MISSION STATEMENTS

The U.S. Department of the Interior protects America's natural resources and heritage, honors our cultures and tribal communities, and supplies the energy to power our future.

The mission of the Bureau of Reclamation is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public.

DISCLAIMER

This handbook is intended as an introduction to its subject matter and as a reference tool. It does not create or alter any policy or otherwise implement any law and should not be cited as a source of authority.
### Abbreviations and Acronyms

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<td>ACHP</td>
<td>Advisory Council on Historic Preservation</td>
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<td>APE</td>
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<td>ARPA</td>
<td>Archaeological Resources Protection Act</td>
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<td>BA</td>
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<td>BIA</td>
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<td>BLM</td>
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<td>BON</td>
<td>basis of negotiation</td>
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<td>CAA</td>
<td>Clean Air Act</td>
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<td>CBD</td>
<td>Center for Biological Diversity</td>
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<td>CD</td>
<td>compact disc</td>
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<td>CE</td>
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Chapter 1

Introduction to the Handbook

This edition of the Bureau of Reclamation’s National Environmental Policy Act (NEPA) Handbook has been developed in response to the Council on Environmental Quality’s (CEQ) and the U.S. Department of the Interior’s implementing regulations on NEPA. These regulations state that each agency will interpret the provisions of NEPA as a supplement to its existing authority and as a mandate to view its policies and missions in the light of its national environmental objectives.

1.1 Who It’s For

This handbook has been designed as a guidance tool for use by all Reclamation staff. It should also be useful to applicants, contractors, tribal representatives, the general public, and others who may be involved in Reclamation’s NEPA process, or those who develop environmental reports for Reclamation’s use in preparing NEPA documents.

1.2 What It Does

This handbook describes Reclamation guidance for implementing the National Environmental Policy Act of 1969 (42 United States Code [U.S.C.] 4321, et seq.), CEQ’s Regulations for Implementing the Procedural Provisions (40 Code of Federal Regulations [CFR] Parts 1500–1508), Interior’s NEPA Regulations (43 CFR Part 46), and the Departmental Manual (DM) Chapter 516. This handbook draws these requirements together and provides guidance on how to apply them to Reclamation programs and activities. The Reclamation Manual NEPA Policy (ENV P03) refers to this handbook as the source of additional information on NEPA compliance for Reclamation. The handbook also presents and summarizes other related environmental laws and Executive orders (EO) which should be addressed during NEPA compliance.

This handbook provides an overview of NEPA in chapter 2. Chapter 3 contains a general description of the requirements and procedures of NEPA. Chapter 4 provides information on integrating NEPA with other Reclamation activities. Specific information on categorical exclusion checklists (CEC), environmental assessments (EA), and environmental impact statements (EIS) can be found in chapters 5, 6, and 7, respectively. This organizational structure has been selected to allow the user to quickly locate specific, step-by-step information on the different levels of NEPA compliance. Chapter 8 addresses EIS content, and chapter 9 discusses the requirements of a record of decision (ROD). Chapters 10
and 11 present other information that can be useful in the various situations that arise in applying NEPA to Reclamation’s Federal actions. Chapter 12 concludes the handbook with information on gaining additional assistance on NEPA issues.

In addition, various issues and special problems are discussed throughout the handbook. Where possible, solutions that have worked historically, or approaches that seem most reasonable, are recommended.

1.3 What It Does Not Do

The handbook does not replace the law, including case law, CEQ regulations, Interior regulations, the DM, or the Reclamation Manual for appropriate policy and procedures. Although this handbook has been written with these authorities in mind, if a conflict should be found between the handbook and these authorities, the authorities take precedence.

This handbook will not answer every potential NEPA compliance question. Reclamation’s activities can lead to situations that do not fit “classic” NEPA definitions. Regulatory, social, and political realities can complicate the application of NEPA to unusual situations. The handbook cannot, and does not try to, address every possible situation. It should be useful as a starting point in any situation, but there is no substitute for discussions of complex situations with experienced environmental staff within Reclamation, whether at the area, regional, or Denver offices. The regional offices and Solicitor’s Office can also provide assistance when NEPA compliance issues or questions arise.

1.4 Modifications to the Handbook

This handbook is issued by the Policy and Administration Office of the Bureau of Reclamation. It will be reviewed periodically, modified, and reissued (in part or whole) by this office to reflect changes in environmental, Interior, and/or Reclamation regulations and policy.

Reclamation staff and managers should let Policy and Administration staff know if there are areas in the handbook that are not clear or not helpful. Revisions can occur any time there is an identified problem with the existing text. Mandated changes from higher level authorities and minor updates can be made quickly, as appropriate, and without extensive reviews. The most recently updated handbook is available at www.usbr.gov/NEPA. Hard copies will be made available only on a limited basis, upon request to Policy and Administration.
1.5 Figures, Links, and Attachments

Most of the figures located at the end of chapters are examples of the various documents discussed in the chapter. These figures are intended to be guides. Reasonable deviation from these examples is sometimes an option, but such changes should be discussed with appropriate staff. For example, the format of the Federal Register (FR) notices and other process requirements are often determined outside Reclamation and are not subject to change by Reclamation.

A list of useful links is located at the end of most chapters. These links pertain to information discussed in that chapter. In some cases, linked items are also included as attachments.

Attachments to this NEPA Handbook are contained on a compact disc (CD) issued with the handbook.

1.6 Disclaimer

This handbook is a guidance document and, as such, is for informational purposes only. It does not create any responsibility or obligation regarding NEPA activities performed by Reclamation or Interior. It does not create any right of action for failure to perform NEPA activities as described herein. The provisions of this handbook should be construed in harmony with applicable statutes, regulations, and Interior manuals to the extent possible and do not affect the provisions of these authorities. In the event of a conflict between this handbook and applicable authorities, the applicable authorities shall control.
Chapter 1 Useful Links

Departmental Manual – Part 516 (Environmental Quality Programs)
http://elips.doi.gov/elips/browse.aspx

National Environmental Policy Act of 1969, 42 U.S.C 4321, et seq.
http://ceq.hss.doe.gov/laws_and_executive_orders/the_nepa_statute.html

Reclamation Manual
http://www.usbr.gov/recman/index.html

Reclamation Manual Policy - ENV P03

40 CFR Parts 1500 – 1508
http://ceq.hss.doe.gov/ceq_regulations/regulations.html

43 CFR Part 46
Chapter 2
Overview of NEPA

2.1 The Purpose of NEPA

When NEPA was signed into law in 1970, Congress and the President established a new environmental policy for Federal agencies. This new policy became part of each agency’s mission. NEPA states its purposes (NEPA Section 2, 42 U.S.C. § 4321) as follows:

To declare a national policy that will encourage productive and enjoyable harmony between man and his environment;

To promote efforts that 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.

In addition, NEPA states in Section 101, 42 U.S.C. § 4331(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 . . .

In other words, Reclamation must be environmentally aware in looking at the relationship its planning actions, projects, and programs have with the human environment now and in the future.

In order to make NEPA effective, Congress directed that all “policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act” (Section 102, 42 U.S.C. § 4332). NEPA established the CEQ to promulgate regulations to implement the Act.
2.2 Federal Agencies’ NEPA Responsibilities

To the fullest extent possible, Federal agencies are required to use all practicable means (NEPA Section 101(b)) to implement the policy expressed in NEPA. Section 102 of NEPA addresses how agencies are to integrate consideration of environmental values into planning and decisionmaking (i.e., through use of a systematic interdisciplinary approach, development of methods and procedures, and preparation of EISs on major Federal actions significantly affecting the quality of the human environment). Federal agencies must also consult with other Federal agencies having jurisdiction or expertise regarding the environmental effects of proposed Federal actions and make EISs available for public review and comment.

2.3 The NEPA Process

The NEPA process is defined by the CEQ NEPA Regulations (40 CFR, Section 1508.21) as “all measures necessary for compliance with the requirements of Section 2 and Title I of the Act.” The NEPA process applies primarily to the steps leading up to and including the preparation of environmental documents, required in Section 102(2)(C) of the Act. This environmental information is integrated into the planning process (see section 4.2 in chapter 4) and supports agency decisionmaking. The CEQ Regulations allow Federal agencies to supplement the NEPA procedures with agency procedures describing how compliance will be carried out for specific agency programs and activities. Interior’s regulations (43 CFR 46) provide additional specific requirements and are further supplemented by DM Part 516.

Within Reclamation, NEPA compliance is the responsibility of all Reclamation employees, not just management or the environmental staff. Failure to carry out the NEPA process creates a risk of legal action. Most of the suits brought against Federal agencies related to NEPA are for infractions of NEPA procedures under the Administrative Procedures Act.

2.3.1 What NEPA Does

Compliance with NEPA is a Federal responsibility and involves the participation of Federal, State, tribal, and local agencies, as well as concerned and affected public in the planning process. NEPA requires full disclosure of the potential effects of major actions proposed by Federal agencies and accompanying alternatives, impacts, and possible mitigation. NEPA also requires that environmental concerns and impacts be considered during planning and decisionmaking so that steps may be more easily taken to correct or mitigate the impacts of an action. Once a project is implemented, it may be too late or too difficult to avoid or mitigate environmental effects without a substantial increase in the cost and the manageability of the project (i.e., irretrievable commitment of
compliance. Compliance with NEPA results in more informed decisions and the opportunity to avoid or mitigate for potential environmental effects before an action is implemented.

2.3.2 What NEPA Does Not Do

The following list is intended to dispel some of the misconceptions about NEPA. Compliance with NEPA does not:

- **Decide which alternative to choose.**—The NEPA process provides for the development of reasonable alternatives and evaluates their impacts so that the decisionmaker can make an informed decision.

- **Prevent environmental impacts from occurring.**—NEPA compliance requires only that impacts and potential mitigation be disclosed before decisionmaking. NEPA does not require that potential mitigation be implemented.

- **Guarantee how information will be utilized by the decisionmaker.**—NEPA compliance provides information for consideration in the decisionmaking process. It does not guarantee how the decisionmaker will act upon the information.

- **Justify a predetermined action.**—The NEPA process is intended to identify and evaluate alternatives in an impartial manner.

- **Apply to non-Federal entities.**—NEPA applies only to discretionary actions by a Federal agency, including actions dependent upon Federal approval or Federal funding, where the Federal agency retains sufficient control and responsibility over the use of the funding.

2.4 Other Parts of NEPA (Section 102 (F), (G), and (H))

Section 102 contains several sections that are rarely referenced but may be applicable to special situations, including:

- **Paragraph (F)** recognizes the worldwide and long-range character of environmental problems and authorizes Federal agencies to lend appropriate support to activities maximizing international cooperation and preventing declines in the world environment.

- **Paragraph (G)** authorizes Federal agencies to make assistance available to State and local governments in restoring, maintaining, and enhancing the environment.
Paragraph (H) authorizes Federal agencies to initiate and use ecological information for the planning and development of resource-oriented projects.

2.5 **Council on Environmental Quality and U.S. Environmental Protection Agency**

2.5.1 **Council on Environmental Quality**
NEPA created CEQ in the Executive Office of the President as an advisory body. The specific functions of CEQ related to the NEPA process include:

- Promulgating regulations implementing NEPA (40 CFR Parts 1500-1508) and guidance. (See NEPA’s Forty Most Asked Questions by CEQ.)

- Overseeing Federal agency implementation of NEPA and CEQ regulations, including approving agency NEPA regulations.

- Providing assistance in developing environmental policies and proposed legislation as requested by the President.

- Interpreting NEPA and CEQ regulations for agencies and citizens.

- Providing consultation with Federal agencies regarding legislation and litigation.

- Mediating interagency disputes.

- Acting on referrals to CEQ (40 CFR Part 1504).

2.5.2 **U.S. Environmental Protection Agency**
The U.S. Environmental Protection Agency (EPA) has a unique responsibility to review the environmental effects of other Federal agencies’ actions under the authority of Section 309 of the Clean Air Act (CAA). Section 309 requires EPA to review and publicly comment on the environmental impacts of any matter related to the duties, responsibilities, and authorities of EPA’s administrator, including actions to which Section 102(2)(C) of NEPA applies. EPA has developed a rating system for these reviews (figure 2.1). If EPA’s administrator determines that a proposed action is unsatisfactory from the standpoint of public health, welfare, or environmental quality, Section 309 requires that the determination be made public (generally in the FR) and referred to CEQ.
EPA’s review is carried out to ensure that an independent review of the environmental effects of Federal proposals occurs. EPA’s reviews emphasize consultation with the lead agency and public disclosure of EPA actions and concerns. EPA does not have the authority to require changes to a NEPA document. However, Reclamation should work closely with EPA to resolve any issues that may result in less than adequate ratings.

Section 309 generally requires that EPA review and comment on the adequacy of the analysis, the environmental impacts of the proposed action, issues related to its duties and responsibilities, and potential violations of, or inconsistencies with, national environmental standard. The major elements of the Section 309 review are:

- If the action is a Federal project to be located in a specific area, the appropriate EPA regional office has the jurisdiction and delegated responsibility for carrying out the Section 309 CAA review and working with the lead Federal agency to resolve any problems. If the action is legislative or regulatory, the Section 309 review will generally be conducted directly by EPA headquarters.

- If the regional or original reviewing office finds the proposed action in a draft EIS is “environmentally unsatisfactory” or that the information in the draft EIS is “inadequate” to assess the potentially significant environmental impacts of the proposed action, EPA headquarters and CEQ will be notified. These findings indicate that the reviewed draft EIS is a prime candidate for referral to CEQ if the deficiencies are not corrected in the final.

- If the EPA region finds that the subsequent final EIS is “environmentally unsatisfactory,” the region recommends to the EPA administrator that the matter be referred to CEQ for resolution. At this time, EPA headquarters becomes significantly involved in the factual determination and judgment concerning the EIS.

EPA has other NEPA-related duties. In accordance with a memorandum of agreement between EPA and CEQ, EPA carries out the operational duties associated with the administrative aspects of the EIS filing process. The Office of Federal Activities, at EPA headquarters, has been designated the official EPA recipient of all EISs prepared by Federal agencies. EPA’s filing guide was published in the FR on March 7, 1989.

### 2.6 Interior’s NEPA Regulations (43 CFR 46)

In October 2008, Interior published final regulations for the implementation of NEPA (43 CFR Part 46). These regulations are to be used in conjunction with,
and supplementary to, the other existing authorities (CEQ regulations, Executive orders, etc.). These regulations provide greater visibility to the material previously contained within the DM and enhance cooperative conservation by highlighting opportunities for public engagement and input in the NEPA process.
Environmental Impact of the Action

LO — Lack of Objections
EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

EC — Environmental Concerns
EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

EO — Environmental Objections
EPA review has identified significant environmental impacts that must be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

EU — Environmentally Unsatisfactory
EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potential unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to CEQ.

Adequacy of the Impact Statement

Category 1 — Adequate
EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

Category 2 — Insufficient Information
The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion would be included in the final EIS.

Category 3 — Inadequate
EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of that action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS which should be analyzed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the NEPA and/or Section 309 review and, thus, should be formally revised and made available for public scoping comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to CEQ.

Figure 2.1.—Summary of EPA rating definitions and followup action.
Chapter 2 Useful Links

Administrative Procedures Act

Clean Air Act Section 309

Departmental Manual – Part 516 (Environmental Quality Programs)
http://elips.doi.gov/elips/browse.aspx

EPA’s Federal Register Filing Guide

http://ceq.hss.doe.gov/laws_and_executive_orders/the_nepa_statute.html

NEPA’s Forty Most Asked Questions – CEQ

Policy and Procedures for the Review of Federal Actions Impacting the Environment
http://www.epa.gov/compliance/resources/policies/nepa/nepa_policies_procedures.pdf

Summary of EPA Rating Definitions and Followup Action
http://www.epa.gov/compliance/nepa/comments/ratings.html

40 CFR Parts 1500 – 1508
http://ceq.hss.doe.gov/ceq_regulations/regulations.html

43 CFR Part 46
http://www.doi.gov/oepc/nepafr/docs/Federal%20Register%20October%202015%202008%20NEPA.pdf
Chapter 3

The NEPA Process

The NEPA process is intended to clarify whether an action proposed by a Federal agency is a major Federal action significantly affecting the quality of the human environment, and, if so, to disclose the potential impacts to the public and to agency decisionmakers. Action may be addressed by categorical exclusions (CE), while Federal actions that are clearly major require an EIS. An EA addresses those situations that are neither covered by CEs nor clearly require an EIS.

Compliance with Section 102(2)(c) of NEPA is carried out through a formal process (see figure 3.1). When the courts find NEPA compliance to be inadequate, it is frequently because of procedural errors by the Federal lead agency. The courts will determine if Reclamation complied with the required process but will usually defer to Reclamation on issues of analysis and technical knowledge, provided that differing opinions are documented.

3.1 Types of Environmental Reviews: Categorical Exclusion, Environmental Assessment and Finding of No Significant Impact, Environmental Impact Statement

NEPA compliance is triggered by a discretionary Federal action that is subject to Reclamation control and responsibility (40 CFR 1508.18). The nature of the Federal action may be construction of a project, granting a permit, providing Federal funding, or any other action where a Federal decision is required. If no Federal action is being taken or proposed by Reclamation, no NEPA document is required.

