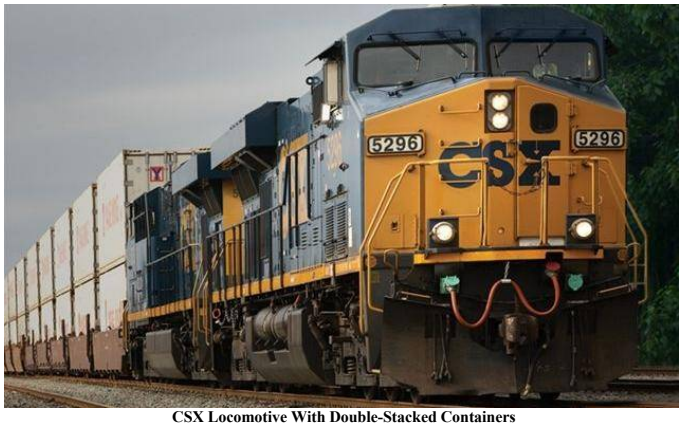
Transportation and Climate Change Resource Center | SCOE Website

5. NEPA Flowchart, Maryland Department of Transportation

National Environment Policy Act (NEPA)



CSX Locomotive With Double-Stacked Containers

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National Environmental Policy Act (NEPA)

On This Page

I. NEPA Background

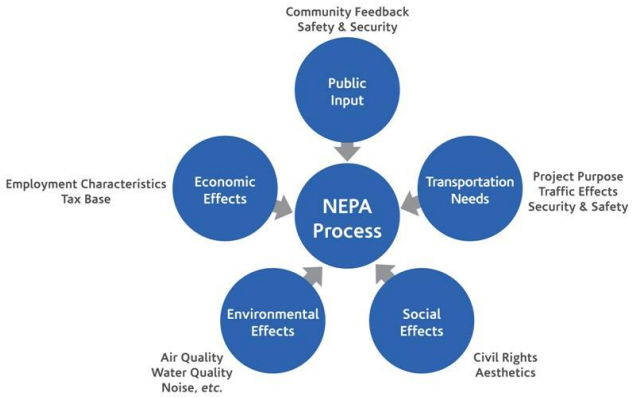
The National Environmental Policy Act of 1969 (NEPA) establishes protection of the environment as a national priority and mandates that environmental impacts be considered when undertaking federal actions affecting the environment.

NEPA has four primary purposes:

1. **To declare a national environmental policy**
2. **To promote efforts to protect the environment**
3. **To improve national understanding of environmental issues**
4. **To establish the Council on Environmental Quality**

The NEPA process should be integrated as early as possible into project planning. This effort requires federal agencies to work with state and local agencies to the fullest extent possible.

Public involvement is a key component of the NEPA process. As part of the NEPA review, environmental impacts to natural, social, economic, and cultural resources are studied and weighed against the project's purpose and need. The project findings are presented to the public for review.



NEPA also guides project planning by establishing an umbrella process to coordinate compliance with federal, state and local laws, while protecting our environmental and cultural resources such as the following:

- **Wetlands**
- **Farmland**
- **Parklands**
- **Historic preservation**
- **Air quality**
- **Noise**
- **Traffic**
- **Visual impacts**
- **Cultural resources**
- **Community impacts**
- **Federal, state, and local laws**
- **Endangered species**
- **Safety**
- **Civil rights**
- **Environmental justice**
- **And more…**

II. Application of NEPA

A project may trigger a NEPA analysis when one of the following federal actions occurs:

- **A project receives federal funding**
- **A project requires federal permits or approvals**
- **A project involves federal lands and facilities**

III. NEPA Process Overview

The NEPA process includes a number of chronological steps to identify and evaluate a project and its impacts on the environment. Public involvement is encouraged during all stages of the NEPA process.

IV. NEPA Documentation

After a comprehensive public review, the "lead" federal agency—for example, the Federal Railroad Administration or the Federal Highway Administration—will determine the significance of a project's overall impact and whether additional evaluation is necessary.

NEPA categorizes projects into one of three classifications, each requiring a different level of documentation.

1) Categorical Exclusions (CE)— CEs are granted for actions that do not individually or cumulatively involve significant social, economic or environmental impacts. A CE typically has little or no impact. Few additional studies, if any, are required for projects of this type. Successful completion of a CE allows the project applicant to proceed to the design, right-of-way acquisition, construction, and mitigation phases.

2) Environmental Assessments (EA) — An EA is required when the significance of the environmental impact is not clearly understood. Technical analyses, public coordination and evaluation of the project alternatives are undertaken to assess and determine the level of mitigation, if required, for the project. An EA may result in either:

a. A "Finding of No Significant Impact (FONSI)" requiring no further environmental evaluation. Successful completion of a FONSI allows the project applicant to proceed to the design, right-of-way acquisition, construction, and mitigation phases.

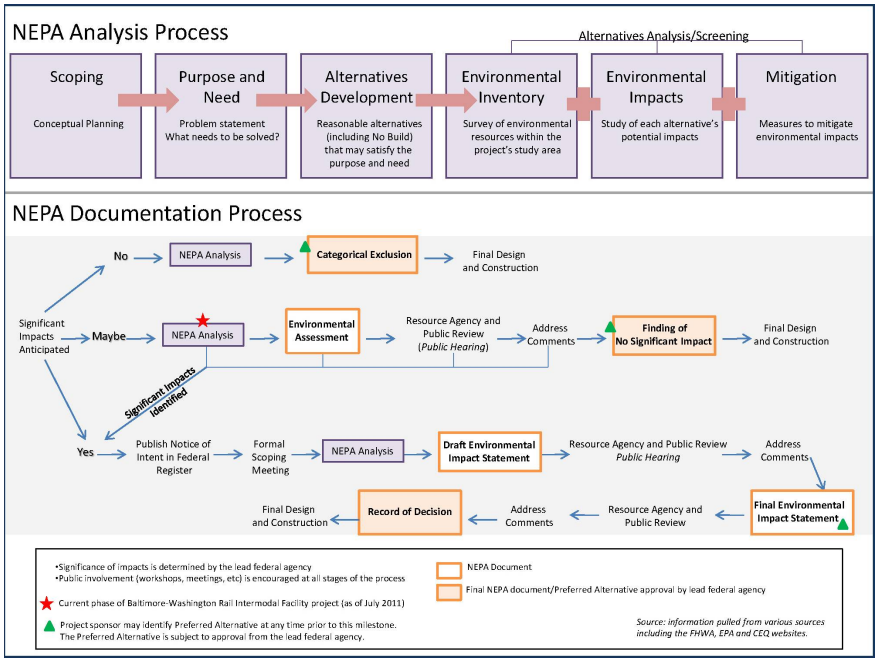
b. An identification of potentially "significant impact." This requires completion of an Environmental Impact Statement (EIS).

3) Environmental Impact Statements (EIS)—An EIS, the most detailed documentation required under NEPA, is required for all major federal actions resulting in significant impacts to the environment. An EIS requires substantial technical analysis and a public review process to evaluate project alternatives, identify potential social, economic and environmental impacts of the project, and designate methods to avoid or mitigate these impacts. Successful completion of an EIS results in a "Record of Decision." At this point, an applicant may proceed to the design, right-of-way acquisition, construction, and mitigation phases.

V. PA Analysis and Documentation Process

The following flowchart outlines the milestones of the environmental analysis and documentation process required by NEPA. Please click on the

graphic to view a larger image.



For additional information on NEPA, please visit the Council on Environmental Quality's NEPA homepage by clicking here

6. CEQ 40th Anniversary Guidance

a. Categorical Exclusion

February 18, 2010

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: NANCY H. SUTLEY, Chair, Council on Environmental Quality

SUBJECT: ESTABLISHING AND APPLYING CATEGORICAL EXCLUSIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

In this Memorandum, the Council on Environmental Quality (CEQ) proposes guidance on establishing, applying, and revising categorical exclusions in accordance with Section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and the CEQ Regulations for Implementing the Procedural Provisions of NEPA.[1] The guidance memorandum does not establish new requirements. CEQ's interpretation of NEPA is entitled to deference. *Andrus v. Sierra Club*, 442 U.S.347, 358 (1979). CEQ is providing this draft guidance for public review and comment. CEQ intends to issue final guidance expeditiously after reviewing public comment. CEQ does not intend for this guidance to become effective until issued in final form.

I. INTRODUCTION

A "categorical exclusion" describes a category of actions that do not typically result in individual or cumulative significant environmental effects or impacts. When appropriately established and applied, categorical exclusions serve a beneficial purpose. They allow Federal agencies to expedite the environmental review process for proposals that typically do not require more resource-intensive Environmental Assessments (EAs) or Environmental Impact Statements (EISs).

The CEQ Regulations define "categorical exclusion" at 40 Code of Federal Regulations (CFR) § 1508.4:

> "Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Before applying a categorical exclusion, a Federal agency reviews a proposed action to ensure there are no factors that merit analysis and require documentation in an EA or EIS. This review assesses

[1] Council on Environmental Quality, "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act," 40 C.F.R. Parts 1500-1508 (Nov. 1978), available at http://ceq.hss.doe.gov/nepa/regs/ceq/toc_ceq.htm.

whether there are any "extraordinary circumstances" to determine whether the application of a categorical exclusion is appropriate. Extraordinary circumstances are a required element of all Federal agency National Environmental Policy Act (NEPA) implementing procedures.[2]

Though categorical exclusions have been one method used since the 1970s to satisfy Federal agencies' NEPA obligations, the expansion of the number and range of activities categorically excluded combined with the extensive use of categorical exclusions has underscored the need for guidance about the promulgation and use of CEs. An inappropriate reliance on categorical exclusions may thwart the purposes of NEPA, compromising the quality and transparency of agency decisionmaking as well as the opportunity for meaningful public participation and review. Categorical exclusions are the most frequently employed method of complying with NEPA, underscoring the value for guidance on the development and use of categorical exclusions[3] Previously, CEQ established the CEQ NEPA Task Force, made up of senior agency experts, to review, improve, and modernize NEPA implementation. The Task Force recommended CEQ issue clarifying guidance to promote the consistent and appropriate development and use of categorical exclusions.[4] This guidance addresses that recommendation.

This guidance is provided to assist Federal agencies in establishing and applying categorical exclusions under NEPA. It addresses the substantive and procedural predicates for establishing categorical exclusions. This guidance is limited to categorical exclusions established by Federal agencies pursuant to 40 C.F.R. § 1507.3.[5] It is based on CEQ regulations and guidance, legal precedent, and agency NEPA experience. In accordance with 40 C.F.R. § 1507.1 of the CEQ Regulations, the intent of this guidance is to afford agencies flexibility in developing and implementing categorical exclusions while ensuring categorical exclusions are administered to further the purposes of NEPA and the CEQ implementing regulations.

The guidance addresses how to:

- Establish categorical exclusions by outlining the process required to establish a categorical exclusion.
- Use public involvement and documentation to help define and substantiate a proposed categorical exclusion.
- Apply an established categorical exclusion, and determine when to prepare documentation and involve the public.
- Conduct periodic reviews of categorical exclusions to assure their continued appropriate use and usefulness.

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[2] 40 C.F.R. § 1508.4.

[3] See the CEQ reports to Congress at http://ceq.hss.doe.gov/nepa/nepanet.htm. This speaks to the wide use of categorical exclusions and therefore the value of clearer guidance.

[4] Council on Environmental Quality, "The NEPA Task Force Report to the Council on Environmental Quality – Modernizing NEPA Implementation," (Sep. 2003), available at http://ceq.hss.doe.gov/ntf/report/index.html.

[5] This guidance does not address categorical exclusions established by Congress, as their use is governed by the terms of specific legislation and its interpretation by the agencies charged with implementation of that statute and NEPA.

II. ESTABLISHING NEW CATEGORICAL EXCLUSIONS

A. The Purpose for Establishing New Categorical Exclusions[6]

Agencies should establish new categorical exclusions to eliminate unnecessary paperwork and effort reviewing the environmental effects of categories of actions that, absent extraordinary circumstances, do not have significant environmental effects. By establishing new categorical exclusions and using them appropriately, agencies can focus their environmental review efforts on proposals that warrant preparation of an EA or an EIS.[7] Thus, categorical exclusions should be established as an integral part of an agency's NEPA program that ensures agency capacity to implement NEPA, the CEQ regulations, and the agency implementing procedures,[8] and identifies actions that "normally" do or do not require environmental impact statements and environmental assessments in its implementing procedures.[9]

B. Conditions Warranting a New Categorical Exclusion

Federal agencies should develop and propose a categorical exclusion whenever they identify a category of actions that under normal circumstances does not have, and is not expected to have, significant individual or cumulative environmental impacts. Agency actions that are typically subject to categorical exclusion are readily identified based on a considered determination that the activities are expected to have no significant environmental effects (e.g., administrative activities [such as payroll processing], conducting surveys and data collection, and routine procurement of goods and services [such as office supplies]). Other potential categorical exclusions may be identified after conducting NEPA reviews, mission changes, or the addition of new responsibilities. Federal agencies typically propose new categorical exclusions after they gain experience with new activities, perhaps through new legislation or an administrative restructuring, and determine the environmental consequences are not significant.[10]

Other activities may be more variable in their environmental effects and therefore require a more detailed description to ensure the category is limited to actions that have been shown not to have individual or cumulatively significant effects. For example, the status and sensitivity of environmental resources vary across the nation; consequently, it may be appropriate to categorically exclude a category of actions in one area or region rather than across the nation as a whole. Federal agencies should consider establishing categorical exclusions limited to those regions or areas where an agency can conclude the actions will not have significant environmental effects individually or cumulatively.

C. The Elements of a Categorical Exclusion

1. Categorical Exclusion

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[6] This guidance applies to agencies establishing new or revised categorical exclusions, and uses the term "new" to include revisions or modifications that are more than administrative (e.g., revisions to update outdated office or agency title) or editorial (e.g., correcting spelling or typographical errors).

[7] 40 C.F.R. §§ 1500.4(p) and 1500.5(k).

[8] 40 C.F.R. § 1507.2.

[9] 40 C.F.R. § 1507.3.

[10] When legislative or administrative restructuring creates a new agency or realigns an existing agency, the agency will need to determine if the decisionmaking processes have changed and then develop new NEPA procedures that align the NEPA and other environmental planning processes with agency decisionmaking.

Prior CEQ guidance generally addresses the crafting of categorical exclusions:

> The Council encourages the agencies to consider broadly defined criteria which characterize types of actions that, based on the agency's experience, do not cause significant environmental effects. If this technique is adopted, it would be helpful for the agency to offer several examples of activities frequently performed by that agency's personnel which would normally fall in these categories. Agencies also need to consider whether the cumulative effects of several small actions would cause sufficient environmental impact to take the actions out of the categorically excluded class.[11]

The text of a proposed categorical exclusion should clearly define the category of actions, as well as any physical, temporal, or environmental factors that would constrain its use. Physical constraints are spatial limits on the extent of the action (e.g., distance or areas). Temporal and environmental constraints are limits on the time when a particular categorical exclusion is applicable (e.g., seasons or nesting periods in a particular environmental setting) or limits on the number of actions that can rely upon a categorical exclusion in a given area or timeframe. Federal agencies that identify these constraints can better ensure a new categorical exclusion is neither too broadly nor too narrowly defined.

Agencies are encouraged and, in the case of broad categorical exclusions should, provide representative examples of the types of activities the categorical exclusion covers. This will provide further clarity and transparency regarding the category of actions covered by the categorical exclusion.