Once it has been established that there is a proposed Federal action, the next step is to determine relevant environmental issues, the potential magnitude of environmental impacts, and the appropriate level of NEPA documentation. Based on an early evaluation of a proposed action’s environmental effects, the documentation for the action can be placed in one of the following three categories.

3.1.1 Categorical Exclusions

(40 CFR 1508.4, 43 CFR 46. 205, 43 CFR 46.210, 43 CFR 46.215, and 516 DM 14)

The first (and simplest) type of environmental review is the CE. A CE applies to actions that have been determined not to individually or cumulatively have a
significant effect on the human environment. A CE excludes categories of Federal actions from further NEPA review because the actions within these defined categories have been determined to generally have no significant effect on the environment, have no unresolved conflicts concerning alternative uses of available resources, or have no extraordinary circumstances that are applicable. Reclamation recommends a completed CEC for every use of a Reclamation-specific CE. If all the questions on the CEC can be checked “no” (see chapter 5, figure 5.2), no further NEPA documentation is necessary. If “uncertain” or “yes” is checked, an EA or EIS would be necessary.

Development of a new CE category must be approved by CEQ and published in the FR for public review and comment before it is finalized. There may be cases in which a CE appears to apply but, because of particular circumstances such as controversy, action-specific environmental circumstances, or cumulative effect in relationship to other actions, NEPA analysis and documentation in an EA or EIS may be necessary. Interior’s CEs and list of exceptional circumstances are included in 43 CFR 46.210 and 46.215. Reclamation’s CEs are listed in 516 DM 14.5.

A CE can only be used for actions specifically defined by the exclusion category. The CEs and the procedures for using them, including actions for which a CEC is and is not necessary, are discussed in chapter 5.

3.1.2 Environmental Assessment and Finding of No Significant Impact
(40 CFR 1501.3 and 1508.9, 43 CFR 46.300-325, 516 DM 1.13, 516 DM 3.4 A, and 516 DM 4.4 B)

The purpose of an EA is to allow the decisionmaker to determine whether to prepare an EIS or a finding of no significant impact (FONSI). An EA is written for any action that may have effects that are uncertain, and for which it is uncertain whether an EIS may be required. An EA is used to identify the issues and the environmental effects. Based on the EA, a FONSI may be prepared if the EA has demonstrated that there are no significant impacts resulting from the proposed action; if not, an EIS will be initiated. In addition, an EA may be used for evaluating any potential agency action to assist in planning and decisionmaking.

An EA is a concise document prepared with input from various disciplines and interested parties that provides sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI. This conclusion cannot be reached without having knowledge of what the issues are, as determined by appropriate Federal, tribal, State, local, and public entities, as well as the general public. The decision to conduct the next level of evaluation (an EIS) can be made any time there is enough information to indicate that significant impacts may occur or that sufficient controversy (disputes over scientific conclusions or impacts of the action) about the impacts exists. Mere opposition is not controversy.
If a decision has already been made to prepare an EIS, then an EA is not necessary. More detail on circumstances when an EA is appropriate and a detailed discussion of EA procedures and the FONSI can be found in chapter 6.

3.1.3 Environmental Impact Statement

(40 CFR 1502.1 through 1502.25, 43 CFR 46.400 through 46.450, 516 DM 1.13, 516 DM 3.3, 516 DM 3.4, 516 DM 4.4 D through G, and 516 DM 14.4)

An EIS is normally required for a major Federal action where environmental effects are potentially significant. Reclamation actions normally requiring the preparation of an EIS are listed in 516 DM 14. The nature of an action, and its environmental effects, may be apparent from the beginning of the study, and these factors may call for an EIS without the preparation of an EA. Some latitude exists in determining those actions which require an EIS. The determination is the result of many factors, including controversy (disputes over scientific conclusion or impacts of the action), environmental considerations, project history, and the language in the regulations (see also 40 CFR 1502.4, 40 CFR 1508.18, 40 CFR 1508.23, and 40 CFR 1508.27).

Chapters 7 and 8 discuss EIS requirements in detail.

3.2 When to Apply NEPA

Section 102 of NEPA indicates that a “detailed statement” (i.e., an EIS) shall be included with “proposals for legislation and other Federal actions significantly affecting the quality of the human environment.” NEPA is required when a discretionary Federal action is proposed. The regulations (40 CFR 1508.18(a)) define a Federal action as including new and continuing activities, actions partly or entirely financed by Federal agencies (where some control and responsibility over the action remain with the Federal agency [43 CFR 46.100]), actions conducted by Federal agencies, actions approved by Federal agencies, new or revised agency rules or regulations, and proposals for legislation.

3.3 When NEPA Documentation Is Not Required

(40 CFR 1508.18 and 43 CFR 46.100)

No NEPA documentation is needed if there is no Reclamation action or no Federal discretion. If there is a Reclamation discretionary action and it is not on the list shown below, it will likely require some NEPA documentation. If a proposed action is on the list, environmental concerns should still be considered in decisionmaking, and regional and other environmental staff should be consulted as appropriate before the decision is made that an action is exempt from NEPA documentation. The following activities are exempt from NEPA:
Congressional legislation expressly exempting specific projects or actions from NEPA compliance (note that other environmental laws may still apply, depending upon the specific situation)

- Funding assistance solely in the form of general revenue sharing funds (unrestricted block grants under the State and Local Fiscal Assistance Act of 1972) with no Federal control over the subsequent use of such funds

- Judicial or administrative civil or criminal enforcement actions such as levying fines or sentencing

- Internal administrative actions, including standard materials acquisition and use, as well as organization and administrative changes

- Actions by others that do not involve Federal monies, facilities, or approval

- Operational decisions on ongoing Reclamation projects where there would be no major changes in existing operations or no new information relevant to potentially significant effects (i.e., maintenance of the status quo)

- Federal funding assistance where there is no Federal agency control and responsibility as to the expenditure of funds by the recipient

Be aware that NEPA compliance documents are generally required for every other action. When questions arise, consult your area office environmental staff, regional environmental staff, and/or solicitor.

**3.4 Apply NEPA Early**  
*(40 CFR 1501.2, 1502.5, and 43 CFR 46.200)*

CEQ regulations state that: “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” (40 CFR 1501.2).

Environmental considerations should be taken into account as soon as a proposal is identified (40 CFR 1502.5). In some cases, the activity may be already covered by previous NEPA documentation, but this assumption should be confirmed early in the process. Area office and/or regional environmental staff should determine whether any changes have occurred in environmental conditions and if the previous NEPA documentation is still accurate.
Chapter 3: The NEPA Process

Reclamation personnel should begin developing environmental information at the earliest reasonable time so that environmental data are used in the decisionmaking process. Consideration of environmental information and issues should begin with the identification of a need that Reclamation contemplates addressing.

3.5 Scoping
(40 CFR 1500.4, 1501.7, and 516 DM 1.11)

The purpose of scoping is to obtain information that will focus the NEPA analysis (whether an EA or EIS) on the potentially significant issues and deemphasize insignificant issues (40 CFR 1500.4(g)). Information should come from a variety of sources, and reasonable effort should be made to contact all parties who may have information on the proposed action. Scoping (required by NEPA implementing regulations at 40 CFR 1501.7) is similar to, and closely related to, public involvement. Information gathered either identifies or can be used to identify:

- Significant resource issues
- Interested parties
- Study participants
- Resources available for the study
- Study constraints
- Alternatives to be considered
- The potentially affected geographical area
- Potential effects

3.5.1 Scoping Defined

Scoping is required by NEPA regulations (40 CFR 1501.7). It is to 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.” It includes all types of information-gathering activities and should not be viewed as a process limited only to a public meeting forum. Information can be obtained in a variety of ways: contacts with other agency personnel, water districts, citizens groups, and other interested individuals and parties are all scoping activities.

Scoping activities should be flexible and tailored to the action being considered. For example, scoping activities for a CE may be limited to intra-agency (environmental, technical services, planning, water operations, etc., groups or staff within Reclamation) and interagency contacts such as those with the U.S. Fish and Wildlife Service (Service), U.S. Army Corps of Engineers (USACE), and the State Historic Preservation Officer (SHPO). If warranted by the action, it may be beneficial to contact additional individuals and groups for information.
Scoping activities can be tailored to a project’s needs. For example, scoping activities for an EA would likely include the intra- and interagency contacts routinely made for a CE. Public scoping is not required for an EA, but if a project is more complex, it may warrant a media program to solicit input from the general public, using newspaper articles or Web site information. Some Reclamation regions, recognizing the benefits of involving the public early in the scoping process, require a public notice for the development of an EA. The action should dictate scoping activities, and if a public notice and/or public meetings facilitate information gathering, such activities are encouraged.

Scoping activities associated with an EIS may include any of the activities previously described and any others necessary to gather relevant information. For highly visible actions, a newsletter, or even a home page on the World Wide Web, may facilitate information gathering. According to NEPA regulations, a notice of intent (NOI) to prepare an EIS must be published in the FR prior to initiating scoping. However, some information gathering is usually necessary before publication of the NOI to ensure that the interested publics understand the action and can effectively provide additional information. Depending on the action, an NOI may be an effective tool to facilitate scoping at other levels of compliance, such as an EA.

3.5.2 Public Meetings

Public meetings for scoping activities are not required. However, public meetings can be effective communication tools, as well as effective mechanisms for gathering information. The use of public meetings as a scoping tool is strongly encouraged. Scoping generally involves a series of intra-agency, interagency, and public meetings, or it may consist of a series of smaller meetings with interested groups, agencies, or even individuals, including those opposed to the proposed action. Scoping meetings should, to the extent practicable, be held in the project impact area. Interested Federal, tribal, State, and local agencies; interested citizens; and environmental groups should be invited to participate.

3.5.3 Benefits of Scoping

At the beginning of this section, the purpose of scoping was described as information gathering. Scoping should also be viewed as a “value-added” interdisciplinary process. Effective scoping identifies the public’s concerns and, together with agency considerations and input from technical staff, defines significant resource issues. Reclamation can then focus on the defined issues and avoid encyclopedic discussions of topics that are irrelevant to the proposed action. The more an analysis can be focused on significant resource issues, the better the exchange between the public and the decisionmakers. Issues that are not significant, or that have been covered in the other documents, should be handled by reference, or the depth of coverage should be reduced. Often, it is just as important to understand which resource issues are not significant as it is to identify which resource issues are.
Scoping aids in identifying issues defined in other environmental laws (i.e., Endangered Species Act of 1973 (ESA), National Historic Preservation Act (NHPA), the Clean Water Act (CWA), Fish and Wildlife Coordination Act (FWCA), etc.). Staff can begin to lay the groundwork for coordinating and consulting with other Federal agencies with jurisdiction and expertise in these areas and integrating these analyses into the NEPA process. This helps prevent delays later in the NEPA process. Scoping is an especially important consideration whenever endangered species or cultural resources is involved. These issues can become major considerations with proposed actions, and the constraints associated with such considerations should be identified and addressed early in the scoping process. It is important that the Federal agency staff attending scoping (or cooperating agency) meetings are able to describe the requirements of all Federal laws within their jurisdiction.

Scoping activities help to identify interested and/or potentially affected parties. Where applicants are involved, it can bring them into the process to identify information needs, how other environmental reviews may be integrated into the NEPA document, and any major obstacles that could cause delays. Detailed records of contacts made during scoping activities become part of the project files and can become an important reference. Scoping can also assist in identifying resources for the study, including staff time, data, and funding.

By defining significant resource issues, scoping activities help identify the geographical area potentially affected by the proposed action. Issues can often be associated with physical areas, although impact areas may vary by resource. For example, changes in dam operations may affect biological resources for many miles downstream, but the same changes could affect hydropower in several States. In some cases, scoping may reveal a new alternative to the project that was not previously considered by the agency.

In situations in which a non-Federal action involves a Reclamation decision that is the only Federal decision involved, and in which Reclamation’s decision affects only a small portion of the overall action, it may be within reasonable agency discretion to limit the NEPA review to those parts of the action directly related to Reclamation’s decision. This recognition of the overwhelmingly private nature of the action avoids the “federalization” of the action. Such a situation could, for example, involve proposals to cross Reclamation properties that are merely a link in a transportation or utility transmission project. Great care should be taken to ensure that the entire Federal relationship with the action (not just Reclamation’s) has been analyzed before concluding that the appropriate scope of the NEPA analysis will not include the entire project. It is important to realize that the type of actions under discussion (where Reclamation’s analysis could be limited) would not involve Reclamation project operations or Reclamation project water.

### 3.6 Public Involvement

**(40 CFR 1506.6, 43 CFR 46.110, 43 CFR 46.305, 43 CFR 46.430-435, and 516 DM 1.7)**

Public involvement activities are required by CEQ regulations (40 CFR 1506.6(a)), which state: “Agencies shall: Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.” The public should be involved as much as possible, on a continuing basis throughout project planning, to build consensus for the final decision. It is not always easy to seek out those with differing viewpoints, but it is an important part of the process to be aware of all points of view and to work with all concerned individuals and the public. Initial efforts spent listening and being open to other ideas should prevent many headaches later in the process.

Public involvement means effective involvement of the affected and interested individuals and/or groups in planning and the decision process. It centers on effective two-way communication among the partners, agencies, organizations, and all the various stakeholders.

Often, interested parties do not understand the NEPA process or how they may get involved. Reclamation, like other agencies, has a responsibility to ensure that parties directly affected by an action are informed about the NEPA process. This may be as simple as distributing NEPA fact sheets or other information at public meetings; in newspapers or other media resources, including Reclamation’s Web site; or more involved, such as providing NEPA training or workshops.

#### 3.6.1 Public Notification

**(40 CFR 1506.6(b), 40 CFR 1501.7(a)(1), 43 CFR 46.305, and 43 CFR 46.435)**

Reclamation shall involve the appropriate public in preparing NEPA documents. It will provide public notice of NEPA-related hearings, public meetings, EAs, FONSI, NOIs, and the availability of EISs. Notices will include appropriate tribal, local, and State government entities in any distribution, as well as other parties upon request.

The requirement for public notice varies by the level of NEPA compliance. No public notice is required for a CE, although in unusual circumstances, some notice may be advisable.
Public notice of the availability of EAs and FONSIs is required, though the requirements depend upon the proposed action, potential issues, and public interest. Noticing may include posting to a regional Internet Web site, posting to community bulletin boards, direct mailings, or other methods.

In the case of an EIS, Reclamation must publish a notice of intent (NOI in the FR when the EIS is initiated). Reclamation will issue the FR, regional, and local notices, as appropriate, for draft, final, and supplemental EISs and RODs. Additional information on the ROD can be found in section 9.5 of this handbook.

Public involvement continues throughout the planning and implementation of the action and, thus, includes all scoping activities. After a major scoping activity, Reclamation should implement some means of informing the public participants of the decisions made. It may be appropriate to prepare a public document that identifies how the issues raised by the public will be handled and how data will be developed. The document (perhaps a newsletter or scoping report) should be distributed to all individuals who participated in the scoping meetings and to the news media.

3.6.2 A Continuing Process

Reclamation’s public involvement program should begin early so that environmental concerns can be discussed with the public as the plans are developed and evaluated. Early meetings may need to focus on how the NEPA process works and how the public can most effectively participate in that process. Consensus-based management, if appropriate, should be initiated at the earliest possible opportunity (43 CFR 46.110) (see Section 8.6, Description of Alternatives). Training on how to effectively participate in the NEPA process and discussion of any applicable adaptive management components may also be appropriate early in the public involvement process.

When working with Indian tribal governments, it should be kept in mind that Indian tribes are not just another stakeholder or member of the public. They are sovereign entities. Please see more on working with tribes in the next section.

There are many ways to continuously involve the public in the NEPA process. None will answer all the concerns for involvement that the public may express. The greater the degree of public interest, the more expansive the continuing scoping efforts should be. Briefings, Web sites, newsletters, special issue groups, and regular attendance at local governmental meetings are just some of the many techniques that are available.

Reclamation environmental personnel and other relevant disciplines (the interdisciplinary team) should be involved early in the planning process. They can help identify important resources, opportunities, and potential difficulties and any known environmental constraints so conflicts can be avoided. For example,
there may be endangered species or sensitive wetland areas that should be avoided, or there may be a nonstructural way to accomplish the project purpose and satisfy the identified needs.

After Reclamation’s environmental personnel are involved, other agencies with environmental expertise and/or legal jurisdiction (i.e., potential cooperating agencies) and potential partners should be identified and involved. When the project purpose and need have been defined, all appropriate publics should be contacted to identify their questions and concerns and to begin NEPA documentation.

The participation of project sponsors, cooperating agencies, tribes, and partners in the public involvement process is encouraged. They should be present at important scoping meetings, public hearings, and other events to provide information concerning non-Reclamation objectives associated with the proposed action.