When developing a categorical exclusion, Federal agencies must be sure the proposed category is reflective of the entire proposed action to be categorically excluded. Categorical exclusions should not be established or used to divide a proposed action into smaller elements or segments that do not have independent utility to the agency.

The Federal agency program charged with complying with NEPA should develop and maintain the capacity to monitor actions approved based on categorical exclusions where necessary to ensure the prediction that there will not be significant impacts is borne out in practice. Providing the results of such monitoring will also enable the agency to engage stakeholders in determining whether to revise categorical exclusions and extraordinary circumstances.

2. Extraordinary Circumstances

Extraordinary circumstances identify the atypical situations or environmental settings when an otherwise categorically excludable action merits further analysis in an EA or EIS. Extraordinary circumstances are often presented as a list of factors that must be considered when the Federal agency determines relying upon the categorical exclusion is appropriate. Many Federal agencies present that list in their agency NEPA procedures (for example, several agencies use the potential effects on protected species or habitat or the potential effects of hazardous materials as extraordinary circumstances).

When proposing new categorical exclusions, Federal agencies should evaluate the extraordinary circumstances described in their NEPA procedures to ensure the circumstances adequately account for the atypical situations that could affect the use of the categorical exclusion for a particular action. For example, the presence and nature of a protected resource (e.g., threatened or endangered species or historic resource) and the proposed action's impacts on that resource, is an appropriate extraordinary circumstance for situations where the categorical exclusion would not be appropriate for a proposed

[11] Council on Environmental Quality, "Guidance Regarding NEPA Regulations," 48 Federal Register (FR) 34263 (Jul. 28, 1983), available at http://ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm.

action taking place in areas where protected resources may be present. When the extraordinary circumstances provided in the agency NEPA procedures are not sufficient for a newly proposed categorical exclusion, an agency can identify extraordinary circumstances that will specifically apply to the new categorical exclusion. Such extraordinary circumstances must be issued along with the new categorical exclusion in both draft form, for public review and comment, and in final form.

III. SUBSTANTIATING A NEW CATEGORICAL EXCLUSION

Two key issues confronting Federal agencies are how to evaluate whether a new categorical exclusion is appropriate, and how to support the determination that the proposed categorical exclusion describes a category of actions that does not individually or cumulatively have a significant effect on the human environment.[12]

When substantiating a new categorical exclusion, Federal agencies should: (1) gather information supporting a proposed categorical exclusion; (2) evaluate the information; and (3) make findings to explain how the agency determined the proposed category of actions does not result in individual or cumulatively significant environmental effects.

A. Gathering Information to Substantiate a New Categorical Exclusion

The amount of information required to substantiate a new categorical exclusion is directly related to the type of activities included in the proposed category of actions. Actions that obviously have little or no impact (e.g., conducting surveys or purchasing office supplies consistent with applicable acquisition standards such as Executive Order 13514) require little information. Actions that are not intuitively obvious in their lack of environmental effects require more information to support their establishment as categorical exclusions.

There are several sources of information an agency can draw upon to substantiate a categorical exclusion. These include: (1) previously implemented actions; (2) impact demonstration projects; (3) information from professional staff, expert opinion, or scientific analyses; and (4) other agencies' experiences.[13] These sources of information, or any combination of them, are appropriate to support a proposed categorical exclusion.

1. Evaluating Implemented Actions

Evaluation of implemented actions refers to a Federal agency's monitoring and evaluation of the environmental effects of completed or ongoing actions. The benefit of such an evaluation is that the agency's implementation and operating procedures are well known and can be taken into account in developing the proposed categorical exclusion. Monitoring and evaluating implemented actions internally or collaboratively with other agencies and groups can provide additional, useful information for substantiating a categorical exclusion. The evaluation must consist of data collected before the proposed

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[12] 40 C.F.R. §§ 1508.7, 1508.8, and 1508.27.

[13] Agencies should be mindful of their obligations under the Information Quality Act to ensure the quality, objectivity, utility, and integrity of the information they use or disseminate as the basis of an agency decision to establish a new categorical exclusion. Section 515, Pub.L.No. 106-554; Office of Management and Budget Information Quality Guidelines, 67 Fed. Reg. 8452 (Feb. 22, 2002), available at http://www.whitehouse.gov/omb/inforeg/infopoltech.html. Additional laws and regulations that establish obligations that apply or may apply to the processes of establishing and applying categorical exclusions (such as the Federal Records Act) are beyond the scope of this guidance.

categorical exclusion is finalized.

For implemented actions analyzed in EAs that supported Findings of No Significant Impact, evaluations that validate the predicted environmental effects may provide strong support for a proposed categorical exclusion. When mitigation is developed during the EA process, care must be taken to ensure such mitigation measures are an integral component of the action considered.

Evaluation of implemented actions analyzed in an EIS may also be useful. In such cases, the action must have independent utility to the agency, separate and apart from the broader action analyzed in the EIS, and the EIS must specifically address its environmental effects and determine them not to be significant. For example, when a discrete, independent action is analyzed in an EIS that analyzed a broad management action, an evaluation of the actual effects of that discrete action may support a proposed categorical exclusion for the discrete action.

Federal agencies may also be able to use data generated through their Environmental Management System (EMS) or other data systems that contain a record of environmental performance for particular actions. This information can help agencies identify or substantiate new categorical exclusions and extraordinary circumstances.[14]

2. Impact Demonstration Projects

When Federal agencies lack experience with a particular category of actions, impact demonstration projects may be used to evaluate the projects' impacts and potential for the category of actions to be the subject of a proposed categorical exclusion. As used in this guidance, an "impact demonstration project" consists of the EA or EIS prepared for a proposed action an agency lacks experience with, implementation of the action, evaluation of the action's environmental effects, and the subsequent monitoring of the environmental effects of the project. The NEPA documentation for the impact demonstration project should explain how the results of the analysis will be used to evaluate the merits of a proposed categorical exclusion.

When designing an impact demonstration project, it is particularly important for the action being evaluated to accurately represent the category of actions that will be described in the proposed categorical exclusion. This includes a similar scope, as well as similar operational and environmental conditions. A series of impact demonstration projects may be useful when environmental conditions vary in different settings. For example, a Federal agency could develop a series of projects in different regions or areas of the country where the proposed categorical exclusion might be used.

3. Professional Staff and Expert Opinions, and Scientific Analyses

A Federal agency may use its professional staff and rely upon their expertise, experience, and professional judgment to assess the potential environmental effects of applying proposed categorical exclusions. In addition, outside experts can be looked to as sources of information to substantiate a new categorical exclusion. Those individuals should have expert knowledge, training, and experience relevant to the implementation and environmental effects of the actions described in the proposed categorical exclusion. The administrative record for the proposed categorical exclusion should document the

[14] An EMS provides a systematic framework for a Federal agency to monitor and continually improve its environmental performance through audits, evaluation of legal and other requirements, and management reviews. The potential for EMS supporting NEPA work is further described in "Aligning National Environmental Policy Act Processes with Environmental Management Systems" available at http://ceq.hss.doe.gov/nepa/nepapubs/Aligning_NEPA_Processes_with_Environmental_Management_Systems_2007.pdf.

credentials (e.g., education, training, certifications, years of related experience) and describe how the staff and any experts not employees of the agency arrived at their conclusions.

The use of scientific analyses need not be limited to peer-reviewed findings. Although such findings may be especially useful to support an agency's scientific analysis, other sources may include professional opinions, reports, and research findings. In all cases, however, any findings must be based on the best available technical and scientific information. Specifically, because the reliability of scientific information varies according to its source and the rigor with which it was developed, the Federal agency remains responsible for determining whether the information reflects accepted knowledge, accurate findings, and agency experience with the environmental effects of the actions in the proposed categorical exclusion.