To the extent possible, Reclamation should encourage community representatives and stakeholders to reach consensus on issues at critical points throughout the NEPA process. This is not always practicable and feasible, especially on large and complex projects where there may be many diverse and competing interests. Reclamation has the responsibility to keep the NEPA process on track and make the final decision on a proposed action. However, an approach that encourages consensus (consensus-based management) may help avoid problems later on if interested parties are on board with the decisionmaking process. See also 43 CFR 46.110, ESM 10-21, and Reclamation memo entitled, “Guidance on Use of Consensus-Based Management in the National Environmental Policy Act Process.”

3.7 Coordination, Consultation, and Cooperation (40 CFR 1500.2(c), 1501.6, 1502.25, 1506.6, 43 CFR 46.155, and 516 DM 1.6)

Coordination is closely related to scoping and public involvement and continues throughout the process. The NEPA process is an open one, integrating the provisions of other environmental statutes and the needs of interested parties. While the extent and formality of the coordination will vary, the need to coordinate with other interested parties is a constant feature of NEPA. The NEPA regulations define a special relationship for some agencies (i.e., a cooperating agency) (40 CFR 1501.7, 1508.5, and 43 CFR 46.225).

Coordination also includes Federal, tribal, State, and local entities that are not cooperating agencies, and any appropriate public. Such entities with a potential interest in the proposed action should be notified early in the process and given opportunity to provide input. NEPA activities should be coordinated with other
environmental requirements so that their requirements are, when possible, met concurrently rather than consecutively. This specifically includes FWCA, CWA, NHPA, ESA, and other environmental review laws and Executive orders. (See EO 13352, Cooperative Conservation, and ESM 10-19, Procedures for Implementing Integrated Analyses in the National Environmental Policy Act Process).

The United States Government has a unique legal and political relationship with Indian tribal governments, established by the Constitution of the United States, treaties, statutes, judicial decisions, and Executive orders. EO 13175 (November 6, 2000) specifically addresses “Consultation and Coordination with Indian Tribal Governments.” Meetings with tribal governments should follow protocols appropriate for a government-to-government consultation. Reclamation has prepared guidance to assist in working with Indian tribes: Protocol Guidelines: Consulting with Indian Tribal Governments (this document can be found under the “NAAO Policy” link at www.usbr.gov/native/). The focus of a scoping meeting is to initiate a thorough identification and review of the issues prior to preparation of a decision and not to debate the ultimate decisions. The scoping meeting should also identify areas that need further research and gather input from tribal leaders about how the consultation process should proceed.

3.8 Lead and Cooperating Agencies (40 CFR 1501.5, 1501.6, 1501.7, 1508.5, 1508.16, 43 CFR 46.220, 46.225, 46.230, 516 DM 1.9, and 516 DM 1.10)

The lead agency has ultimate responsibility for the content of any NEPA document prepared. The lead agency also is responsible for basic scope, definition of purpose and need, alternative development, final document approval, and other decisions within the process. It is recommended that there always be a sole Federal lead agency. If joint Federal lead agencies are selected, one agency should be designated as responsible for printing and filing the document.

If more than one Federal agency either proposes or is involved in the same action, or is involved in a group of actions directly related to each other, the action agencies will select a lead agency to administer the preparation of the NEPA document (EIS or EA). If the action agencies cannot agree on who should be the lead agency, either agency may request that CEQ make the determination.

Reclamation, when acting as lead agency in the preparation of an EIS, will request the participation of any Federal agency or other eligible government entity with jurisdiction by law or with special expertise to be a cooperating agency. Federal agencies with closely related decisions having the same general scope may also be invited to be cooperators, and an agency may request
Reclamation to designate it as a cooperating agency. Non-Federal governmental entities, such as Indian tribes, local governmental entities, or States, can also be cooperators. It is advantageous to invite eligible governmental entities to become cooperators at the earliest opportunity. Reclamation must also respond to any requests for cooperating agency status. (See January 30, 2002, CEQ Memoranda, Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act.) Reclamation may invite qualified agencies to be cooperators in an EA as well. Appendix II of CEQ’s regulations (40 CFR Chapter V) lists Federal and State agencies with jurisdiction by law or special expertise on environmental quality issues.

A cooperating agency is normally expected to fund its own participation (40 CFR 1501.6(b)(5)). Reclamation should use the environmental analysis and recommendations of the cooperating agencies to the maximum extent possible.

A Federal agency with jurisdiction by law is normally expected to become a cooperating agency (40 CFR 1501.6). However, CEQ and other qualified agencies may be a cooperating agency. CEQ Regulations (40 CFR 1501.6(c)) allow a Federal agency to decline to participate. A copy of such a reply shall be sent to CEQ (40 CFR 1501.6(c)) with a copy to the Office of Environmental Policy and Compliance (OEPC) of Interior. See also section 8.10.2 for additional detail on cooperating agencies.

### 3.8.1 Reclamation as a Lead or Joint Lead Agency

When Reclamation is a joint lead with one or more other Federal agencies, each lead agency should sign a separate ROD, although special circumstances may make one ROD, signed by all leads, appropriate.

Reclamation, as lead agency, should always develop a memorandum of understanding (MOU) with each cooperating agency, defining the roles, funding sources, assignments, staff commitments, and schedule. Such MOUs must be used in the case of non-Federal agencies and must include a commitment to maintain confidentiality of documents reviewed prior to the public release of any NEPA document, including drafts (43 CFR 46.225(d)). Where potential conflicts exist with State public disclosure laws, consult your solicitor.

Cooperating agencies, as defined in the applicable MOU, may help identify issues; arrange, collect, and analyze data; develop and evaluate alternatives; and carry out any other mutually agreed-upon task. Cooperating agencies are normally expected to use their own funds, and only rarely should Reclamation provide funding for the participation of cooperating agencies. Situations in which such funding may be appropriate include special studies to be carried out by the cooperating agency, extraordinary travel requests, or other special circumstances (e.g., effective tribal participation, when dealing with Indian Trust Assets, may justify Reclamation funding).
When Reclamation agrees to participate in a joint lead agency situation, it is recommended that an MOU among all parties be developed to clearly identify the schedule, respective responsibilities, and funding commitments. The appropriate Solicitor’s Office should review MOUs before they are signed.

### 3.8.2 Reclamation as a Cooperating Agency

When requested by a lead agency, Reclamation will consider the request to be a cooperating agency based on jurisdictional responsibilities, project effects, and any special expertise (40 CFR 1501.6). Reclamation should actively seek cooperating agency status on other agencies’ EAs or EISs where the activities or the impacts associated with these activities may affect Reclamation lands, waters, facilities, or programs.

Reclamation should enter into an MOU with the lead agency(s), describing what Reclamation’s commitment is in the NEPA process (i.e., in-depth analysis, writing sections of the document, and/or review of the document at various stages of its development). As noted above, where Reclamation is the lead (or joint lead) agency, the appropriate Solicitor’s Office should review MOUs before they are signed.

It is to Reclamation’s benefit that it provide adequate input into the NEPA process and associated documents (i.e., EA and EIS) when Reclamation is a cooperating agency so that all effects of the proposed action are presented in a complete, accurate, and unbiased manner. Reclamation may then adopt the document for follow-on Reclamation actions without further in-depth scoping, analysis, or public review as long as its NEPA requirements, comments, and suggestions have been satisfactorily addressed. Reclamation would have to prepare its own ROD or FONSI. See also 40 CFR 1506.3 (C) and CEQ’s NEPA’s Forty Most Asked Questions, No. 30.

Figure 3.2 is an example of an MOU between Reclamation and a cooperating agency (the content of an MOU with a lead or joint lead would be similar).

### 3.9 Interdisciplinary Approach

(Section 102(2)(a) NEPA; 40 CFR 1502.6)

Reclamation will use an interdisciplinary approach in preparing an EIS or EA, including entities with NEPA, planning, operations, construction, and/or land management expertise, as appropriate. In achieving this broad interdisciplinary approach, Reclamation may use agency staff, other agencies, or public groups with special interest or expertise, and/or prepared studies and other documented sources.
In addition, Reclamation may wish to contract with public or private entities for studies and reports on special and unique issues discovered during the scoping process.

In accordance with Section 102(2)(a) of NEPA, the documents shall be prepared to ensure the integrated use of the natural, social, and environmental sciences. The disciplines of the preparers should be appropriate for the scope and issues identified in the scoping process.

Lengthy discussions in the text on methodologies of the various disciplines should be avoided unless absolutely necessary to understand the analysis and its conclusions. Otherwise, explanations of methodologies may be either appended, if determined to be necessary for adequate review of the document, or filed and referenced in the document, to be available upon request.

### 3.10 Analysis

(Section 102(2)(C) NEPA; 40 CFR 1502.16)

NEPA requires that every EIS include analysis of:

- The environmental impacts of the proposed action
- Any adverse environmental effects which cannot be avoided should the action be implemented
- Alternatives to the proposed action and their impacts
- The relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity
- Any irreversible and irretrievable commitments of resources which would result from implementation

The analysis must also discuss direct and indirect impacts, conflicts with existing land use plans, energy requirements, mitigation, historic and cultural resources, natural or depletable resource requirements, and conservation potential (40 CFR 1502.16). See section 8.8 for more information on EIS content.

#### 3.10.1 Appropriate Level of Analysis

Different types of NEPA compliance (EA and EIS) will likely present different levels of analysis. Both require a “hard look” at the potential impacts, but an EA is intended to be a “concise” document, while an EIS is required to be a “detailed statement.” The analysis should be of sufficient detail in an EA to allow a determination of significance, while the analysis in an EIS should support the full
display of potential impacts, with an emphasis on potentially significant impacts and reasonable mitigation. This level of analysis will vary not only between the two document types, but also within the documents, depending upon the potential issues related to different potential impacts.

### 3.10.2 Incomplete or Unavailable Information

(40 CFR 1502.22 and 43 CFR 46.125)

Reclamation will obtain the information necessary to fully evaluate all reasonably foreseeable, significant adverse impacts in NEPA documents, unless the information cannot be obtained because the costs are too great or the means of getting it are not available. Data and new information needs should be identified early enough in the process to enable timely completion of required studies and integration of the information.

The determination of costs being too great (i.e., exorbitant) is the responsibility of the deciding official. In addition to the monetary costs of obtaining the information, consideration of other nonmonetary costs, such as social costs, delays, opportunity costs, and nonfulfillment or nontimely fulfillment of statutory mandates, is appropriate.

Reclamation should carefully evaluate whether to move ahead on proposals for which limited relevant information may prevent meaningful analysis of alternatives, impacts, or the means to mitigate impacts. If information cannot be obtained, the NEPA document will make it clear that such information is lacking and why, discuss how that information would be relevant to the analysis, provide a summary of relevant existing data, and provide Reclamation’s evaluation of potential impacts based upon generally accepted approaches, methods, or models.

Some information may not be available to Reclamation because it is proprietary information maintained by an applicant (i.e., a non-Federal entity requesting Reclamation to take some action). The CEQ regulations in 40 CFR 1502.21 state that “Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.” Reclamation should work closely with the applicant on questions that deal with proprietary issues or information.

### 3.11 Environmental Commitments

(40 CFR 1505.3)

Environmental commitments are written statements of intent made by Reclamation to monitor and mitigate for potential adverse environmental impacts of an action associated with any phase of planning, construction, and operation and maintenance (O&M) activities. It is a term used by Reclamation to reflect the concept addressed in 40 CFR 1505.3. Environmental commitments are actions that:
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- Reduce or avoid impacts
- Restore or enhance environmental quality
- Are directly controlled by Reclamation
- Are indirectly controlled via a written agreement with another party to carry out the action

Reclamation is obligated to fulfill and appropriately fund all monitoring and mitigation measures that it commits to implementing in its final decision. For NEPA documents, these commitments generally appear in the ROD and other decision documents.

Environmental commitments may be documented in any NEPA compliance activity through the use of a CEC, EA, FONSI, EIS, or ROD. Commitments may state how Reclamation will comply with applicable statutes, regulations, and other obligations, including:

- Clean Water Act
- Clean Air Act
- Endangered Species Act
- National Historic Preservation Act
- Executive orders
- Tribal, State, and local laws, rules, and regulations

Reclamation will:

- Budget and allocate funds necessary to carry out the commitments as scheduled
- Monitor and evaluate the effectiveness of environmental commitments
- Document the results

The implementation of environmental commitments can be delegated to a third-party contractor or required as a condition for a permittee, lessee, or loan recipient for individual projects or actions. Any delegation of responsibility will be in writing. However, compliance with any environmental commitments program (see section 9.7.1) remains the responsibility of the appropriate Reclamation manager.

When Reclamation has the main financial responsibility, program activities should normally be budgeted and allocated in project or program accounts. However, the main financial responsibility may often fall on an applicant, permittee, or lessee.
3.12 Quality of Information  
(Public Law (P.L.) 106-554, 40 CFR 1502.24, and 40 CFR 1506.5)

In response to a directive of Congress in Section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554), Reclamation published Information Quality Guidelines (IQG) (http://www.usbr.gov/main/qoi). These guidelines are intended to meet requirements for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information). The guidelines also provide a mechanism for the public to seek and obtain correction of any erroneous information disseminated by the agency. NEPA documents and any other environmental documents that Reclamation distributes or makes available to the public are covered by these guidelines.

To ensure the quality of data in NEPA documents, information should be accurately documented and verified to the extent possible (40 CFR 1502.24). NEPA analyses may be peer reviewed any time there is a need. Peer review may be conducted using experts within other Reclamation offices (other regions, Technical Service Center [TSC], Policy and Administration, etc.) or outside of Reclamation.

The NEPA comment process may be utilized as the mechanism for parties seeking correction of information that is not consistent with the IQGs (quality, integrity, utility, and objectivity). Requests for information correction which cite the Information Quality Act (IQA) must be submitted in a certain format outlined in the IQG. The Reclamation office responsible for the NEPA document would respond to these comments as it would for any response to comments on NEPA documents. There is no process to appeal Reclamation’s response to public comments on EISs under NEPA. However, under the IQA, a party may appeal a Federal agency response to the head of the agency if they remain dissatisfied with the quality of the data after the agency’s corrections (if any). This has the potential to delay completion of the NEPA process, so it is important to respond clearly and fully to requests for correction under the IQGs.

3.13 Emergency Actions  
(40 CFR 1506.11 and CFR 46.150)

CEQ and Interior regulations provide for emergency situations in which circumstances make it necessary to take actions without following the usual NEPA procedures. Emergencies are unexpected events that occur suddenly—not events that develop over weeks or months. The responsible official may immediately take actions necessary to control an emergency situation and mitigate harm to life, property, or important natural, cultural, or historic resources. When taking such actions, the responsible official must consider the potential
environmental consequences of these actions and mitigate potential adverse effects to the extent practicable while acting immediately to address the emergency.

The responsible official shall document that an emergency exists and describe the actions taken to address that emergency. Immediate preparation of a project file may be advisable.

Further actions to address the emergency will require NEPA compliance, or where proposed actions are required prior to the completion of a NEPA document, consultation with Interior’s OEPC. The consultation with OEPC will address alternative arrangements, consultation with CEQ, and approval by the Assistant Secretary – Policy, Budget, and Management. These emergency events are rare, and there are always unique twists; so while this is the “formally approved” process, there is room for flexibility in practice.

Some emergency actions may be so limited in intensity and duration that the effects would be insignificant. Reclamation may be able to utilize an Interior or Reclamation CE if one is available for the type of action being undertaken. It is advisable to document the findings in a CEC and include it as part of the administrative record.

### 3.14 Adoption of Other Documents

(40 CFR 1500.4(n), 43 CFR 46.120, 43 CFR 46.135, 43 CFR 46.140, and 43 CFR 46.320)

CEQ and Interior regulations (40 CFR 1500.4(n) and 43 CFR 46.120(d)) indicate that Federal agencies should reduce duplication by adopting appropriate environmental documents prepared by other agencies.

#### 3.14.1 Adoption of Federal Documents

(40 CFR 1506.3 and 43 CFR 46.120)

The adoption of other Federal environmental documents is encouraged to avoid duplication. However, one basic premise of adopting documents is that the adopting agency must make its own independent review of the document and take full responsibility for its scope and content.

An EIS prepared by another agency may be adopted by Reclamation if, upon independent evaluation by the regional or area office, it is found to comply with Reclamation policy, Interior regulations, and CEQ regulations. In general, there are three situations in which adoption of an EIS may be appropriate:

- Reclamation participated as a cooperating agency. In this case, Reclamation, upon reviewing the document and ensuring that its
NEPA procedures have been satisfied, simply adopts the final environmental impact statement (FEIS) and issues its own ROD.

- Reclamation was not a cooperating agency but is undertaking an activity that was the subject of an EIS. In this rare case, Reclamation, after reviewing the document and ensuring that its NEPA procedures have been satisfied, would adopt the EIS, recirculate it as an FEIS, and then issue its own ROD.

- Reclamation’s proposed action is not substantially the same as that covered in the EIS. In this case, Reclamation may adopt an EIS or portions of the EIS and recirculate it as a draft prior to completing an FEIS and issuing a ROD.

Adoption of EAs is addressed in 43 CFR 46.320 and is similar to the procedures to adopt EISs. The decisionmaker may adopt EAs prepared by other agencies as long as the following have been satisfied:

- Reclamation independently reviews the document for compliance with all of Reclamation’s NEPA procedures, including public involvement.

- When appropriate, augment the environmental document to be consistent with Reclamation’s action.

- Cite the environmental document.

- Once these requirements have been met, Reclamation may adopt the document for its own EA.

3.14.2 Use of Non-Federal Environmental Documents

While the use of non-Federal environmental documents in Reclamation’s NEPA compliance activities is encouraged, the distinction should be kept in mind between environmental documents and documents prepared pursuant to NEPA. In general, non-Federal environmental documents may be used as a basis for preparing NEPA documents, incorporated by reference, or, in certain cases, adopted as EAs.

There is no provision in CEQ regulations for adopting a non-Federal document as an EIS. If a non-Federal document had been prepared comparably to an EIS, Reclamation could use that document as a draft environmental impact statement (DEIS) after first ensuring that the document meets all NEPA and Reclamation procedural requirements. All requirements for completing an EIS would need to be met, including issuing an NOI and scoping. In effect, the non-Federal
document would be the equivalent of a DEIS prepared under contract for
Reclamation and, from a procedural aspect, would need to be treated in the same
manner.

Concerning EAs, a non-Federal document may be adopted after independent
review by Reclamation to ensure that all NEPA and Reclamation procedures
relating to EAs have been met. Reclamation would take full responsibility for its
scope and content. Upon completion of this review, Reclamation may issue a
FONSI. It is recommended, in this situation, that the EA and FONSI be publicly
available for 30 days before a final decision is made.

3.14.3 Eliminate Duplication with Tribal, State, and Local Agencies
(40 CFR 1506.2 and 43 CFR 46.120)
CEQ’s NEPA regulations require Federal agencies to cooperate with tribal, State,
and local agencies to reduce duplication of NEPA and comparable requirements
unless specifically barred from doing so by law. Such cooperation includes joint
planning, joint environmental research and studies, joint public hearings, joint
EAs, and joint EISs. In these instances, one or more Federal agencies and one or
more tribal, State, or local agencies could be joint lead agencies (see section 3.8
of this chapter). Depending on the circumstances, Reclamation could be the
NEPA lead agency, and the other agencies would take the lead on
tribal/State/local requirements.

In instances where tribal or State laws or local ordinances have environmental
compliance requirements in addition to, but not in conflict with, NEPA,
Reclamation shall, to the fullest extent possible, cooperate in fulfilling these
requirements, as well as those of Federal law, so that one document will comply
with all applicable laws and regulations.

Reclamation will discuss any inconsistencies between a proposed action and
approved tribal, State, or local plans and laws in an EIS or EA. Where
inconsistency exists, the document should describe the extent to which
Reclamation will modify its proposed action to reconcile it with the approved
tribal, State, or local plan or law.

3.15 Integrating Related Environmental Legislation and
Requirements (40 CFR 1502.25)
To the fullest extent possible, the NEPA process will integrate the requirements of
other statutes, such as the FWCA, NHPA, ESA, and other laws and EOs. The
analytical process under these laws and concepts of no action, impacts, and scope
may be described differently than under NEPA. It is important to recognize these
differences and resolve them early in the process so that the environmental
requirements are effectively addressed in one process with minimal redundancy.
Environmental staff in the region, Policy and Administration, and the Solicitor’s
Office can provide assistance to the Reclamation program offices in determining which laws apply to specific actions and how consultation and analyses may be incorporated into the NEPA process.

Where possible, the analysis of impacts required by these other laws should be included in or appended to the NEPA document. A section should also be included in the document describing the consultation and coordination that took place with the agencies overseeing these laws. If compliance with these other laws is treated as a separate action, delays could occur, possibly leading to additional costs and damage to public relations. At a minimum, the status of compliance should be documented in any EA or EIS.

Following is a list of examples, of which some or all may be identified for a given action. There may be other laws and Executive orders that also apply. Note that for all applicable laws and Executive orders, full and appropriate compliance is required and will be completed for any action, regardless of integration into the NEPA process.

3.15.1 Endangered Species Act
(P.L. 93-205, as amended; 50 CFR 402; and 40 CFR 1502.25)

Special attention should be given to the integration of NEPA and the ESA. Section 7(a)(2) of the ESA requires consultation with the Service and/or NOAA-NMFS for any Reclamation action which may affect a species federally listed as threatened or endangered (listed species). This consultation process may result in the Service and/or NOAA-NMFS issuing a biological opinion containing actions to be undertaken to avoid jeopardizing a species or to reduce the level of take associated with the proposed action. Reclamation shall, to the fullest extent possible, integrate ESA and NEPA analyses and schedules. There are several areas where, typically, issues have arisen that may not allow this integration of analyses. These are discussed below. The requirement to invite the Service as a cooperating agency (for an EIS), and the recommended MOU, should help integrate the respective schedules.

The initiation of Section 7 consultation requires the identification of a proposed Federal action. Therefore, consultation often is not initiated until the later stages of the NEPA process and usually only on the preferred alternative. This can create conflicts and delays in completing the NEPA process. Accordingly, it is important to provide a well-developed preferred alternative to the Service in a timely fashion. Consulting on multiple alternatives is not recommended because it can significantly increase the consultation timeframes. It is also useful, as appropriate, to maintain communications with the Service during the consultation process to address any questions that may arise.

A second consideration is that some of the actions emanating from an ESA consultation (i.e., agency commitments, reasonable and prudent alternatives [RPA], etc.) may require significant changes to alternatives; thus, a biological
opinion received late in the NEPA process can confound the NEPA process by presenting actions that have not been fully evaluated. Ongoing communication with the Service and/or NOAA can assist in understanding these outcomes earlier in the process. It is possible that Reclamation may modify the proposed action as a result of a late biological opinion and be required to supplement the NEPA document. The integration of NEPA and ESA in a timely manner is best accomplished by close and careful coordination and cooperation between Reclamation and the Service and/or NOAA-NMFS as early as practical in the NEPA process.

Another consideration is the definition and use of the term “baseline.” The Section 7 implementing regulations state that the effects of a proposed action are added to the baseline to determine if the species is jeopardized by the totality of actions that may affect it. If a species would be jeopardized by the proposed action (in addition to all other actions), a jeopardy biological opinion would be issued. “Environmental baseline” is defined in Section 7 regulations (50 CFR 402.02): “The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.” This definition is similar to the “affected environment” under the NEPA regulations. The environmental baseline sets the stage for determining potential effects upon listed species under ESA. The environmental baseline is not the same thing as the “No Action Alternative” under NEPA.

Finally, both ESA and NEPA must address cumulative effects, but the regulations for the two acts define the term differently. Under NEPA, the cumulative effects analysis includes the reasonably foreseeable effects of both Federal and non-Federal actions. Under ESA, cumulative effects include the effects of the proposed action and those future tribal, State, local, and private actions that are also reasonably certain to occur, but they do not include future Federal actions. This difference is another factor making true integration of NEPA and ESA analyses difficult.

It is advised that the terminology being used in connection with NEPA and ESA on a particular project be clarified early on in the environmental compliance activities so as to meld these two processes as much as possible and to avoid unnecessary confusion. (See also Reclamation’s ESA Policy, ENV P04, at http://www.usbr.gov/recman/env/env-p04.pdf).

Endangered species actions that involve Indian tribal rights are further addressed in Secretarial Order 3206.

There have been a number of recent ESA court cases which are, and may be, changing ESA interpretations. It is advisable, in situations where ESA issues are
significant, to consult with Policy and Administration and the Office of the Solicitor for the most recent guidance on compliance requirements.

3.15.2 Magnuson-Stevens Fishery Conservation and Management Act
(P.L. 94-265, 16 U.S.C. 1801 et seq.)

In 1976, the Magnuson Fishery Conservation and Management Act (Magnuson Act) established a management system to more effectively utilize the marine fishery resources of the United States. It established eight regional fishery management councils (Councils), consisting of representatives with expertise in marine or anadromous fisheries from the constituent States. As amended in 1986, the Magnuson Act required Councils to evaluate the effects of habitat loss or degradation on their fishery stocks and take actions to mitigate such damage. In 1996, this responsibility was expanded to ensure additional habitat protection.

On October 11, 1996, the Sustainable Fisheries Act (P.L. 104-297) became law, which, among other things, amended the habitat provisions of the Magnuson Act. The renamed Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) calls for direct action to stop or reverse the continued loss of fish habitats. Toward this end, Congress mandated the identification of habitats essential to managed species and measures to conserve and enhance this habitat. The Magnuson-Stevens Act requires cooperation among NOAA-NMFS, the Councils, fishing participants, Federal and State agencies, and others in achieving the essential fish habitat (EFH) goals of habitat protection, conservation, and enhancement.

EFH means those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity (Magnuson-Stevens Act, 16 U.S.C. 1801 et seq.). For the purpose of interpreting the definition of essential fish habitat: “Waters” include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; “substrate” includes sediment, hard bottom, structures underlying the waters, and associated biological communities; “necessary” means the habitat required to support a sustainable fishery and the managed species’ contribution to a healthy ecosystem; and “spawning, breeding, feeding, or growth to maturity” covers a species’ full life cycle (EFH Final Rule, 67 FR 2343).

Consultation and coordination for EFH under the Magnuson-Stevens Act should be consolidated with interagency coordination procedures required by other statutes, such as NEPA, FWCA, ESA, and the Federal Power Act to reduce duplication and improve efficiency (50 CFR 600.920(f)). The use of existing environmental coordination and/or review procedures to meet the EFH consultation requirements is the preferred approach for EFH consultations. In Reclamation NEPA documents (EAs and EISs), an evaluation of impacts to
essential fish habitat of anadromous or marine fisheries should be included under a separate subheading, either in the discussion of fisheries or, if there are listed anadromous fish in the project area, under the discussion of threatened and endangered species.

Compliance with the Magnuson-Stevens Act could be done by submitting draft EAs and EISs to NOAA-NMFS specifically requesting consultation pursuant to the Magnuson-Stevens Act.

### 3.15.3 Migratory Bird Treaty Act
(16 U.S.C. 703-711)

Under the Migratory Bird Treaty Act (MBTA), it is unlawful “by any means or manner to pursue, hunt, take, capture or kill” any migratory bird, except as permitted by regulations issued by the Service. “Take” is not defined in the MBTA, but the Service’s regulations in 50 CFR 10.12 define it as meaning: “to pursue, hunt, shoot, wound, kill, trap, capture, or collect...” any wildlife or plants, including any migratory bird or any part, including nest or egg. MBTA does not distinguish between intentional or unintentional take resulting from lawful activities. The Service has developed a system of permits for activities involving intentional take of migratory birds but has no regulations for unintentional take.

Federal agencies are liable for both intentional and unintentional take of migratory birds under the MBTA. Court cases which have affirmed this include: *Humane Society v. Glickman*, 217 F. 3d 882 (D.C. Cir 2000) and *Center for Biological Diversity (CBD) v. Pirie*, 191 F.Supp.2d 161 (D.D.C. 2002).

In January 2001, EO 13186, entitled “Responsibilities of Federal Agencies to Protect Migratory Birds,” was issued to promote the conservation of migratory birds and assist Federal agencies in complying with the MBTA. The EO lists 15 actions that Federal agencies “taking actions that have or are likely to have a measurable negative effect on migratory bird species” should implement to the extent practicable. Among the actions listed in the EO, agencies are to ensure that their NEPA analyses include an evaluation of potential effects on migratory birds. In light of the prohibitions under the MBTA and the goals of the EO, Reclamation should informally consult with the Service on proposed actions that could significantly impact migratory birds. Consultation should be initiated beginning with the planning of a proposed action and throughout the NEPA process in order to identify potential impacts on migratory birds and ways to avoid/minimize effects.

### 3.15.4 Fish and Wildlife Coordination Act
(P.L. 85-624, as amended, and 40 CFR 1502.25)

Section 2 of the FWCA of 1958 states that fish and wildlife conservation shall receive equal consideration with other project purposes and will be coordinated
with other features of water resources development projects. The specific wording of Section 2, which is the trigger mechanism for consultations under the FWCA, is as follows:

. . . whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or any public agency or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service and with the head of the agency exercising administration over the wildlife resources of the particular State.

The FWCA specifically identifies the Service as a point of consultation. However, Reclamation should also consult with the National Oceanic and Atmospheric Administration - National Marine Fisheries Service (NOAA-NMFS) for activities falling under the purview of the FWCA that affect species under their jurisdiction (in most Reclamation actions, these species will be anadromous fish). Generally, consultation with the applicable State agency is through the Service, although it can be separate.

Compliance with the FWCA should be initiated early in the NEPA process. If the proposed action triggers compliance with the FWCA, the Service will have legal jurisdiction and special expertise and must be invited to be a cooperating agency (43 CFR 46.225). If the Service declines the invitation, reasonable effort should be made to include them in the analysis of fish and wildlife impacts and mitigation. The draft NEPA document should be circulated to them during the public review period for comments related to their jurisdiction and expertise.

3.15.5 Section 404 of the Clean Water Act
(P.L. 92-500, as amended; 33 U.S.C. § 1344; and 40 CFR Part 230)

When undertaking a NEPA-triggering activity that may result in the discharge or placement of dredged or fill material into jurisdictional waters of the United States or otherwise requiring a Section 404 permit from the USACE, it is imperative that the development and consideration of alternatives for the NEPA process address the requirements of the Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 CFR 230). The guidelines are used by USACE in determining whether or not the proposal is consistent with Section 404 and whether or not to issue a 404 permit. EPA also uses them in its oversight responsibility when reviewing USACE’s decisions. The most essential element of the guidelines, when neither a nationwide nor a regional general permit is appropriate, is the concept of the “practicable alternatives analysis.”
This should be addressed early in the NEPA process and is especially true if the proposed activity is not a water-dependent activity.\(^1\)

According to the guidelines, no discharge of dredged or fill material within waters of the United States will be permitted if there is a practicable alternative that would have a less adverse impact on the aquatic ecosystem. The term “waters of the U.S.” is a heavily litigated term that frequently changes meaning. Practitioners should consult with the Office of the Solicitor if the Reclamation activity involves the discharge of dredged or fill material. An alternative is considered to be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of the overall project purpose. An alternative is not considered to be practicable if it would result in other significant adverse environmental consequences (40 CFR 230.10 a.2.).

Before USACE completes its evaluation of an individual 404 permit application for compliance with the 404(b)(1) guidelines to determine whether or not to issue a permit, a public notice is issued providing interested agencies and persons an opportunity to comment on the application.\(^2\) In practice, what may be considered a “significant adverse environmental consequence” by one reviewing agency may not be considered significant, or even adverse, by another agency. This may result in some agencies either not concurring with the elimination of alternatives considered to be not practicable or insisting upon the consideration of other alternatives in the late stages of the process. The detailed information needed to prepare a 404 permit application is typically not available until a preferred alternative has been identified and the NEPA process is nearing completion. Being required to consider other alternatives (either new or previously eliminated alternatives) as a result of the public notice review process can cause delays in the project schedule. Therefore, it is imperative to engage the participation of key resource agencies in coordinating NEPA compliance activities (especially as they relate to the evaluation of alternatives). Resource agencies that routinely review 404 permit application public notices (State fish and game departments, EPA, the Service, and USACE) should be encouraged to participate in the preparation of the NEPA document as cooperating agencies so that 404 permit-related issues can be resolved in a timely manner. This opportunity should be investigated early in the process.

Section 404(r) of the Clean Water Act provides for the exemption of a Federal project from the requirement of obtaining a 404 permit for the discharge of dredged or fill material when the project has been specifically authorized by

\(^1\) Water-dependent activities are those activities requiring access or proximity to, or location within, waters to fulfill their basic purpose (40 CFR 230.10 a. 3). These include activities such as construction of river crossings, boat ramps, and dams.

\(^2\) Some types of dredge or fill activities do not require public notice (see Nationwide Permits (33 CFR 330)).
Congress after certain requirements are met. This exemption is allowed as long as information on the effects of the discharge, including consideration of the 404(b)(1) guidelines, are included in the EIS. The EIS, along with EPA’s and USACE’s evaluation of the 404(b)(1) analysis, must be submitted to Congress before the actual discharge of dredged or fill material and prior to either authorization of project construction or appropriation of funds for such construction.

3.15.6 Cultural Resources Compliance (P.L. 89-665, as amended; 36 CFR Part 800)

NEPA establishes a national policy by which to consider the environmental impacts of Federal actions. Among the responsibilities of the Federal Government established by NEPA is preservation of “. . . important historic, cultural and natural aspects of our national heritage . . .” (Section 101(b)(4), 42 U.S.C. § 4331).

Reclamation’s responsibility for protecting cultural resources is primarily based on the NHPA; P.L. 89-665, as amended; its implementing regulations (36 CFR Part 800); and Reclamation Policy (LND P01) and Directives and Standards (LND 02-01). Section 106 of NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties. These properties are defined as any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places (National Register).