4. Benchmarking Public and Private Entities' Experiences

As used in this guidance, "benchmarking" means evaluating information and records from other private and public entities that have experience with the actions covered in a proposed categorical exclusion. Those other entities include state, local and tribal agencies, and academic and professional institutions, as well as other federal agencies. When determining whether it is appropriate to rely on others' experience, it will be necessary to demonstrate the benchmarked actions are comparable to the actions in a proposed categorical exclusion.

Benchmarking should consider the similarities and differences in: (1) characteristics of the actions; (2) methods of implementing the actions; (3) frequency of the actions; (4) applicable standard operating procedures or implementing guidance (to include extraordinary circumstances); and (5) context, including the environmental settings in which the actions take place. Although a Federal agency cannot simply use another agency's categorical exclusion, the agency may find it useful to consider another agency's experience with a categorical exclusion along with the administrative record developed when the categorical exclusion was established.

B. Evaluating the Supporting Information

Following review of the supporting information, Federal agencies should develop findings that account for similarities and differences between the proposed categorical exclusion and the information used to substantiate it. The findings should include a description of the methodology and criteria used to define the proposed category of actions, and include the rationale for any new extraordinary circumstances.

The Federal agency should maintain an administrative record that includes the supporting information used, the evaluation of that information and the agency's related findings. The record should be maintained so that it remains available for consideration by the agency when reviewing its categorical exclusions and for benchmarking by other agencies.

C. Refining a Proposed Categorical Exclusion

If a type of action or category of actions proposed for a categorical exclusion is found to have a potentially significant environmental effect, the Federal agency can either end its consideration and not proceed with the proposal, or refine the proposed categorical exclusion. Refining a proposed categorical exclusion can consist of limiting or removing actions, placing additional constraints on the categorical exclusion's applicability, or refining the applicable extraordinary circumstances. For example, if the category of actions is typically without significant effects in the northeastern United States or in a particular set of watersheds, it may be appropriate to limit the geographic applicability of the categorical exclusion to a specific region or environmental setting. An agency may also identify additional

extraordinary circumstances specifically tailored to ensure that the proposed actions do not have the potential for significant impacts.

This process of refining, or tailoring, can result in an appropriate categorical exclusion that further clarifies the atypical circumstances that warrant further environmental evaluation in an EA or EIS. Any revision to either the proposed categorical exclusion or the extraordinary circumstances should be summarized in the agency's evaluation and included in the administrative record.

IV. Procedures for Establishing a New Categorical Exclusion

The process of establishing or revising an agency's NEPA procedures is found in 40 C.F.R. §1507.3(a).

> Each agency shall consult with the Council while developing its procedures and before publishing them in the Federal Register for comment. Agencies with similar procedures 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 [40 C.F.R. Parts 1500 – 1508]. 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.

Federal agencies must consult with CEQ when developing the categorical exclusion.[15] Federal agencies are encouraged to involve CEQ early in the process to take advantage of CEQ expertise and assist with agency coordination to make the process as efficient as possible.

All proposed categorical exclusions must be made available for public review and comment. At a minimum, the CEQ Regulations require Federal agencies to publish the categorical exclusion in the *Federal Register*, and provide a period during which the public may submit comments.[16] To maximize the value of input from interested parties and assist them in focusing their comments, the Federal agency should:

- Describe the proposed activities covered by the categorical exclusion and provide the proposed text of the categorical exclusion.
- Summarize the information in the agency's administrative record used to support the categorical exclusion, the evaluation of the information, and the findings. Where the public might view a specific impact as potentially significant, the agency should explain why it believes that impact to be presumptively insignificant. Whenever practicable, include a link to a website containing all the supporting information, evaluations, and findings.[17]

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[15] 40 C.F.R. § 1507.3.

[16] 40 C.F.R. §§ 1507.3 and 1506.6(b)(2).

[17] Ready access to all supporting information will likely minimize the need for members of the public to depend on Freedom of Information Act requests, and enhance the NEPA goals of outreach and disclosure. Agencies should considering using their regulatory development tools to assist in maintaining access to supporting information, such as establishing an online docket using www.regulations.gov.

- Define all applicable terms.
- Explain how extraordinary circumstances may limit the use of the categorical exclusion.
- Explain the options for submitting questions and comments about the proposed categorical exclusion (e.g., email addresses, mailing addresses, and names and phone numbers of points of contact).

Following the public comment period, the Federal agency must consider public comments and consult with CEQ to discuss substantive comments and how they will be addressed. For consultation to successfully conclude, CEQ must provide a written statement that the categorical exclusion was developed in conformity with NEPA and the CEQ regulations. CEQ shall complete its review within 30 days of receiving the final text of the proposed categorical exclusion.

The final categorical exclusion should then be published in the *Federal Register*. This publication, when combined with publication on an established agency website, can satisfy the requirements to file the final categorical exclusion with CEQ and to make the final categorical exclusion readily available to the public.

Following is a summary of the steps for an agency to establish a categorical exclusion as part of the agency NEPA procedures.[18]

- Draft the proposed categorical exclusion based on the agency's experience and supporting information.
- Consult with CEQ on the proposed categorical exclusion.
- Consult with other Federal agencies that have similar procedures to coordinate their procedures, especially for programs requesting similar information from applicants.
- Publish a notice of the categorical exclusion in the *Federal Register* for public review and comment.
- Consider public comments.
- Consult with CEQ on the final categorical exclusion to obtain CEQ's written determination of conformity with NEPA and the CEQ Regulations.
- Publish the categorical exclusion in the *Federal Register*.
- File the categorical exclusion with CEQ (publication in the *Federal Register* and on the agency website can satisfy this requirement).
- Make the categorical exclusion readily available to the public (publication in the *Federal Register* and on the agency website can satisfy this requirement).

V. Public Involvement in Establishing a Categorical Exclusion

An Environmental Assessment or an Environmental Impact Statement is not required for establishing or revising a categorical exclusion.[19] However, engaging the public in the environmental aspects of federal decisionmaking is a key aspect of NEPA. Therefore, an opportunity for public involvement beyond publication in the *Federal Register* should be considered.[20]

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[18] NEPA and the CEQ Regulations do not themselves require agency NEPA implementing procedures to be promulgated as regulations through rulemaking. Agencies should ensure they comply with all appropriate agency rulemaking requirements.

[19] *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp. 2d 962, 972-73 (S.D. Ill. 1999), *aff'd*, 230 F.3d 947, 954-56 (7th Cir. 2000).

[20] "Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6.

When establishing a categorical exclusion, the Federal agency should tailor the type and length of public involvement to the nature of the proposed category of actions, and its perceived environmental effects. CEQ encourages Federal agencies to engage interested parties such as public interest groups, Federal NEPA contacts at other agencies, and Tribal, State, and local government agencies to share relevant data, information and concerns. The methods noted in 40 C.F.R. § 1506.6 and other public involvement techniques such as focus groups, e-mail exchanges, conference calls, and web-based forums can be used to stimulate public involvement.

CEQ also encourages Federal agencies to post updates on their official websites whenever they issue *Federal Register* notices for new or revised categorical exclusions. Not only is this another method for involving the public, an agency website can serve as the centralized location for informing the public about agency NEPA implementing procedures and their use, and provide access to updates and supporting information. At a minimum, agency NEPA implementing procedures and any final revisions or amendments should be accessible through an agency's website.

VI. APPLYING AN ESTABLISHED CATEGORICAL EXCLUSION

There are two key issues Federal agencies face when they want to use a categorical exclusion that has been established and made part of the agency's NEPA implementing procedures. They are: (1) whether to prepare documentation supporting a categorical exclusion determination; and (2) whether external outreach may be useful to inform determinations about categorically excluded actions.

A. Documentation

CEQ guidance states:

> The Council believes that sufficient information will usually be available during the course of normal project development to determine the need for an EIS and further that the agency's administrative record (for the proposed action) will clearly document the basis for its decision. Accordingly, the Council strongly discourages procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded.[21]

Each Federal agency should decide if a categorical exclusion determination warrants preparing separate documentation. There are some activities with little risk of significant environmental effects that generate no practical need or benefit for preparing any additional documentation (e.g., routine personnel actions or purchases of supplies). In those cases, the administrative record for establishing the categorical exclusion may be considered sufficient documentation for applying the categorical exclusion to future actions.

In cases when an agency determines that documentation is appropriate, the extent of the documentation should be related to the type of action involved, the potential for extraordinary circumstances, and compliance requirements for other laws, regulations, and policies. In all circumstances, categorical exclusion documentation should be brief, concise, and to the point. The need for lengthy documentation should raise questions about whether applying the categorical exclusion in a particular situation is appropriate.

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[21] Council on Environmental Quality, "Guidance Regarding NEPA Regulations,"48 FR 34263 (Jul. 28, 1983), available at http://ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm.

If a record is prepared, it should cite the categorical exclusion used and show that the agency determined: (1) the action fits within the category of actions described in the categorical exclusion; and (2) there are no extraordinary circumstances that would preclude the project or proposed action from qualifying as a categorically excluded action.

In some cases, courts have required documentation to demonstrate that a Federal agency has considered the environmental effects associated with extraordinary circumstances.[22] Documenting the application of a categorical exclusion can demonstrate the agency decision to use the categorical exclusion is entitled to deference and should not be disturbed.[23]

Using a categorical exclusion does not absolve Federal agencies from complying with the requirements of other laws, regulations, and policies (e.g., the Endangered Species Act or National Historic Preservation Act). Documentation may be necessary to comply with such requirements. When that is the case, all resource analyses and the results of any consultations or coordination should be included or incorporated by reference in the administrative record developed for the proposed action.

B. Public Engagement and Disclosure[24]

Most Federal agencies currently do not routinely notify the public when they use a categorical exclusion to meet their NEPA responsibilities. CEQ encourages Federal agencies in appropriate circumstances to engage the public in some way (e.g., through notification or disclosure) before using the categorical exclusion. For example, an agency may use scoping or other means to engage or notify the public in circumstances where the public can assist the agency in determining whether a proposal involves extraordinary circumstances or cumulative impacts. Agencies can both include circumstances where the public could be helpful and identify categorical exclusions that would not merit public engagement or disclosure in the agencies' NEPA implementing procedures.

Agencies should also make use of current technologies to provide the public with access to information on how the agency has complied with NEPA. CEQ recommends agencies provide access to the status of NEPA compliance (e.g., completing environmental review by using a categorical exclusion) on agency websites, particularly in those situations where there is a high public interest in a proposed action. The recent initiative by the Department of Energy to post categorical exclusion determinations provides an example of how agencies can effectively increase transparency in their decision making when using categorical exclusions.[25]

VII. Periodic Review of Agency Established Categorical Exclusions

Though the CEQ Regulations direct Federal agencies to periodically review their NEPA policies and procedures, they do not describe how such a review should be conducted.[26] Some Federal agencies

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[22] Council on Environmental Quality, "The NEPA Task Force Report to the Council on Environmental Quality – Modernizing NEPA Implementation," p. 58, (Sep. 2003), available at http://ceq.hss.doe.gov/ntf/report/index.html.

[23] The agency determination that an action is categorically excluded may itself be challenged under the Administrative Procedures Act. 5 U.S.C. 702 et seq.

[24] The term "public" includes any external individuals, groups, entities or agencies.

[25] See the DOE website at http://www.gc.energy.gov/NEPA/categorical_exclusion_determinations.htm.

[26] 40 C.F.R. § 1507.3.

have internal procedures for reviewing categorical exclusions and identifying and revising categorical exclusions that no longer reflect current environmental circumstances, or an agency's procedures, programs, or mission.

There are several reasons why Federal agencies should periodically review their categorical exclusions. A review can serve as the impetus for clarifying the actions covered by an existing categorical exclusion. For example, a Federal agency may find an existing categorical exclusion is not being used because the category of actions is too narrowly defined. In these cases, the agency should consider expanding the category of actions. Conversely, if an agency finds an existing categorical exclusion includes actions that potentially have or do have significant effects with some regularity, then the agency should revise the categorical exclusion to limit the category of actions. Periodic review can also help agencies identify additional extraordinary circumstances and consider the appropriate documentation when using certain categorical exclusions.

As part of its oversight role and responsibilities under NEPA, CEQ will begin regularly reviewing agency categorical exclusions. CEQ will make every effort to align its oversight with any reviews currently being conducted by the agency and will begin with those agencies currently reassessing or experiencing difficulties with implementing their categorical exclusions, as well as agencies facing litigation challenging their application of categorical exclusions. The agencies and the public will be provided with more information regarding the scope of review on the CEQ websites.[27]

A Federal agency can keep a record of its experience with certain activities by tracking information provided by agency field offices.[28] In such cases, a Federal agency review of a categorical exclusion could consist of communications from field offices that include observations of the effects of implemented actions, both from agency personnel and the public. On-the-ground monitoring to evaluate environmental effects of an agency's categorically excluded actions can be incorporated into an agency's procedures for conducting its quality management reviews and included as part of regular site visits to project areas. The extent and scope of agency monitoring will be considered during the CEQ review.

Another approach to reviewing existing categorical exclusions is through a program review. Program reviews can occur at various levels (e.g., field office, division office, headquarters office) and on various scales (e.g., geographic location, project type, or areas identified in an interagency agreement). While a Federal agency may choose to initiate a program review specifically focused on categorical exclusions, it is possible that program reviews with a broader focus may also be able to provide documentation of experience relevant to a categorical exclusion.

Finally, the rationale and supporting information for establishing or documenting experience with using a categorical exclusion may be lost if there are inadequate procedures for recording, retrieving, and preserving agency documents and administrative records. Therefore, Federal agencies will benefit from a review of current practices used for maintaining and preserving such records. Measures to ensure future availability should include, but not be limited to, redundant storage systems (e.g., multiple drives or paper copies), and improvements in the agency's electronic and hard copy filing systems.[29]

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[27] www.whitehouse.gov/ceq and www.nepa.gov.

[28] Council on Environmental Quality, "The NEPA Task Force Report to the Council on Environmental Quality – Modernizing NEPA Implementation," p. 63, (Sep. 2003), available at http://ceq.hss.doe.gov/ntf/report/index.html.

[29] Agencies should be mindful of their obligations under the Federal Records Act for maintaining and preserving agency records. 44 U.S.C. chapters 21, 29, 31, and 33.

VIII. CONCLUSION

This draft guidance addresses how agencies establish, apply, and review categorical exclusions. Questions regarding this draft guidance should be directed to the CEQ Associate Director for NEPA Oversight.

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6. CEQ 40th Anniversary Guidance

b. Mitigation and Monitoring

February 18, 2010

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: NANCY H. SUTLEY, Chair, Council on Environmental Quality

SUBJECT: DRAFT GUIDANCE FOR NEPA MITIGATION AND MONITORING

I. INTRODUCTION

In this memorandum, the Council on Environmental Quality (CEQ) proposes to provide guidance for departments and agencies of the Federal government on the mitigation and monitoring of activities undertaken in a National Environmental Policy Act (NEPA) process. Through guidance, CEQ seeks to enable agencies to create successful mitigation planning and implementation procedures with robust public involvement and monitoring programs. The Appendix to this proposed guidance provides an overview of the Department of the Army Regulation which demonstrates how an agency can exercise its responsibility to advance mitigation and monitoring when establishing its NEPA program and procedures. Agencies should consider adopting similar requirements when developing their NEPA programs and procedures. 40 C.F.R. §§ 1507.2, 1507.3.