The steps for complying with Section 106 are defined in 36 CFR Part 800 and are commonly referred to as the Section 106 process. Briefly, steps include: identifying the area of potential effect (APE) of an undertaking; identifying historic properties through inventories, as needed; evaluating the significance of cultural resources within the APE; assessing the effect of the proposed undertaking on historic properties; and, if there is an effect, determining whether it is adverse. If adverse effects are identified, Federal agencies must evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate the adverse effects. A finding of adverse effect on a historic property does not necessarily require the preparation of an EIS under NEPA.

A key component of the Section 106 process involves consultation with the appropriate SHPO or, for projects occurring on or affecting historic properties on tribal lands, the Tribal Historic Preservation Officer(s) (THPO). When an Indian tribe has not assumed the responsibilities of the SHPO for Section 106 on tribal lands, the Federal agency must consult with a tribal government representative. Federal agencies must also provide adequate opportunities for public involvement and identify other parties with whom to consult throughout the process. Indian tribes must be consulted when they attach religious and cultural significance to historic properties that may be affected by an undertaking. Tribes must be
provided a reasonable opportunity to identify their concerns and articulate their views on possible effects and proposed mitigation measures. The consultation process can be time consuming and complex, depending on the nature of the undertaking.

Reclamation cultural resources management policy (LND P01) is to preserve historic properties in place to the fullest extent possible and attempt to avoid adverse effects to them. However, in some cases, Reclamation and the consulting parties may agree that no mitigation measures are possible and that the public benefits of proceeding with an undertaking outweigh the adverse effects to historic properties. In accordance with 36 CFR Part 800.6, resolution of adverse effects (and any agreed to mitigation) would be documented in a memorandum of action (MOA) signed by Reclamation, the SHPO/THPO, and other invited signatories. The Advisory Council on Historic Preservation (ACHP), an independent Federal agency that promotes the preservation, enhancement, and productive use of our Nation’s historic resources, may choose or be invited to join the consultation process. It is important to note that title transfers are subject to the Section 106 process and that under 36 CFR Part 800.5(a)(2)(vii), the “transfer, lease, or sale of a historic property out of federal control without adequate and legally enforceable restrictions or conditions to ensure the long term preservation of the property’s historic significance constitutes an adverse effect.”

Although the Section 106 process is independent of the NEPA process, 36 CFR Part 800.8 addresses the need for coordination between the two to reduce duplication of effort. Federal agencies are instructed to “consider their Section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner.” Reclamation should include cultural resources in EAs and EISs by referencing the relevant cultural resource consultation processes and, if completed, referencing the finding of “no historic properties affected” if 36 CFR 800.4 applies, or the finding of adverse effect or no adverse effect if 36 CFR 800.5 applies. If all steps in the Section 106 process are not completed prior to finalization of NEPA documentation, the latter must contain commitments for Reclamation to fulfill its Section 106 responsibilities, generally in either an MOA or a programmatic agreement. In summary, the key to successfully integrating NHPA and NEPA is to address cultural resources at the earliest stages of planning an undertaking. Under amendments made to 36 CFR Part 800 in 1999, a Federal agency may use the NEPA process to comply with Section 106 if certain standards echoing its key components are met. This provision is intended to permit streamlining without sacrificing the main elements of the Section 106 process. If Reclamation selects this alternate process for meeting its Section 106 requirements, it must notify the SHPO/THPO and the ACHP in advance.
Even if an action is categorically excluded from NEPA review, Reclamation cultural resource staff must still determine if it qualifies as an undertaking requiring review under Section 106 (36 CFR 800.3). See chapter 5 for more information.

In addition to the NHPA, there are numerous other Federal laws that exist to preserve and protect the Nation’s cultural heritage and with which Reclamation must comply. Among these laws are the American Indian Religious Freedom Act (P.L. 95-341), Archaeological Resources Protection Act (ARPA) (P.L. 96-95), Antiquities Act, and the Native American Graves Protection and Repatriation Act (P.L. 101-601).

Reclamation will consult with appropriate Indian tribes when there are planned excavations on, and removal of, cultural items of tribal concern from Reclamation lands. All archaeological activities conducted by non-Federal entities and their employees require an ARPA permit prior to beginning the activity. In situations where the archaeological activities are on tribal lands, tribal consent and proof of consultation are required. In addition, an ARPA permit, issued by the Bureau of Indian Affairs (BIA), is required prior to beginning the activity on tribal lands.

Section 110 of the NHPA requires special consideration of National Historic Landmarks, including consultation with the ACHP and the Secretary of the Interior (Secretary) when a landmark is to be adversely affected. When applicable, the identification and consideration of National Historic Landmarks should be incorporated into NEPA documents.

Reclamation has a programmatic agreement in place with the ACHP and the National Council of SHPOs to deal with responses to major natural disasters or national security emergencies. If an emergency occurs and cultural resources are implicated, consult with the appropriate Reclamation cultural resources specialist.

3.15.7 Indian Trust Assets

(512 DM 2)

Indian Trust Assets (ITA) are legal interests in property held in trust by the United States for Indian tribes or individuals. Interior’s policy is to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and individual Indians, to the extent required by relevant statutes and regulations; and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety (512 DM 2). Under this policy, Reclamation is committed to carrying out its activities in a manner that avoids adverse impacts to ITAs, when possible, and mitigates or compensates for such impacts when it cannot avoid the impacts. All impacts to trust assets, even those considered nonsignificant, must be discussed in the trust analyses in NEPA documents and appropriate compensation or mitigation implemented.
Reclamation’s requirements for land use authorizations (such as easements, leases, licenses, and permits), which allow others to use Reclamation lands and interests in its lands, facilities, and water surfaces, also require that ITAs must not be adversely affected. In the event they are, the grantee shall bear the costs associated with mitigation or compensation (Directives and Standards LND 08-01).

Required procedures for assessing and documenting potential impacts to ITAs are discussed in the appropriate sections of this handbook. These include, but are not limited to:

- An ITA question in the CEC.
- Required sections in EAs and EISs. When no ITAs are identified in or near the potentially affected area, a statement to this effect must be included.
- Public involvement activities.
- Consultation with potentially affected and interested Indian tribes and individuals (when dealing with individual ITAs) in the review and distribution of EAs and EISs.
- Required narrative in the FONSI or ROD.

Additional information concerning ITAs can be found in the attachments, including 303 DM 2, 512 DM 2, environmental compliance memorandum (ECM) 97-2, Departmental Responsibilities for Indian Trust Resources and Indian Sacred Sites on Federal Lands, Reclamation’s ITA policy, and Indian Trust Asset Policy and Guidance, which provides an introduction to considering potential ITA impacts.

ITA assessments should be carried out in consultation with the potentially affected tribal and other trust beneficiaries. Reclamation has prepared guidance to assist in this effort, Protocol Guidelines: Consulting with Indian Tribal Governments (this document can be found under the “NAAO Policy” link at www.usbr.gov/native/).

### 3.15.8 Indian Sacred Sites

Reclamation is required by EO 13007, to the extent practicable permitted by law, and not clearly inconsistent with essential agency functions, to: (1) accommodate access to, and ceremonial use of, Indian sacred sites by Indian religious practitioners; and (2) avoid adversely affecting the physical integrity of such sacred sites. When adverse impacts cannot be avoided, alternative access and protection should be considered in consultation with the potentially affected.
Indian tribe(s). It may be noted that EO 13007 includes all potential impacts to the physical integrity of covered sacred sites, not just significant ones.

In accordance with Interior and Reclamation procedures and guidance implementing the EO, any NEPA analysis should address Indian sacred sites by either: (1) clearly stating in the affected environment section that neither Indian sacred sites nor access to such sacred sites will be affected, or by (2) presenting, in the appropriate section, analysis of impacts to Indian sacred sites and access to such sacred sites.

In addition, Reclamation’s requirements for land use authorizations (such as easements, leases, licenses, and permits), which allow others to use Reclamation lands and interests in its lands, facilities, and water surfaces, require that where an Indian sacred site is located on or near a use location, the grantee must accommodate access to, and ceremonial use of, the sacred site by Indian religious practitioners and must avoid adversely affecting the physical integrity of such sacred sites. Often, the locations of sacred sites are not known and/or may not be shared. In these cases, the grantee will be provided direction from the authorized official where access will be allowed and physical effects to the land will be restricted (Directives and Standards LND 08-01).

When appropriate, Reclamation shall, to the greatest extent possible, maintain the confidentiality of sacred sites. This may mean, in some cases, that the specific location of the sacred site should not be included in the NEPA document, even if impacts to the site or to access may occur.

The key terms required to implement EO 13007 are specifically defined in the EO and further explained in Reclamation’s Guidance for Implementing Indian Sacred Sites Executive Order, included in the attachments. These definitions should be referred to when sacred sites are a potential issue. Additional information concerning ITAs can also be found in 512 DM 3 and ECM 97-2—Departmental Responsibilities of Indian Trust Resources and Indian Sacred Sites on Federal Lands, also included in the attachments.

Sacred site assessments will include consultation with the potentially affected Indian tribes. Reclamation has prepared guidance to assist in this effort, Protocol Guidelines: Consulting with Indian Tribal Governments (this document can be found in the “NAAO Policy” link at www.usbr.gov/native/).

3.15.9 Environmental Justice

Executive Order 12898 requires Federal agencies to make achieving environmental justice part of their mission, as practicable and permitted by law. When carrying out its programs, policies, and activities, Reclamation must identify and address any disproportionately high and adverse human health and environmental effects on low income and minority populations. A discussion of
potential effects to these entities must be included in the NEPA document. A line has been included in the CEC to ensure environmental justice considerations in actions that may qualify for a CE.

The affected environment discussion in an EA or EIS should contain a separate, titled section identifying potentially affected minority and low-income communities. The document should explicitly state if no such communities exist in the affected area or none are expected to be affected in a disproportionate way. If the potential for effects exists, the environmental consequences section should identify what, if any, human health or environmental effects would be disproportionately high and what mitigation options exist to avoid or reduce the effects.

In conducting the analysis, the following should be considered:

- The composition of the affected area to determine whether substantial minority and low-income populations are located there. The U.S. Bureau of Census and local city and county data bases can be helpful in identifying these populations within the affected environment.

- Existing conditions in these communities, including multiple or cumulative exposure to human health or environmental hazards and historical exposure to hazards.

- Whether interrelated cultural, social, occupational, historical, or economic factors would amplify the physical environmental effects of a proposed action.

- How scoping and public involvement activities should be carried out to ensure adequate opportunity for minority and low-income populations in the affected area to participate in the NEPA process. The participation of these groups can be particularly important when assessing the significance of impacts and the adequacy of contemplated mitigation measures.

- Obtaining data outside of the affected area when determining whether a “minority population” is present or if the possible impacts would be “disproportionate.” In such cases, it is important to select appropriate units of analysis and baseline measurements and to document the reasons for the selection.

For additional guidance, see references identified in EO 12898, ECM 95-3, and CEQ’s Guidance on Environmental Justice, December 10, 1997, in the attachments.
3.15.10 Pollution Prevention

CEQ has prepared guidance (Memorandum to Heads of Federal Departments and Agencies Regarding Pollution Prevention and the National Environmental Policy Act, 12 January 1993, in the attachments) to Federal agencies on how to incorporate pollution prevention principles into planning and decisionmaking and on how to evaluate and report those efforts in NEPA documents. This guidance does not include new requirements for the NEPA process but does suggest ways that pollution prevention should be incorporated into existing procedures.

CEQ suggests that pollution prevention be specifically addressed when an EIS is scoped. This would encourage the identification of means to prevent pollution associated with an action.

Pollution prevention is defined in the guidance as any reasonable mechanism that avoids, prevents, or reduces pollutant releases other than traditional treatment at the discharge end of a pipe or stack. This definition is consistent with the definition in CEQ regulations for mitigation (40 CFR 1508.20). Accordingly, pollution prevention should be a component of early planning and decisionmaking on proposed Federal actions and addressed in NEPA documents. Each alternative should include pollution prevention measures, as appropriate and practicable, and these considerations should be discussed in the environmental consequences section of the EIS.

CEQ regulations require the ROD to include a statement of whether or not all practicable means to avoid or minimize environmental harm have been adopted, and if not, why not, as well as a discussion of a monitoring and enforcement program, if appropriate (40 CFR 1505.2(c)). The ROD is viewed by CEQ as an appropriate means to inform the public of the extent to which pollution prevention is included as a component of Federal action.

CEQ guidance focuses mostly on the appropriate discussion of pollution prevention in an EIS but also makes the point that a discussion of pollution prevention may also be appropriate in an EA. This is especially critical when pollution prevention measures contribute to a FONSI and are thus required to be part of the action.

3.16 Administrative Record

In carrying out the NEPA process (either a CEC, FONSI, or ROD), Reclamation should maintain an administrative record to support its findings. Although the record may vary, it is commonly a chronological paper/computer trail tracing the NEPA process as it follows CEQ regulations for a particular action. The record may include, but is not limited to: planning documents, notices, documentation of scoping meetings, EA/EIS documents (draft and final) with supporting documents.
and studies, correspondence (letters, memoranda, and email), public comment and agency responses, CEC/FONSI/ROD, and an implementation/monitoring program including environmental commitment plans.

Creation and maintenance of the administrative record as a discrete data set has positive advantages for ready access. The record facilitates Freedom of Information Act (FOIA) requests on agency actions. The record is an information resource for preparation of new NEPA documents and a source for elements to be tiered to, or incorporated by, reference. The administrative record also plays an important role in NEPA litigation. Sometimes, NEPA lawsuits involve challenges to an agency’s decision not to prepare an EIS or the adequacy of an EIS. A plaintiff and reviewing court are generally not entitled to discover evidence or extend review beyond the administrative record if the record contains sufficient information to respond to the plaintiff’s allegations.

3.17 Reclamation Repository

There are many benefits to having all finalized NEPA documents generated in a particular region sent to one central location in that region. In most cases, the most logical place for the repository would be in the regional office. It is recommended that each region establish a procedure that would place a copy of every EIS and every EA produced in the region in one location within the regional office. The inclusion of CECs would also be useful.

FOIA requests are becoming commonplace, necessitating the efficient handling of substantial amounts of information. The regional offices are often given the responsibility to process these requests and, therefore, would benefit greatly from having the applicable NEPA documents readily available. Similarly, most legal actions are handled at the regional level, and the availability of applicable NEPA documents will facilitate any Reclamation involvement.

The regional offices generally take the lead on developing large-scale programmatic NEPA documents such as EISs. These documents often result in tiering (see section 7.3) and incorporation by reference of several related NEPA documents. Having a repository of all NEPA documents in one central location in the region would substantially facilitate these efforts.

Finally, a clearinghouse is a valuable tool for all regional employees involved with the NEPA process. Using a regional repository as a source for pertinent reference materials and previously finalized NEPA documents would contribute greatly to making the NEPA process more efficient.
3.18 Limitations on Actions Before Decisions
(40 CFR 1506.1 and 43 CFR 46.160)

NEPA requires that no actions that have adverse impacts or that limit the choice of alternatives occur until the appropriate NEPA process is completed. These actions include committing funds, personnel resources, or materials that will advance the proposal to a point where alternatives are constrained, where impacts to the environment begin to occur, or where retreat may be impossible or impractical. These actions do not include the reasonable commitment of resources to carry out the necessary studies upon which the EIS and decision document will be based.

Applicants for Reclamation permits, grants, and other approvals are also subject to these limitations. If Reclamation becomes aware that a non-Federal applicant is about to take action within Reclamation’s jurisdiction (e.g., permitting authority) that would result in an adverse effect or limit the choice of reasonable alternatives before Reclamation has completed the NEPA process, it should notify the applicant that this is a violation of NEPA. Reclamation should then take whatever additional steps are necessary to ensure that the objectives and procedures of NEPA are achieved.

3.19 Supplemental Information
(40 CFR 1502.9)

In the NEPA process, situations may occur in which a determination must be made concerning the effect of additional information upon the process. This can result in a need for the responsible official to determine if a supplement to an EIS or revision is warranted. It has become Reclamation practice to call this analysis a supplemental information report (SIR).

The SIR should focus on the analysis of any new information in cases where there is a change to a proposed action analyzed in a DEIS or FEIS or when new information relevant to the action becomes available. A SIR does not satisfy NEPA. Rather, it documents whether additional NEPA analysis is warranted when the need for a supplement to an EIS is unclear. It is recommended that the information used for this decision be included in the record.
Figure 3.1.—NEPA process flowchart.
Memorandum of Understanding
Between
the U.S. Bureau of Reclamation
and
the Western Area Power Administration
for the Environmental Impact Statement for Adoption of a
Long-Term Experimental Plan for the Future Operation of
Glen Canyon Dam and Other Associated Management Activities

Introduction

Pursuant to the National Environmental Policy Act (NEPA), the Bureau of Reclamation (Reclamation or lead agency) is preparing an environmental impact statement (EIS) for adoption and implementation of a long-term experimental plan for the future operation of Glen Canyon Dam and other associated management activities. Reclamation is the lead agency and the Western Area Power Administration (or cooperating agency) along with others has agreed to serve as a cooperating agency. The purpose of this Memorandum of Understanding (MOU) is to outline the responsibilities of the lead and cooperating agencies.