The NEPA process was designed to ensure transparency and openness, and mitigation and monitoring should be transparent and open. This draft guidance is designed to serve that end. This draft guidance is issued pursuant to CEQ's duties and functions under Section 204 of NEPA, 42 U.S.C. § 4344, and Executive Order No. 11514 (Mar. 5, 1970) 35 Fed. Reg. 4247, *as amended by* Exec. Order No. 11991 (May 24, 1977)) and is intended to reinforce existing requirements and responsibilities. CEQ is providing this draft guidance for public review and comment. CEQ intends to issue final guidance expeditiously after reviewing public comment. CEQ does not intend for this guidance to become effective until issued in final form.

II. DISCUSSION AND GUIDANCE

Mitigation is an important mechanism for agencies to use to avoid, minimize, rectify, reduce, or compensate the adverse environmental impacts associated with their actions. 40 C.F.R. § 1508.2. Federal agencies typically rely upon mitigation to reduce environmental impacts through modification of proposed actions and consideration and development of mitigation alternatives during the NEPA process. Planned mitigation at times can serve to reduce the projected impacts of agency actions to below a threshold of significance or to otherwise minimize the effects of agency action. However, as identified in several studies, ongoing agency implementation and monitoring of mitigation measures is limited and in need of improvement. *See* CEQ, *NEPA: A Study of its Effectiveness After Twenty-Five Years* (Jan. 1997); NEPA Task Force, *Modernizing NEPA Implementation* (Sept. 2003); NEPA Roundtable Reports Oct. 2003-Jan. 2004 (available at http://ceq.hss.doe.gov/ntf/roundtables.html).

Implementing Federal agency actions and mitigation involves consideration of future impacts and conditions in an environment that is evolving and not static; therefore, monitoring can help decision-makers adapt to changed circumstances. Monitoring can also improve the quality of overall agency

decisionmaking by providing feedback on the effectiveness of mitigation techniques and commitments. With the opportunity for reducing environmental impacts through mitigation, a comprehensive approach to mitigation planning, implementation and monitoring will help ensure the integrity of the entire NEPA process.

Through this draft guidance, CEQ proposes three central goals to help improve agency mitigation and monitoring. First, proposed mitigation should be considered throughout the NEPA process. Decisions to employ mitigation measures should be clearly stated and those mitigation measures that are adopted by the agency should be identified as binding commitments to the extent consistent with agency authority, and reflected in the NEPA documentation and any agency decision documents. Second, a monitoring program should be created or strengthened to ensure mitigation measures are implemented and effective. Third, public participation and accountability should be supported through proactive disclosure of, and access to, agency mitigation monitoring reports and documents. Although these goals are broad in nature, implementing agency NEPA procedures and guidance should be employed to establish procedures that create systematic accountability and the mechanisms to accomplish those goals. 40 C.F.R. § 1507.3.

Agencies necessarily and appropriately rely upon the expertise and experience of their professional staff in determining mitigation needs, appropriate mitigation plans, and mitigation implementation. In making those determinations, the agency staff may refer to outside resources when establishing mitigation requirements in order to ensure the efficacy of the desired outcomes, including sufficient attention to ecosystem functions and values protected or restored by mitigation. A Federal agency may use outside experts when developing the mitigation and monitoring. The individuals helping to develop the measures and plans should have expert knowledge, training, and experience relevant to the resources potentially affected by the actions and, if possible, the potential effects from similar actions.

To inform performance expectations, mitigation goals should be stated clearly by specifying whether they are intended to reduce the impacts to a particular level, as in a mitigated FONSI, or adopted to achieve an environmentally preferable outcome. These should be carefully specified in terms of measurable performance standards to the greatest extent possible. The recommendation for measurable performance standards was one of the key National Research Council recommendations incorporated into the 2008 Final Compensatory Mitigation Rule promulgated jointly by the Corps of Engineers and EPA.[1]

A. Mitigation in NEPA Analyses and Decisions

CEQ NEPA regulations identify mitigation in the NEPA process as measures to avoid, minimize, rectify, reduce, or compensate for environmental impacts. 40 § C.F.R. 1508.20. The CEQ regulations provide for mitigation in the form of alternatives (see 40 C.F.R. §§ 1502.14(f), 1508.25(b)(3)) and NEPA itself requires agencies to "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)). Furthermore, NEPA was enacted to promote efforts that will prevent or eliminate damage to the human environment.

[1] For example, in 2001, the Committee on Mitigating Wetland Losses, through the National Research Council, conducted a nationwide study evaluating compensatory mitigation, focusing on whether the process is achieving the overall goal of "restoring and maintaining the quality of the nation's waters." Committee on Mitigating Wetland Losses et al., *Compensating for Wetland Losses Under the Clean Water Act* 2 (2001) ("NRC"). Many of the NRC's recommendations from the 2001 report are incorporated into the 2008 Final Compensatory Mitigation Rule promulgated jointly by the Corps of Engineers and EPA. *See* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19594 (April 10, 2008) ("Compensatory Mitigation Rule")

In addition to considering mitigation alternatives, the NEPA analysis can also consider mitigation as an integral element in the design of the proposed action. Mitigation measures included in the project design are integral components of the proposed action, are implemented with the proposed action, and should be clearly described as part of the proposed action. An example of measures that are typically included as part of the proposed action and don't involve alternatives are agency standardized best management practices such as those developed to prevent stormwater runoff or furtive dust emissions at a construction site.

(1) Mitigation Alternatives in Environmental Impact Statements

In situations where an agency is preparing an Environmental Impact Statement (EIS), the agency will be considering reasonable alternative mitigation measures that should be included in that analysis. 40 C.F.R. §§ 1502.14(f), 1508.25(b)(3). The EIS should, and the Record of Decision must, describe those mitigation measures that the agency is adopting and committed to implementing. 40 C.F.R. § 1505.2(c).

(2) Mitigation Alternatives in Environmental Assessments

When an agency develops and makes a commitment to implement mitigation measures to avoid, minimize, rectify, reduce, or compensate for significant environmental impacts (40 C.F.R. § 1508.20), then NEPA compliance can be accomplished with an Environmental Assessment (EA) coupled with a Finding of No Significant Impact (FONSI). Using mitigation to reduce potentially significant impacts to support a FONSI enables an agency to conclude the NEPA process, satisfy NEPA requirements, and proceed to implementation without preparing an EIS. In such cases, the basis for not preparing the EIS is the commitment to perform those mitigation measures identified as necessary to reduce the environmental impacts of the proposed action to a point or level where they are determined to no longer be significant. That commitment should be presented in the FONSI and any other decision document.CEQ recognizes the appropriateness, value, and efficacy of providing for mitigation to reduce the significance of environmental impacts; consequently, when that mitigation is available and the commitment to perform it is made, there is an adequate basis for a mitigated FONSI.[2]

(3) Implementing Mitigation

To provide for the performance of mitigation, agencies should create internal processes to ensure that mitigation actions adopted in any NEPA process are documented and that monitoring and appropriate implementation plans are created to ensure that mitigation is carried out.[3] Agency NEPA implementing procedures should require clearly documenting the commitment to mitigate the measures necessary in the environmental documents prepared during the NEPA process (40 C.F.R. § 1508.10) and in the decision

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[2] CEQ previously stated that it would issue guidance on the propriety of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) rather than requiring an Environmental Impact Statement (EIS) when the environmental effects of a proposal are significant but that, with mitigation, those effects are reduced to less than significant levels (1987-88 CEQ Annual Report available at http://www.slideshare.net/whitehouse/august-1987-1988-the-eighteenth-annual-report-of-the-council-on-environmental-quality). This proposed draft guidance approves of the use of the "mitigated FONSI" when the NEPA process results in enforceable mitigation measures and thereby amends and supplements the previously issued CEQ guidance in the 1981 Questions and Answers About the NEPA Regulations (commonly referred to as the 40 Forty Most Asked Questions, available at http://ceq.hss.doe.gov/nepa/regs/40/40P1.HTM).

[3] See *Aligning NEPA Processes with Environmental Management Systems* (CEQ 2007) at 4 (discussing the use of environmental management systems to track implementation and monitoring of mitigation). http://ceq.hss.doe.gov/nepa/nepapubs/Aligning_NEPA_Processes_with_Environmental_Management_Systems_2007.pdf (http://www.slideshare.net/whitehouse/aligning-nepa-processes)

documents such as the Record of Decision. When an agency identifies mitigation in an EIS and commits to implement that mitigation to achieve an environmentally preferable outcome, or commits in an EA to mitigation to support a FONSI and proceeds without preparing an EIS, then the agency should ensure that the mitigation is adopted and implemented.

Methods to ensure implementation should include, as appropriate to the agency's underlying authority for decisionmaking, appropriate conditions in financial agreements, grants, permits or other approvals, and conditioning funding on implementing the mitigation. To inform performance expectations, mitigation goals should be stated clearly. These should be carefully specified in terms of measurable performance standards to the greatest extent possible. The agency should also identify the duration of the agency action and the mitigation measures in its decision document to ensure that the terms of the mitigation and how it will be implemented are clear.

If funding for implementation of mitigation is not available at the time the decision on the proposed action and mitigation measures is made, then the impact of a lack of funding and resultant environmental effects if the mitigation is not implemented warrant disclosure in the EA or EIS. In cases where, after analyzing the proposed actions with or without the mitigation, the agency determines that mitigation is necessary to support the FONSI or committed to in the ROD, and the necessary funding is not available, the agency may still be able to move forward with the proposed action once the funding does become available. The agencies should ensure that the expertise and professional judgment applied in determining the appropriate mitigation measures is reflected in the administrative record, and when and how those measures will be implemented are analyzed in the EA or EIS.

(4) Mitigation Failure

Mitigation commitments should be structured to include adaptive management in order to minimize the possibility of mitigation failure. However, if mitigation is not performed or does not mitigate the effects as intended by the design, the agency responsible should, based upon its expertise and judgment regarding any remaining Federal action and its environmental consequences, consider whether taking supplementary action is necessary. 40 C.F.R. 1502.9(c). In cases involving an EA with a mitigated FONSI, an EIS may have to be developed if the unmitigated impact is significant. If an EIS is required, the agency must avoid actions that would have adverse environmental impacts or limit its choice of reasonable alternatives during the preparation of an EIS. 40 C.F.R. § 1506.1(a).

A substantial mitigation failure, in either implementation or effectiveness, should trigger a response from the agency. The manner of response depends on whether there is any remaining Federal action and, if so, the opportunities that remain to address the effects of mitigation failure. In those cases where there is no remaining agency action, and the mitigation has not been effective or fully implemented, then it may be appropriate for future NEPA analyses to address the environmental consequences of the mitigation failure to ensure it is not repeated in subsequent decisions that rely on that mitigation and that environmental baselines reflect true conditions.

B. Monitoring

Under NEPA, a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions. See 42 U.S.C. § 4332(2)(A). For agency decisions based on an EIS, the regulations require that, "a monitoring and enforcement program shall be adopted…where applicable for mitigation." 40 C.F.R. §1505.2(c). In addition, the regulations state that agencies may "provide for monitoring to assure that their decisions are carried out and should do so in important cases." 40 C.F.R. §1505.3. Monitoring plans and programs should be described or incorporated by reference in the agency decision documents.

The following are examples of factors that should be considered when prioritizing monitoring activities:

- Legal requirements from statutes, regulations, or permits;
- Protected resources (e.g., threatened or endangered species or historic site) and the proposed action's impacts on them;
- Degree of public interest in the resource or public debate over the effects of the proposed action and any reasonable mitigation alternatives on the resource; and
- Level of intensity of impacts.

Agencies have the discretion to select the form and method for monitoring, but should be sure to identify the monitoring area and establish the appropriate monitoring system.[4] Subsequently, an effective program should be implemented, followed by a system for reporting results. For mitigation monitoring commitments that warrant rigorous oversight, an Environmental Management System (EMS), or other data or management system could serve as a useful way to integrate monitoring efforts effectively.[5] The form and method of monitoring can be informed by the agency's past monitoring plans and programs that tracked impacts on similar resources, and plans and programs used by other agencies or entities, particularly those with an interest in the resource being monitored. Monitoring methods include agency-specific environmental monitoring, compliance assessment or auditing systems and can be part of a broader system for monitoring environmental performance, or a stand-alone element of an agency's NEPA program. Consistent with the Open Government Directive, efficient systems for reporting should make use of existing agency websites to the maximum extent practicable. OMB Memo Dec. 8 2009 (available at http://www.whitehouse.gov/open/documents/open-government-directive).

(1) Implementation monitoring

Implementation monitoring is designed to ensure that the mitigation measures are being performed as described in the NEPA documents and related decision documents. The responsibility for development of an implementation monitoring program depends in large part upon who will actually perform the mitigation: a cooperative non-Federal partner; a cooperating agency; the lead agency; applicant; grantee; permit holder; other responsible entity; or a combination of these. The lead Federal agency should ensure that responsible parties, mitigation requirements, and any appropriate enforcement clauses are included in documents such as authorizations, agreements, permits or contracts.[6] Monitoring responsibility can be shared with joint lead or cooperating agencies or other entities so long as the oversight is clearly described in the NEPA documents or associated decision documents.

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[4] The Department of the Army regulations provide an example at 32 C.F.R. § 651 app. C.

[5] An EMS provides a systematic framework for a Federal agency to monitor and continually improve its environmental performance through audits, evaluation of legal and other requirements, and management reviews. The potential for EMS supporting NEPA work is further described in "Aligning National Environmental Policy Act Processes with Environmental Management Systems" available at http://ceq.hss.doe.gov/nepa/nepapubs/Aligning_NEPA_Processes_with_Environmental_Management_Systems_2007.pdf. Fort Lewis provides an example of an effective environmental management system for monitoring purposes. (See https://sustainablefortlewis.army.mil) In 2001, the Department of the Army announced that they would implement a recognized environmental management standard, ISO 14001, across Army installations. ISO 14001 represents a standardized system to plan, track, and monitor environmental performance within the agency's operations.

[6] Such enforcement clauses, including appropriate penalty clauses, should be developed based on a review of the agency's statutory and regulatory authorities.

(2) Effectiveness monitoring

Effectiveness monitoring measures the success of the mitigation effort given the expected outcomes and resulting environmental effects. Just as the identification and evaluation of mitigation measures involves the use of agency experts familiar with the predicted environmental impacts and can involve outside experts, so too can developing the means for monitoring the effectiveness of the mitigation. Sources of information within the agency, in other agencies,[7] in State agencies as well as non-governmental sources such as local academic institutions and public groups should be considered in helping to both identify and monitor potential mitigation measures.

C. Role of the Public in Mitigation Monitoring

Equally important for purposes of this guidance, engaging the public in the environmental aspects of federal decisionmaking is a key aspect of NEPA and opportunities for public involvement in the development and implementation of monitoring plans and programs should be provided.[8] Monitoring reporting should be used for assessing agency performance and incorporated into future agency planning and documentation.

It is the responsibility of the lead agency to make the results of relevant monitoring available to the public. 40 C.F.R. § 1505.3(d). NEPA incorporates the Freedom of Information Act (FOIA) by reference and ensures public access to documents reflecting mitigation monitoring and enforcement. 42 U.S.C. § 4332(2)(C). The "basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." Department of Justice, *Guide to the Freedom of Information Act* 1 (2009) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). Consistent with CEQ regulations, the FOIA requires agencies to make available, through "computer telecommunications" (e.g., agency websites), releasable NEPA documents and monitoring results which, because of the nature of their subject matter, are likely to become the subject of FOIA requests. 5 U.S.C. § 552(a)(2); 40 C.F.R. § 1506.6(f).