Background

In conjunction with the announcement of a Glen Canyon Dam Adaptive Management Work Group (AMWG) meeting, Reclamation published an advance Notice of Intent in the Federal Register on November 6, 2006 (71 FR 64982-64983). That notice announced Reclamation's intent to prepare and consider an EIS on a long-term experimental plan for the future operation of Glen Canyon Dam, Arizona. Pursuant to the Council on Environmental Quality's regulations implementing NEPA (40 CFR 1508.22), Reclamation published a Notice of Intent in the Federal Register on December 12, 2006 (71 FR 74556-74558), that described the proposed action and possible alternatives and announced the dates of scoping meetings.

The proposed action for this EIS is to develop, adopt, and implement a long-term experimental plan that will include a structured program of experimentation (possibly including dam operations, modifications to Glen Canyon Dam intake structures, and other non-flow management actions such as removal of non-native fish species) in the Colorado River below Glen Canyon Dam.

Pursuant to Council on Environmental Quality regulations (40 CFR 1502.14), Reclamation will develop an appropriate range of alternatives for this EIS. Comments and suggestions from cooperating agencies and the public will be evaluated by Reclamation in developing or modifying the alternatives. In addition, Reclamation will utilize information developed through prior meetings of the Glen Canyon Dam Adaptive Management Program as well as any future recommendations developed through the AMWG process in determining the scope of the analysis and developing or modifying the alternatives for
this EIS. Through the NEPA process, Reclamation will evaluate the impacts of each of
the alternatives on downstream resources and on all of the purposes and benefits of Glen
Canyon Dam.

Purpose

This MOU defines the relationship and duties of the lead and cooperating agencies in
completing all environmental compliance for the project and in particular, to work
together for completion of NEPA compliance.

By signing this MOU, the parties agree that this MOU provides the framework to fulfill
compliance requirements for NEPA and other applicable environmental resource laws
and regulations. Completion of NEPA compliance does not imply that there will be a
favorable decision to authorize the project as planned by Reclamation or the cooperating
agencies.

This MOU does not apply to permitting, construction, maintenance, or operation of Lake
Powell or other water facilities.

Agency Designee

Each cooperating agency will designate a liaison(s) to act as a point of contact for the
EIS. A cooperating agency may change its point of contact at any time by providing
written notice to Reclamation and the other cooperating agencies.

Authority

The authority of the lead and the cooperating agencies to participate in this agreement is
provided by the National Environmental Policy Act, 42 USC 4321 et seq. NEPA allows
agencies to be designated as a cooperating agency when that agency has jurisdiction by
law or special expertise (40 CFR 1508). Activities contemplated under this MOU are
specifically authorized under:

A. Title I of the National Environmental Policy Act of 1969 (NEPA, 42 USC 4331)
as amended;

B. Regulations for Implementing the Procedural Provisions of the National
Environmental Policy Act," 40 CFR 1500-1508, Council on Environmental
Quality (in particular 40 CFR 1501.6, Cooperating Agencies);

C. Department of the Interior NEPA Implementing Procedures in the Departmental
Manual at 516 DM 2.5, Cooperating Agencies (40 CFR 1501.6).

Figure 3.2.—Example of a cooperating agency MOU (continued).
Lead Agency Responsibilities

Due to its authority for Glen Canyon Dam operations, Reclamation has been designated the lead agency for preparation of this EIS.

As lead agency, Reclamation shall:

- Be responsible for the preparation and overall direction of the EIS and for arranging coordination with cooperating agencies.

- Ensure compliance with federal environmental and related statutes including, but not limited to NEPA, the Clean Water Act, the National Historic Preservation Act, the Grand Canyon Protection Act, and the Endangered Species Act.

- Be responsible for identifying the purpose and need for the project, scope of analysis, and decisions to be made. Make the final decision on the content of all EIS-related documents, including the Record of Decision.

- Prepare a Public Involvement Plan and establish a public involvement process that meets EIS requirements of Section 102(2)(c) of NEPA as defined in the President’s Council on Environmental Quality regulations at 40 CFR 1500-1508 and Section 106 of the National Historic Preservation Act.

- Implement the 2002 Council on Environmental Quality requirements for cooperating agency involvement.

- Sponsor meetings of cooperating agencies, as appropriate, either individually or as a group, and provide advance information for discussions at these meetings whenever possible. Reclamation will conduct cooperating agency meetings near the same location and date of AMWG meetings as one way to interact with cooperating agencies. This should most efficiently accomplish our goals and minimize the financial impact of cooperating agency involvement. No additional financial support will be provided to cooperators.

- Ensure, through the adaptive management process, that cooperating agency proposals, comments (including divergent views), environmental analysis, and technical expertise are appropriately utilized in completion of the EIS.

- Provide advance copies (normally 30 days) of the draft and final EIS and related compliance documents for review by cooperating agencies.

- Conduct consultation meetings at the outset of the process and throughout the process as needed.

- Provide separate Government-to-Government meetings for affected tribes (Executive Order 13175 of November 6, 2000).

Figure 3.2.—Example of a cooperating agency MOU (continued).
Cooperating Agency Responsibilities

Federal agencies, state and quasi-state organizations, and tribal governments with appropriate expertise or jurisdiction, per Section 1501.6 of the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA, have been invited to participate. Reclamation may, at any time during the course of the project, invite additional agencies to participate in the process.

The Western Area Power Administration shall:

- Provide a representative to serve on the Hydropower Team established to evaluate impacts associated with the alternatives considered in the EIS.

- On request of Reclamation, assume, where possible, the responsibility for developing information and preparing environmental analyses in areas that the cooperating agency has special expertise. Specifically:
  
  o It is anticipated that analyses related to the impact of the alternatives related to the operation of the Salt Lake City Area Integrated Projects (SLCA/IP) electrical power system will be conducted by or with Argonne through Western’s underlying agreement with that entity. Any direction to Argonne on the performance of such analyses will be approved by Reclamation, in writing, in advance of accomplishing such work. It is understood that the scheduling of this work will have priority over any other work assignments made to Argonne by Western. Reclamation may communicate with Argonne on technical matters but will work through Western on changes in the scope of work. All Argonne prepared data/work products associated with the EIS will be provided to Reclamation, concurrent with transmittal to Western.

  o Western will complete analyses on the impact of the alternative to the SLCA/IP firm electrical power rate

  o Western will collaborate with the Hydropower Team on the analyses of the economic impact of the alternatives related to the operation of Glen Canyon Dam and the effect on the operation of the SLCA/IP electrical power system and the marketing of SLCA/IP electrical power

  o Make staff available, if funds allow, to enhance the interdisciplinary capability of the EIS team.

- Use their own funds for staff and expenses.

- Provide timely review (normally within 30 days of receipt) of draft documents when requested.

Figure 3.2.—Example of a cooperating agency MOU (continued).
- As appropriate and practicable, attend cooperating agency meetings and public meetings and hearings on the EIS process.

- Retain the right to comment on all issues related to the EIS through the normal EIS public review and comment process.

- Promptly advise the lead agency of concerns related to the EIS process.

**Joint Responsibilities**

- The lead agency and cooperating agencies will not release any pre-decisional draft documents to the public or other parties unless mutually agreed to by Reclamation and the cooperating agency or required through the Freedom of Information Act. This is not intended to interfere with cooperating agency representatives seeking input from the agency that they represent. Draft documents can be provided to such organizations as long as the cooperating agency abides by these non-release terms and comments are directed back to the cooperating agency representative.

- Reclamation may meet separately with any one or more cooperating agencies to discuss specific topics.

- This MOU does not affect funding agreements either already in place or to be executed among the parties regarding Reclamation’s completion of NEPA compliance. For costs not explicitly covered under such agreements, it is understood that the respective agencies are responsible for their own costs with regard to completion of tasks outlined herein such as attendance at meetings, assembling data, analyzing effects, writing sections of the EIS, etc.

- All parties agree that because of the need for timely completion of NEPA compliance, work will proceed as expeditiously as possible including data gathering, analysis, and document review. However, all parties agree that sufficient time must be allowed to ensure thorough document review. It is anticipated that there will be a minimum of 30 days to review the draft and final EIS.

**Resolution of Disputes**

Reclamation is responsible for all decisions involving the EIS and will make all final decisions on disputes arising during the NEPA process. Reclamation will document for the administrative record the nature of any dispute and the resolution process used. For disputes involving different interpretations of information, Reclamation agrees to consider different interpretations if such interpretations are supported by sufficient credible data, as determined by Reclamation. For other disputes, Reclamation and the cooperating agency will use their best efforts to resolve issues in a manner agreeable to both parties. If a disputed issue cannot be resolved in a collaborative and timely manner,

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Figure 3.2.—Example of a cooperating agency MOU (continued).
Reclamation will make a final decision. The cooperating agency retains the right to comment on all issues related to the EIS, including those in dispute, through the normal EIS public review and comment process.

**Implementation, Amendment, and Termination**

A. This agreement will become effective on the date of the last signature and may be subsequently amended through written agreement of all signatories. Reclamation or the cooperating agency may terminate their cooperative status by providing 30 days written notice of termination to the other party. Otherwise, the cooperative status will terminate when a Record of Decision is issued.

B. Status as lead or cooperating agency will not abridge or amend the authorities and responsibilities of Reclamation or the cooperating agency.

C. The lead or cooperating agencies do not waive their sovereign immunity, and each fully retains all immunities and defenses provided by law with respect to any action under federal or state law or based on or occurring as working cooperatively on the EIS.

D. Nothing in this agreement may be construed to require either Reclamation or the cooperating agency to obligate or pay funds or in any other way take action in violation of the Anti-Deficiency Act (31 USC 1341).

**Signatures**

The parties hereto have executed this Memorandum of Understanding as of the dates shown below.

**BUREAU OF RECLAMATION**

Dave Sabo  
Assistant Regional Director  

Date ________________

**WESTERN AREA POWER ADMINISTRATION**

Bradley S. Warren  
CRSP Manager  

Date ________________

Figure 3.2.—Example of a cooperating agency MOU (continued).
Chapter 3 Useful Links

American Indian Religious Freedom Act – Public Law 95-341
http://www.nps.gov/history/local-law/fhpl_indianrelfreact.pdf

Antiquities Act
http://www.nps.gov/history/local-law/anti1906.htm

Appendix II of CEQ’s (40 CFR Chapter V)
http://ceq.hss.doe.gov/nepa/regs/ceq/iii-7app2.pdf

Archaeological Resources Protection Act – Public Law 96-95
http://www.nps.gov/history/local-law/fhpl_archrsrcsprot.pdf

CEQ’s Guidance on Environmental Justice
http://ceq.hss.doe.gov/nepa/regs/ej/ej.pdf

CEQ’s Memoranda on Cooperating Agencies
http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html

CEQ’s 40 Most Asked Questions

Clean Water Act
http://epw.senate.gov/water.pdf

Cultural – NHPA Public Law 89-665
http://www.achp.gov/docs/nhpa%202008-final.pdf

Departmental Responsibilities of Indian Trust Resources and Indian Sacred Sites on Federal Lands – ECM 97-2

Directives and Standards - LND 02-01
http://www.usbr.gov/recman/Ind/Ind02-01.pdf

Directives and Standards LND 08-01
http://www.usbr.gov/recman/Ind/Ind08-01.pdf

DM 516, Chapter 14
ECM 95-3

Endangered Species Act

Environmental Justice – EO 12898

EO 13007 - Indian Sacred Sites
http://www.achp.gov/EO13007.html

EO 13175 Consultation and Coordination with Indian Tribal Governments
http://ceq.hss.doe.gov/nepa/regs/eos/EO13175.html

EO 13186 Migratory Birds
http://ceq.hss.doe.gov/nepa/regs/EO13186.html

EO 13352 – Facilitation of Cooperative Conservation
http://ceq.hss.doe.gov/nepa/regs/EO13352.html

ESM 10-19 – Procedures for Implementing Integrated Analyses in NEPA
http://oepc.doi.gov/memo.cfm?type=ESM

ESM 10-21 – Consensus Based Management
http://oepc.doi.gov/memo.cfm?type=ESM

ESM 11-2 – Approving and Filing of Environmental Impact Statements
http://oepc.doi.gov/memo.cfm?type=ESM

Essential Fish Habitat Interim Final Rule

Fish and Wildlife Coordination Act

Guidance Regarding NEPA Regulations Memoranda

Indian Trust Assets – 512 DM 2

Information Quality Act - Public Law 106-554
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ554.106
Chapter 3: The NEPA Process

Magnuson-Stevens Fishery Conservation and Management Act
http://www.nmfs.noaa.gov/sfa/magact/

Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping, April 30, 1981
http://ceq.hss.doe.gov/nepa/regs/scope/scoping.htm

Migratory Bird Treaty Act
http://www.fws.gov/laws/lawsdigest/MIGTREA.HTML

National Historic Preservation Act
http://www.achp.gov/docs/nhpa%202008-final.pdf

Native American Graves Protection and Repatriation Act – Public Law 101-601
http://www.nps.gov/history/local-law/fhpl_nagpra.pdf

Policy - LND P01 – Cultural Resources Management

Pollution Prevention – CEQ Memorandum
http://ceq.hss.doe.gov/nepa/regs/poll/ppguidnc.htm

Public Law 92-500 – Federal Water Pollution Control Act
http://www.glin.gov/view.action?glinID=67980

Public Law 104-297 - Sustainable Fisheries Act

Section 102(2)(c) NEPA
http://ceq.hss.doe.gov/laws_and_executive_orders/the_nepa_statute.html

Section 404 of the Clean Water Act
http://epw.senate.gov/water.pdf

33 CFR 330 Nationwide Permits

36 CFR Part 800 National Historic Preservation Act Regulations

40 CFR 1500-1508
http://ceq.hss.doe.gov/ceq_regulations/regulations.html
40 CFR Part 230 CWA Section 404
http://water.epa.gov/lawsregs/guidance/wetlands/sec404.cfm

43 CFR 46 – Implementation of NEPA, Final Rule

50 CFR 10.12 - Definitions
http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=50&PART=10&SECTION=12&YEAR=2001&TYPE=PDF

50 CFR 402 Interagency Cooperation—Endangered Species Act of 1973, as Amended
http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title50/50cfr402_main_02.tpl

50 CFR 600.920 (f)

303 DM 2 – Principles for Managing Indian Trust Assets
Chapter 4

NEPA and Other Reclamation Activities

4.1 Integrating NEPA with Other Reclamation Activities

Reclamation carries out a number of processes and activities. Integrating NEPA into these may require special considerations. It is important to remember that the intent of NEPA is to ensure consideration of the environment in all processes and activities.

4.2 The Planning Process

Reclamation uses variations of a general planning process to support and facilitate its decisionmaking. NEPA ensures that any Federal planning process considers environmental effects. A general planning process is described in the Decision Process Guidebook – How to Get Things Done, 2002 (www.usbr.gov/pmts/economics/guide/), and specific planning procedures are described in various program-specific guidance documents. When appropriate, Reclamation also follows the Executive Branch policy, Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (P&G) (www.usace.army.mil/CECW/PlanningCOP/Documents/library/Principles_Guidelines.pdf), which contains NEPA-related guidance.

4.3 The Principles and Guidelines

The latest procedures for implementing the Water Resources Planning Act of 1965 were developed in 1983 as the P&G. Copies are available from Policy and Administration. Note, however, that, as of the issuance of this handbook, the P&Gs are currently under revision. Following is a link with the most recent information: http://www.whitehouse.gov/administration/eop/ceq/initiatives/PandG.

The P&G evaluation criteria must be used in studies justifying authorization or reauthorization of federally funded water and related land resources implementation projects. The P&G evaluations are not required for common resource management decisions such as:

- Water service or repayment contracts
- Resource management plans
- Annual operation plan
- Mitigation activities
- Changes in operation of existing projects
- Basinwide or ecosystem management studies

In essence, if funding to implement a project is not being requested from Congress, the P&G are not required. Although not required, the P&G evaluation method is often used because of its acceptance and consistent application throughout the Federal water resources community.

The P&G are followed for implementation studies (e.g., dam construction), which are conducted for projects authorized by Congress. Applying the P&G ensures proper and consistent planning by Federal agencies in formulating and evaluating water resources studies. The P&G and NEPA have a common goal—to “examine all reasonable alternatives during project planning to provide the greatest public benefit and the least adverse environmental effect.” Reclamation integrates the P&G and NEPA to plan and evaluate projects in an organized and environmentally responsible manner. In this way, the purpose and policies of NEPA become a part of the planning process and are considered along with economic and engineering factors.

### 4.4 Special Investigations and Reports

Special investigations and reports may include water management studies and fish and wildlife investigations that result in recommendations for construction or changes in management. Special investigations should include sufficient study of environmental aspects to make viable recommendations for either further study or for implementation of plans of action. If the special report only recommends further study, it would come under an Interior CE (43 CFR 46.210(e)), and no CEC is necessary. When a special report or investigation results in recommendations for action, an appropriate CEC, EA/FONSI, or EIS should be prepared. The level of environmental detail should be commensurate with the level of detail for other study aspects. When appropriate, the NEPA compliance document should accompany a special report through all decisionmaking levels.