Public involvement is a key component of the NEPA review process procedural requirements, and should be fully integrated into agencies' mitigation and monitoring processes in order to assist NEPA compliance. Mitigation and monitoring reports, access to documents, and responses to public inquiries should be readily available to the public through online or print media, as opposed to being limited to requests made directly to the agency. Consistent with the Open Government Agenda, agencies should, to the maximum extent practicable, use their web sites and information technology capabilities to make available and disseminate useful information available under FOIA, so as to promote transparency and accountability in these efforts. The methods and techniques used to provide the mitigation and monitoring information should be commensurate to the importance of the action and resources at issue.

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[7] This includes offices responsible for overseeing impacts to specific resources. Examples include the U.S. Fish and Wildlife and National Marine Fisheries Services for evaluating potential impacts to threatened and endangered species, State Historic Preservation Officers for evaluating potential impacts to historic structures, and the U.S. Army Corps of Engineers for evaluating potential wetlands impacts.

[8] "Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6. Furthermore, NEPA requires all agencies of the Federal government to make "information useful in restoring, maintaining, and enhancing the quality of the environment" (including information on mitigation monitoring of potentially significant adverse environmental effects)"available to States, counties, municipalities, institutions, and individuals." 42 U.S.C. § 4332(2)(G). The CEQ regulations also require agencies to be "capable (in terms of personnel and other resources) of complying with the requirement … (to) fulfill the requirements of section 102(2)(G)." 40 C.F.R. § 1507.2(f).

In addition to advancing accountability and transparency, public interest and input may also provide insight or perspective for improving any mitigation activities as well as providing actual monitoring assistance.

APPENDIX

Case Study: Existing Agency Mitigation Regulations & Guidance

A number of agencies already have taken actions to improve their NEPA monitoring of mitigation commitments. An example of this approach, the Department of the Army NEPA regulation, is highlighted below, because it is instructive as to how agencies may meet the goals of this Guidance.

The Department of the Army has promulgated regulations implementing NEPA for military installations and programs that include a monitoring and implementation program. These regulations are notable for their comprehensive approach to ensuring that mitigation proposed in the NEPA review process is completed and monitored for effectiveness.

a. *Mitigation Planning*

Consistent with existing CEQ guidelines, the Army's mitigation regulations place significant emphasis on the planning and implementation of mitigation measures throughout the environmental analysis process. The first step in mitigation is avoiding or minimizing harm. *See* 40 C.F.R. § 1508.2. However, when the analysis proceeds to an EA or EIS, Army regulations require that any mitigation measures be "clearly accessed and those selected for implementation will be identified in the FNSI or the ROD." 32 C.F.R. § 651.15(a)(5)(b). This is notable as the mitigation measures are binding commitments documented in the agency NEPA decision. In addition, the adoption of mitigation measures that reduce environmental impacts below the NEPA significance threshold (32 C.F.R. § 651.35(g)) are similarly binding upon the agency. When these mitigation measures result in a FNSI in a NEPA analysis, the measures are considered legally binding. 32 C.F.R. § 651.15(a)(5)(c). Because these regulations create a clear obligation for the agency to carry out any proposed mitigation adopted in the environmental review process, there is assurance that mitigation will lead to a reduction of environmental impacts in the implementation stage and include binding mechanisms for enforcement.

Another important mechanism in the Army's regulations to assure effective mitigation results is the requirement to fully fund and implement proposed mitigation measures. It is acknowledged in the regulations that "unless money is actually budgeted and manpower assigned, the mitigation does not exist." 32 C.F.R. § 651.15(a)(5)(d). As a result, a proposed action cannot proceed until all adopted mitigation measures are fully resourced or until the lack of funding is addressed in the NEPA analysis. 32 C.F.R. § 651.15(a)(5)(d). This is an important step in the planning process as mitigation benefits are unlikely to be realized unless financial and planning resources are committed through the NEPA planning process.

b. *Mitigation Monitoring*

The Army regulations recognize that monitoring is an integral part of any mitigation system. 32 C.F.R. § 651.15(a)(5)(i). As the Army regulations require, monitoring plans and implementation programs should be summarized in NEPA documentation, and should consider several important factors. These factors include anticipated changes in environmental conditions or project activities, unexpected outcomes from mitigation measures, controversy over the selected alternative, potential impacts or adverse effects on federally or state protected resources, and statutory permitting requirements. 32 C.F.R. §§ 651.15(a)(5)(h)(1-4); 651 App. C. Consideration of these factors can help prioritize monitoring efforts and anticipate possible challenges.

The Army regulations distinguish between implementation monitoring and effectiveness monitoring. Implementation monitoring ensures that mitigation commitments made in NEPA documentation are implemented. To further this objective, the Army regulations specify that these conditions must be written into any contracts furthering the proposed action. In addition, the agency or unit proposing the action is ultimately responsible for the performance of the mitigation activities. 32 C.F.R. § 651.15(a)(i)(1). In a helpful appendix to its guidance, the Army outlines guidelines for the creation of an implementation monitoring program to addresses contract performance, the role of cooperating agencies and responsibilities of the lead agency. 32 C.F.R. § 651 App. C.

The Army's effectiveness monitoring addresses changing conditions inherent in evolving natural systems and the potential for unexpected environmental mitigation outcomes. For this monitoring effort, the Army utilizes its Environmental Management System based on the standardized ISO 14001 protocols. *See also, Aligning NEPA Processes with Environmental Management Systems* (CEQ 2007). The core of this program is the creation of a clear and accountable system for tracking and reporting both quantitative and qualitative measures of the mitigation efforts. An action-forcing response to mitigation failure is essential to the success of any mitigation program. According to the Army regulations, if any "identified mitigation measures do not occur, so that significant adverse environmental effects could be reasonably expected to result, the [agency actor] must publish a NOI and prepare an EIS." 32 C.F.R. § 651.15(c). This is an essential response measure to changed conditions in the proposed agency action. In addition, the Army regulations address potential failures in the mitigation systems indentified through monitoring. If mitigation is ineffective, the agency entity responsible should re-examine the mitigation measures and consider a different approach to mitigation. However, if mitigation measures required to reduce environmental impacts below significance levels (32 C.F.R § 651.35(g)) are found to be ineffective, the regulations contemplate the issuance of a NOI and preparation of an EIS. 32 C.F.R 651.15(k).

The Army regulations also provide guidance for the challenging task of defining parameters for effectiveness monitoring. These include identifying a source of expertise, using measurable and replicable technical parameters, conducting a baseline study before mitigation is commenced, using a control to isolate mitigation effects and importantly, providing timely results to allow the decision-maker to take corrective action if necessary. 32 C.F.R. § 651 App. C (g)(1-5). In addition, the regulations call for the preparation of an environmental monitoring report to determine the accuracy of the mitigation impact predictions made in the NEPA planning process. 32 C.F.R. § 651.15(l). The report is essential for agency planning and documentation and promotes public engagement in the mitigation process.

c. *Public Engagement*

The Army regulations seek to integrate robust engagement of the interested public in the mitigation monitoring program. Its regulations require the entity proposing the action to respond to inquiries from the public and other agencies regarding the status of mitigation measures adopted in the NEPA process. 32 C.F.R. § 651.15(b). In addition, the regulations find that "concerned citizens are essential to the credibility of [the] review" of mitigation effectiveness. 32 C.F.R. § 651.15(k). The Army specifies that outreach with the interested public regarding mitigation efforts is to be coordinated by the installation's Environmental Office. 32 C.F.R. § 651.15(j). These regulations bring the public a step closer to the process by designating an agency source responsible for enabling public participation and acknowledging the important role the public can play to ensure the integrity and tracking of the mitigation process. The success of agency mitigation efforts will be bolstered by public access to timely information on NEPA mitigation monitoring.

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