Status reports may be prepared at any time during a planning investigation. As the name implies, a status report should set forth the status of the investigation and summarize the data collected and analyses made. Such a summary should include a discussion of the environmental data and the analyses to the extent that they have been completed. Since a status report would not include a recommendation for action, no NEPA compliance is required.
4.5 Resource Management Plans

Reclamation encourages the development of a resource management plan (RMP) for each significant Reclamation area to assist in future resource decisions. RMPs should include applicable sections on recreation, fish and wildlife, operations, cultural resources, ITAs, agriculture, and other special uses. The purpose of RMPs is to incorporate in one document all information pertinent to future management of the area. Included in the document is an analysis of the resources of the area, the identification of land use suitability and capability, the determination and designation of land use zones, and the development of management policies, objectives, responsibilities, guidelines, and plans. It is also useful to include copies of agreements, laws, EOs, rules and regulations, special reports, special plans, maps, and all other documents relevant to the management area. The refinement and complexity of the material to be included in the plan and its length are governed by the size, complexity, and importance of the area for which the plan is prepared and the alternative management actions being considered. Additional guidance on RMPs is available in Reclamation’s Resource Management Plan Guidebook (http://www.usbr.gov/recreation/publications/RMPG.pdf).

Since a properly prepared RMP should contain much of the information and analyses required by NEPA, the RMP and NEPA material should be developed concurrently. Much of the initial public involvement and resource inventory information can be used in the NEPA document. Either an EA or an EIS should be prepared, dependent upon the significance of the potential impacts. The draft EA/EIS evaluates all resource management alternatives, including the preferred alternative, and is submitted for public review prior to completion of the RMP. The final RMP and final EA/EIS may either be issued together upon completion of the review process, or the final RMP may be issued later. If there is strong public interest associated with the preferred alternative, it is best to wait to issue the final RMP for at least 30 days following the EA/FONSI or until after a ROD is issued.

On projects that were subject to previous NEPA compliance, no additional compliance may be required for the approval of a new RMP unless there are substantial departures from the original development and management proposals or new data regarding significant effects upon the environment. Where minor changes are proposed after completion of the RMP, normally only those changes are subject to additional NEPA compliance and may qualify as a CE. Often, the original NEPA document is programmatic and indicates that followup NEPA compliance will be carried out for site-specific projects.
4.6 Construction Activities

While some construction activities are covered by CECs or EAs, those for major Reclamation projects and programs are ordinarily covered by project or programmatic EISs. From time to time during construction, it is necessary to modify construction features after filing an FEIS. Such structural modifications may result in a different set of environmental impacts. Reclamation shall evaluate the environmental consequences of such structural or location changes. Based on the amount of change and its relationship to the environmental consequences, the appropriate NEPA compliance document shall be completed.

Other construction activities are carried out for regional programs or specific projects and may not have prior NEPA documentation. These could include repair of existing facilities or additions to authorized projects. While some of these activities may be considered as categorically excluded (40 CFR 1508.4), many minor construction activities may not qualify for CEs because the impacts are unknown or may be significant. The CEC should be used to determine if the proposed action qualifies as a CE and to decide if additional NEPA documentation is needed.

4.7 Safety of Dams

The modification of existing dams for safety purposes can cause environmental impacts. The impacts can vary from the traditional O&M impacts, which are usually categorically excluded, to impacts associated with repairing, modifying, replacing, or breaching dams. The potential significance of the environmental impacts caused by repairing, modifying, replacing, or breaching would determine if a CE, preparation of an EA, or EIS would be appropriate. If the action does not fit a CE category or extraordinary circumstances exist which would disqualify the action for a CE, then an EA should be prepared to determine the significance of the impacts of the proposed action, unless it is apparent that an EIS is required. It should be noted that many of Reclamation’s dams and associated facilities are historic, and NHPA consultations may be needed.

The decision on the type of NEPA compliance document required and the preparation of the NEPA document to accompany the Safety of Dams (SOD) proposals are the responsibility of the region involved. When a safety issue is first identified, solutions should be developed with the use of environmental information, as well as economic and engineering information. If safety concerns require an emergency response action, then emergency NEPA procedures may be applied (40 CFR 1506.11, 43 CFR 46.150; see also section 3.13, Emergency Action, in chapter 3). If it is not an emergency, however, development of solutions should fully integrate environmental concerns into the decisionmaking process regardless of the level of NEPA documentation required. ESA and CWA (Section 404) compliance, for example, must be fully considered.
Care should be taken in developing the purpose and need statement and alternatives for the SOD NEPA document. The purpose and need is usually to correct some safety deficiency at the facility and prevent the loss of life and property that could occur from possible dam failure. At times, Reclamation has received comments from other agencies and parties requesting that it include alternatives that go beyond remedying the safety problems at a facility and address issues such as fish passage as part of dam reconstruction. Any alternatives that would address conditions not associated with the safety concern would not meet the purpose and need for the action. Moreover the Safety of Dams Act authorizes only those Reclamation construction actions needed for dam safety purposes and to maintain existing authorized project purposes.

The procedures for funding SOD activities may appear to force the preparation of a NEPA document before the final details are known. The location or alignment of borrow sites or haul roads, for example, may not be known when funding requests need to go forward. This situation should be avoided; but when it cannot, it is best to include a wide range of components for all the reasonable alternatives. The final selection is then more likely to have been addressed without the need to supplement the NEPA document. Supplementation may be required, however, and this should be considered in scheduling.

4.8 Soil and Moisture Conservation Program

The soil and moisture conservation program, 16 U.S.C. 590a and 606 DM 1.2, authorizes cooperating agreements for the conservation of soils and moisture. Such activities may qualify as categorically excluded from further NEPA requirements under several of Reclamation’s CEs (516 DM, Chapter 14). However, such activities will be evaluated by use of a CEC to ensure that there are no extraordinary circumstances that would disqualify it from a CE. If extraordinary circumstances exist, an EA should be prepared, and either a FONSI or EIS will be completed. Alternatively, Reclamation may still determine that an EIS is appropriate without an EA or a CEC.

4.9 Routine O&M Activities

O&M activities which have been routinely, even if infrequently, carried out over long periods of time and do not constitute a change in established O&M procedures generally do not need any NEPA compliance, as they constitute maintenance of the status quo.

Ongoing O&M activities that preceded the enactment of NEPA in 1969 (pre-NEPA) clearly do not need any NEPA compliance. However, new and continuing activities which have never undergone NEPA review and/or are unprecedented or involve changes to past practices or environmental effects, even
if carried out over long periods of time, should be reviewed and evaluated for compliance with NEPA (Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 234 [9th Cir. 1990]).

The regional or area office that is responsible for this evaluation should determine if NEPA is appropriate in any specific situation. The appropriate level of NEPA analysis that may be needed (CE, EA, EIS) is also at the responsible office’s discretion.

On many Reclamation projects, O&M is carried out by contract with a private entity (usually a water district). In these situations, it is important to recognize that while the activities may be delegated, Reclamation usually retains responsibility for the action and compliance with NEPA. An examination of the O&M agreement and an exact understanding of the action being considered may be necessary to determine the extent of Federal involvement and the need for NEPA compliance documents. The appropriate Solicitor’s Office may be included in this determination. Generally, if Reclamation must approve the O&M action, NEPA applies. Delegated O&M activities would have to go through the same evaluation process described above to determine what level of NEPA is required.

### 4.10 Land Exchanges, Acquisitions, Withdrawals, and Disposal

For Reclamation projects that have undergone NEPA compliance at the time of development/construction, no further compliance is needed when land exchange, acquisition, withdrawal, and/or disposal discussed in that NEPA compliance occurs, unless there are significant changes in the action or there is significant new information concerning environmental issues. Significant changes or significant new information may trigger the need to supplement the original NEPA compliance documents.

For Reclamation projects built before NEPA was enacted, or for proposals not previously addressed, land proposals will need to be evaluated to determine appropriate NEPA documentation. A CE would generally be appropriate only if there is no change in land use and the action is only administrative. If the action is not administrative only and/or there is a change in land use, then an EA or EIS will likely be needed. Note that under the regulations implementing NHPA, the transfer, lease, or sale of a historic property out of Federal control, without adequate and legally enforceable restrictions or conditions to ensure the long-term preservation of the property’s historic significance, constitutes an adverse effect (36 CFR 800.5 (a) (2) (vii)). Be aware that for land acquisitions or disposals, Interior requires bureaus to conduct a pre-acquisition/disposal environmental site assessment to determine the potential for, and extent of, liability for hazardous substances or environmental remediation for hazardous substances on the lands to
be acquired or disposed of. This assessment may be incorporated into the NEPA analysis. The outcome will determine whether Reclamation may go ahead with the acquisition (see 602 DM 2). For all exchanges, acquisitions, withdrawals, and disposals, other statutes, (such as NHPA, ESA, etc.) may require analyses beyond the NEPA compliance requirement.

### 4.11 Invasive Species/Integrated Pest Management Program

Integrated pest management (IPM) is a pest control strategy that is called for in several Executive orders and Interior policies. IPM uses information on the life cycles of pests and their interaction with the environment. This information is combined with available pest control methods (mechanical, chemical, cultural, and biological).

IPM is not a single method of pest control but a combination of management decisions, evaluations, and controls. It usually involves four approaches: (1) setting action thresholds (the point at which pests or the environmental conditions indicate action must be taken), (2) identification of the pests and monitoring, (3) prevention, and (4) control. Less environmentally damaging methods are used first. Only if these methods are unlikely to work are additional, more invasive control methods employed. These approaches are usually described in an IPM plan that is prepared for a project or an area office.

NEPA may apply at several different stages in the IPM process. The Reclamation CE in 516 DM 14.5 D (1) may be used if no extraordinary circumstances exist in managing an invasive species or pests. A Reclamation CE for nondestructive types of research and monitoring is found in 516 DM 14.5 A (3). It may apply to certain types of Reclamation pesticide research and IPM activities. A CEC should be completed to determine if a proposed pesticide research activity qualifies as a CE. Many offices elect to do an EA when an IPM plan is prepared. Others choose to initiate the NEPA process when the agency is deciding to take a specific control action.

### 4.12 Negotiations and Water-Related Contracts

NEPA compliance and negotiation situations, such as any type of water contracting, present a unique set of issues to be considered. The interplay between the discussion and decisions of the negotiators and the NEPA alternative development and disclosure processes, along with other environmental compliance activities, can be complex. Figure 4.1 provides a flowchart illustrating the interaction of these processes. Following are brief descriptions of the contracting process and the associated NEPA process.
4.12.1 **Overview of Reclamation’s Contracting Process**

Contracting is a dynamic process, and the stages discussed herein may reoccur many times and at any point in the process, as may be dictated by new information. Water-related contracts may be for new or additional water supplies, and amendments to or renewals of existing contracts. Negotiations do not become final until the contract is executed. The Federal action triggering NEPA compliance is contract execution.

Contracts define the respective rights, obligations, privileges, and duties of the United States and the contractor in constructing, financing, operating, and maintaining projects. No government agency or individual can contract on behalf of the United States without specific authority from Congress. Congress has authorized the Secretary to carry out the provisions of Reclamation law and to redelegate this authority to the Commissioner or other officers within Reclamation. Contracting authority for smaller amounts of water and shorter terms has been delegated to Regional Directors. Authority to negotiate and execute contracts for larger amounts of water or longer terms can be delegated to Regional Directors following the Commissioner’s approval of a “basis of negotiation” (BON). The BON request is a request for approval to negotiate and execute a contract. The Commissioner’s response, referred to as the “approval” memorandum, delegates the contracting authority and provides the negotiating parameters for the contract.

The contracting process may begin with a request from a water user for a contract. At this stage, basic information is collected on the practical, operational, environmental, legal, policy, and political considerations. These categories include such issues as Reclamation’s authority to provide the water, the water users’ authority to contract, the availability of water, cost of water, updating of the contract’s terms (if the contract is being considered for renewal), NEPA, ESA, and other environmental considerations, as well as potential impacts to third parties (i.e., Indian tribes). If a contract appears feasible, technical discussions are held with the water user and other interested parties to gain a broader understanding of the water users’ needs and the potential impacts to other water users. The technical discussions are also used to research alternatives to better meet the concerns of all parties having a stake in the contract action. These discussions do not commit Reclamation to any plan or alternative. Following the data collections and technical discussions, the BON is prepared and submitted by the Regional Director to the Commissioner for approval. The BON summarizes the basic information gathered and technical discussions, and recommends a negotiating strategy. Although most basic data have been collected by the time the BON is developed, certain activities such as NEPA and ESA compliance, while they may be ongoing, may not be completed until a definitive project description (i.e., draft contract) is developed. In these instances, the BON will discuss the status of those activities and note that execution of the contract will be
dependent upon the completion and results of those studies. Prior to the Commissioner’s signature, the memorandum is reviewed for legal sufficiency by the Office of the Solicitor in Washington, DC.

Following the Commissioner’s approval memorandum, the Regional Director negotiates the contract. The time to negotiate a contract can vary greatly depending on a variety of circumstances. Typically, once agreement is reached on a contract, there follows a 60-day public review period, after which the contract is executed by the water user and the Regional Director.

4.12.2 Integration of NEPA with the Contracting Process

At the very beginning of the contracting process, even before preparation of a BON, Reclamation should engage the NEPA process and include the consideration of environmental factors into development of a BON. This could be in the form of discussions, some type of report or analysis addressing environmental considerations, or a preliminary draft EA identifying the possible contracting alternatives and related environmental impacts. The BON should include a general summary of potential environmental issues.

To be effective in providing information to the negotiators, NEPA documentation and related environmental information should be developed before a final decision is framed. Having the environmental information available early reduces the risk that the NEPA process will uncover some impacts that require renegotiation of the agreement. The actual NEPA documentation should be initiated before the beginning of the negotiation process and should be framed by the positions of the negotiating parties and the no action alternative. As negotiations progress, additional alternatives can be included. The draft NEPA document released for public review should include a preferred alternative. If this is not possible, it must be included in the final NEPA document. A preferred alternative identified in the final NEPA document should be within the range of alternatives analyzed in the draft NEPA document.

The contracting/NEPA process must recognize the differences between executing new contracts and renewing existing contracts. One important distinction relates to the no action alternative. This is important because the no action alternative provides the frame of reference for determining impacts of alternatives. For new contracts, the no action alternative simply represents conditions as they would be with no contract. For renewal of water-related contracts, no action means continuing the existing contract with minor changes to satisfy current legal and contractual requirements. This definition of no action stems from CEQ findings and recommendations on a contract renewal action published in the FR on July 6, 1989. The analysis should describe differences in environmental effects between continuing the existing contract for the proposed contract period compared to the effects of other reasonable alternatives (which may include different contract terms). A renewed contract may implement only administrative/financial changes to an existing contract with no identifiable environmental effects. Reclamation
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has a CE for these types of actions (516 DM 14.5 (D) (14)), and a CEC would have to be completed to ensure that no extraordinary circumstances exist which would necessitate preparation of an EA or EIS.

As with any NEPA process, there may be certain legislative or practical reasons for defining the range of alternatives considered in the contracting process. If an alternative would not be implemented because of legal or other substantive reasons, it may be considered unreasonable and eliminated from consideration and analysis.

4.12.3 Warren Act Contracts

Warren Act contracts are generally agreements entered into to allow the storage or conveyance of nonproject water in Reclamation facilities. These contracts are entered into at times when Reclamation has excess conveyance or storage capacity in its facilities. Briefly, Reclamation must determine the direct and indirect impacts of entering into a Warren Act contract and then complete the appropriate level of NEPA compliance. As with other actions associated with the use or transfer of water, care must be taken to clearly define Reclamation’s action and those impacts that may result from the Federal action.

Reclamation’s policy is to make excess capacity available for storage and conveyance of nonproject water only after considering whether and how adverse effects can be avoided or mitigated. Mitigation will be considered on a case-by-case basis, and costs are to be borne by parties other than Reclamation (i.e., the party requesting a contract for the use of excess capacity or others, but not a project contractor or O&M contractor unless they voluntarily agree to do it). See Directives and Standards WTR 04-01.

4.12.4 General and Summary Comments

Scoping of issues and potential alternatives should occur during the development of the BON to provide Reclamation with a broad public review of the issues associated with the existing contract and to provide options for consideration in the development of the BON. Additionally, public involvement can help define the appropriate level of NEPA documentation for the contracting effort. It is expected that an EA is appropriate in many situations, but EISs and CEs may be more appropriate in some situations. This determination should be made as early in the process as possible to allow a reasonable amount of time for the level of documentation that is appropriate.

The preparation of the NEPA document should be initiated as soon as the appropriate level of documentation needed is defined. If possible, it would be most beneficial to provide a preliminary understanding of the environmental consequences in the BON for the Commissioner’s consideration. If this is an EA or an EIS, it is helpful to have the draft available at, or shortly after, the start of negotiations. This allows Reclamation, the water users, and the public to
understand the environmental consequences (or lack of them) for the issues being negotiated. This should, in turn, encourage the negotiation of provisions that avoid significant environmental impacts, fulfilling the intent of NEPA.

Before a final decision is made, final NEPA documentation should be coordinated with the required public review of the negotiated contract to allow public disclosure of the environmental consequences (or lack of them) for the provisions in the negotiated contract and to provide Reclamation management with the environmental information required by NEPA.

### 4.13 Changing Water Use

The concept of a change in water use has a variety of meanings. Water use changes happen when the application of water is moved from one: (1) location to another, (2) entity to another, or (3) purpose (irrigation) to another purpose (municipal and industrial (M&I)) or multiple purposes (flood control and M&I). It can also occur when the quantity of water applied at a specific location is changed. Changing water use may be accomplished by the assignment of contract entitlements, new water service and repayment contracts, subcontracts, or other arrangements as may be provided by law. Regardless of the type of water use change or mechanism for accomplishing the change, Reclamation and other Federal and State law must be followed before the change can occur. Generally, when Reclamation facilities or water rights are involved, Reclamation’s approval must be obtained. An exception may occur when water within a contractor’s service area is transferred from one user to another, depending upon individual project circumstances.

Since the 1960s, many Reclamation projects have seen significant changes in water use. These changes are the result of the continued trends of greater irrigation efficiencies, retirement of agricultural lands, and increased urbanization. Other water users such as Indian tribes and fish and wildlife have increasingly been recognized as having equal or prior rights to water. Reclamation’s policy is to encourage and facilitate the most efficient beneficial use of water when: (1) such change can be accomplished in accordance with applicable State and Federal laws, and (2) it can be accomplished without diminution of service to those parties otherwise being served by such Federal resources.

A NEPA review is required to identify the likely environmental consequences of a change in water use. The information gathered during the NEPA review, such as the potential impacts to an endangered species, must be considered in Reclamation’s decision in approving the water use change. Environmental impacts are considered for both the immediate and long-term effects of a water use change. Some of the questions that are asked to determine the immediate and long-term effects are:
What is the relationship of water supply and urban population growth?

Is the change growth inducing, or are we simply accommodating already existing demographic trends by providing a relatively impact-free source of water?

How far, and to what degree, do we follow the impacts that are associated with the newly approved water use?

Reclamation may use a CEC if the proposed water use change qualifies for exclusion. Examples of Reclamation CEs that may apply include:

- Approval, execution, and implementation of water-related contracts for minor amounts of long-term water use or temporary or interim water use where the action does not lead to long-term changes and where the impacts are expected to be localized (516 DM 14.5 (D) (4)).

- Approval, renewal, transfer, and execution of an original, amendatory, or supplemental water service or repayment contract where the only result will be to implement an administrative or financial practice or change (516 DM 14.5 (D) (14)). An example would be an acquisition of one water company by another, where the project water contract is transferred to the new company, which then provides water to the same service area.

- Approval of second party water sales agreement for small amounts of water (usually less than 10 acre-feet) where Reclamation has an existing water sales contract in effect (516 DM 14.5 (D) (15)).

The complete list of CEs is found in 516 DM 14.5. In those situations where a CE does not apply, or when all questions on a CEC cannot be checked no, an EA or EIS will be required.

During any NEPA compliance activity, Reclamation should avoid encroaching on State and local governments’ jurisdiction over local planning, zoning, and other issues associated with “growth.” This cannot, however, interfere with Reclamation’s legal responsibilities under NEPA. It should be recognized that there may be occasions when a Reclamation action may be associated with urban growth.

The U.S. Supreme Court discussed the concept of the need for a reasonably close causal relationship between the Federal action and an environmental effect in Department of Transportation v. Public Citizen (541 U.S. 752 (2004)). In this case, the Federal agency discretion over a potential impact (more truck traffic and more air pollution) was limited, and the Court ruled that the NEPA document did
not have to address that potential impact as an effect of the action. Similarly, when Reclamation is involved in a water contracting action, our discretionary control over local growth issues may be very limited.

Consideration of this logic for limiting the scope of analysis in a NEPA document should involve discussions with the Solicitor’s Office and management to determine applicability to a particular situation before the NEPA document is drafted.

### 4.14 Title Transfer

Title transfer involves transferring title to Reclamation facilities to another entity. The Framework for the Transfer of Title, August 1995, describes Reclamation’s title transfer process and addresses policy and criteria for transferring uncomplicated projects (i.e., those without outstanding environmental or other issues). This document should be referenced during evaluation of any title transfer proposal. Copies of the document may be obtained from the title transfer coordinators in the regions or Reclamation’s Web site (http://www.usbr.gov/gp/titleframework.cfm). Issues and obligations that may come up as part of title transfer include: endangered and threatened species concerns, cultural resources issues, hazardous materials concerns, treaties and compacts (international/Indian and interstate), ITAs, and compliance with a variety of EOs (e.g., wetlands, flood plains, pollution prevention, environmental justice, and others). Note that under the regulations implementing the NHPA, the transfer, lease, or sale of a historic property out of Federal control, without adequate and legally enforceable restrictions or conditions to ensure the long-term preservation of the property’s historic significance, constitutes an adverse effect (36 CFR 800.5 (a) (2) (vii)). It is very important to address cultural resources, as well as issues under other laws and obligations (e.g., ESA, ITA) at the outset of any discussions on potential title transfers. Compliance with certain statutes and Federal responsibilities may trigger a series of consultation and analytical steps that could delay completion of the NEPA process and possibly terminate title transfer.

As in any other environmental review, staff will have to review the proposal and determine if compliance with other environmental laws is an issue.

The title transfer process includes a public involvement component. One means of identifying potential environmental problems and controversial issues is to notify stakeholders and interested parties and get them involved early in discussions on title transfer.

If mitigation of potential environmental impacts is appropriate, or if there are prior environmental commitments associated with the project, it is Reclamation’s recommendation that these should be fully implemented before title is transferred,
preferably by the party receiving title. Only in unusual, site-specific circumstances would it be appropriate for Reclamation to attach conditions to the property that require action after title has transferred.

4.15 Financial Assistance Programs

Reclamation provides financial assistance through several different types of business instruments. These are used to convey funds to other entities through: (1) cost-share programs such as Title XVI and Title 28, Water SMART grants, and other partnership activities; (2) cost reimbursement for programs such as drought relief assistance; and (3) funding of activities such as FWCA reports.

Appropriate NEPA compliance will depend upon the specific action being considered. When Reclamation has no control and responsibility over the expenditure of funds provided, NEPA compliance is not required (43 CFR 46.100(a)). This generally occurs when an Act of Congress specifically directs Reclamation to provide funding for a particular activity or to a particular entity. It should be noted that Federal funding under these circumstances may still require consideration under other requirements (e.g., NHPA section 106).

When some degree of control and responsibility exists, NEPA compliance is appropriate. Signing of financial assistance documents, payments of associated costs, and transfers of money are contingent upon first completing appropriate environmental compliance.

Generally, studies and planning assistance activities are categorically excluded from NEPA compliance by Interior and do not require completion of a CEC. In addition, if these activities are restricted to such actions as nondestructive data collection, monitoring, and nonmanipulative field studies, they may not require analysis under other environmental laws and regulations. However, cultural clearances and Section 404 permits may be required for monitoring or studies involving ground disturbing actions such as test pits or drill holes and, therefore, a CEC should be completed. In general, if the action being approved or funded is not expected to cause on-the-ground effects, it is probably not necessary to complete a CEC.

Under NEPA, an appropriate document must be prepared which describes and analyzes the environmental effects of a proposed Federal action, including non-Federal actions funded by Reclamation. Preparation of a CEC may be appropriate for most financial assistance proposals. However, proposals with unclear or potentially significant impacts will require preparation of an EA or an EIS. For these latter two documents, sufficient time and funds must be allowed for completion before the assistance document can be signed (i.e., the document which approves the proposed action and commits funds to implement that action).
In addition, NEPA compliance for projects of non-Federal partners on Reclamation lands, regardless of the funding source (cost share or otherwise), is generally required. For example, NEPA compliance is required prior to construction of new facilities in a recreational area managed by a county for Reclamation, even if the county and/or other entities are paying the total cost.

It should be noted that non-Federal entities are not “responsible” for compliance with NEPA. NEPA compliance is Reclamation’s responsibility. However, due to policy, budget, and staffing limitations, Reclamation often requires that benefiting entities (proponents) provide the needed information and even, in some cases, the analysis necessary for the NEPA compliance documentation (40 CFR 1506.5(a)). In the case of interagency acquisitions, the appropriate Federal partner may be required to complete the NEPA analysis and documentation. This requirement should be specified in the financial agreement.

The cost of NEPA compliance may be funded jointly or as a direct cost to the applicant. The respective financial agreement should specify how these costs will be covered.

See also Reclamation memo entitled “Guidance on Complying with the National Environmental Policy Act and other Environmental Laws for Water 2025 Challenge Grant Proposals” in the attachments.

4.16 Inclusions/Exclusions

Inclusions and exclusions occur when land is being added to an existing service area (inclusion) or when land is being removed from an existing Reclamation project area (exclusion). Inclusions and exclusions should be viewed as any other action undertaken by Reclamation and, as such, are to be reviewed pursuant to NEPA. There is often some land-use change that is caused by these activities, and such a change must be evaluated as part of the action in evaluating an inclusion or exclusion. When the inclusion/exclusion may result in land use changes impacting the environment, an EA or an EIS (if warranted) may be appropriate. In cases in which it can be established that Reclamation’s action of approving inclusions/exclusions has no demonstrable effect on land use (and, thus, no environmental effects), a CEC is likely the appropriate document.

4.17 Water Conservation

Reclamation will comply with NEPA on all actions associated with Federal assistance to water districts in conservation planning and implementation activities, including programs such as the Water SMART Grant Program, the Water Conservation Field Services Program, and the Title XVI Water
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Reclamation and Reuse Program. The type of compliance (CE, EA or EIS) will be commensurate with the potential significance of impacts and the level and type of assistance provided or the Federal action taken, as outlined below.

1. **Submittal and Review of Water Conservation Plans (WCPs).**—Districts are required under the Reclamation Reform Act to develop and submit WCPs to Reclamation. Reclamation will review each individual WCP that is submitted and provide comments and recommendations to the district on the adequacy of the plans in meeting the district’s identified goals and measures. These comments will be advisory in nature but will be substantive in identifying possible environmental impacts of measures proposed in the plan. Reclamation will include in those comments information on any possible future NEPA or ESA compliance that may be envisioned for site-specific implementation of plan elements. Reclamation does not approve plans but may publish notice of submitted WCPs. Because they are public documents, Reclamation will make available to any interested party, as requested, a copy of each submitted plan and/or Reclamation comments and recommendations.

2. **NEPA Compliance Associated with Conservation Planning Assistance.**—When Reclamation provides a district with assistance in the preparation of WCPs, Reclamation will comply with NEPA on the Federal action taken. Technical assistance that can be considered general, day-to-day, and limited in scope will usually fall within an existing Interior NEPA CE covering such routine informational technical assistance activities, and no formal documentation (CEC) of such activity need be processed. However, indepth, site-specific assistance may not be covered by the CE, and preparation of an EA may be required.

3. **NEPA Compliance Associated with Conservation Implementation Assistance.**—When Reclamation provides a district with assistance in the implementation of water conservation measures identified in a district’s plan, Reclamation will again comply with NEPA on the Federal action taken prior to implementation of the measure. When Reclamation provides a district with financial assistance to implement or demonstrate a water conservation measure identified in a plan, appropriate NEPA compliance will be documented as a part of the financial assistance agreement. If Reclamation provides a district with technical assistance to implement or demonstrate a water conservation measure, Reclamation will address appropriate NEPA compliance as described above for conservation planning assistance, depending on whether such technical assistance is provided generally or formally through agreement.

When Reclamation provides financial assistance for implementing or demonstrating a water conservation measure, Reclamation will consider
the interrelationship of all measures proposed in the district’s WCP and provide recommendations on possible legal requirements, potential environmental impacts, and mitigation strategies.

4.18 Applicant-Driven Actions

Applicants are private or other non-Federal entities that initiate or propose actions which, at some stage of planning and development, need Reclamation approval or assistance through the submission of applications. It is a requirement of Interior NEPA regulations (43 CFR 46.200(e)) that the applicants be informed, as soon as it is practicable, of any responsibility they will bear for funding environmental analysis. Reclamation should always inform applicants of environmental information that must be included in their application and any consultations the applicant must complete before or during the application process. In practical terms, this means Reclamation EAs, and even EISs, will frequently be drafted by consulting firms paid by the applicants. For such externally driven proposals, NEPA compliance questions commonly arise in three areas: (1) range of alternatives, (2) limitations on actions by the applicant, and (3) contractor selection requirements. As noted earlier, Reclamation remains fully responsible for the adequacy of NEPA compliance.

Be aware that the ESA uses the term “applicant” in a different way than described here. An applicant in the ESA process has specific rights to be involved in the process that do not apply to applicants in the sense used here (see Section 7 of the ESA for more details).

4.18.1 Range of Alternatives

(40 CFR 1502.14; also see CEQ’s Forty Most Asked Questions, No. 2, and CEQ Guidance Memorandum issued August 10, 1983)

Frequently, the applicant’s proposed action will be submitted to Reclamation for approval, and the Federal decision (action) may be to simply approve or disapprove. In such situations, Reclamation must determine what other alternatives should be considered in the NEPA document and whether these alternatives are “reasonable,” given the purpose and need of the action.

In general, the referenced guidance is to include and consider reasonable alternatives in applicant-driven proposals in the same fashion that an internal Reclamation proposal would include and consider them. In CEQ’s Forty Most Asked Questions, it is observed that…

Reasonable alternatives include those that are practical or feasible from the technical or economic standpoint and using common sense rather than simply desirable from the standpoint of the applicant.
In later guidance (August 1983 guidance memorandum), CEQ concludes it is reasonable for the Federal agency to limit the range of alternatives to those “. . . which are considered feasible, given the applicant’s stated goals.” The agency should consider the “applicant’s purposes and needs and the common sense realities of a given situation in the development of alternatives.”

The determination of appropriate alternatives is a Reclamation responsibility. The responsible official has discretion to determine what (if any) action alternatives are appropriate. The number and scope of alternatives also remain Reclamation’s responsibility. It is recommended that the rationale for the decision be documented either in the NEPA document or in the office’s files.

### 4.18.2 Limitations on Actions by the Applicant
(40 CFR 1506.1, 43 CFR 46.160; also see CEQ’s Forty Most Asked Questions, No. 11)

The applicant is clearly held to the same standard as the Federal agency in taking action prior to completion of the NEPA process. That is, the applicant should not take any action prior to the ROD or FONSI that would have an adverse environmental impact or that would limit the choice of reasonable alternatives. The difficulty for the Federal agency lies in how to enforce this limitation when the applicant may be initiating the proposal with its own money and on its own property (i.e., there is no Federal authority to stop such private actions). CEQ advises the Federal agency to “notify the applicant that the agency will take strong affirmative steps to ensure that the objectives and procedures of NEPA are fulfilled.” For example, the agency might advise an applicant that if it takes such action, the agency will not process its application.

### 4.18.3 Contractor Selection Requirements
(40 CFR 1506.5; also see CEQ’s Forty Most Asked Questions, Nos. 16 and 17, and CEQ Guidance Memorandum issued August 10, 1983)

The above-referenced guidance should be consulted for detailed information, especially the August 10, 1983, CEQ memorandum, regarding contractor-prepared NEPA documents. In general, preliminary EAs may be prepared by applicants (or their consultants, known as “third party contracts”) without prior approval or involvement by the Federal agency in the selection of the consultant. Early coordination, however, is encouraged. The Federal agency may accept such EAs if they meet the agency’s requirements, including compliance with CEQ regulations. Ultimately, Reclamation is responsible for the scope and content of the EA; consequently, Reclamation must independently review and evaluate the information in the EA to ensure that it meets Reclamation’s requirements.
An EIS may be prepared directly by the lead agency or a cooperating agency when appropriate. Alternately, an EIS may be prepared by a contractor selected by a lead and/or cooperating agency.

There are situations in which a consulting firm may be hired under a “third party contract.” According to CEQ’s Forty Most Asked Questions, a third party contract refers to the preparation of EISs by contractors paid by the applicant, not by the agency. In these cases, the lead or cooperating agency must select the contractor, even though the contract is between the consulting firm and the applicant. The applicant would prepare the paperwork for soliciting contractor candidates, and Federal acquisition requirements would not apply because the Federal agency procures nothing and incurs no obligations or costs under the contract. CEQ guidance and regulations, cited above, should be carefully reviewed.

Whether a contractor is hired directly by the lead and/or cooperating agency or hired under a third party contract, Reclamation must provide guidance and participate in the preparation of the EIS to ensure that appropriate scope and analyses are completed. In all cases, the consulting firm selected to prepare the EIS must execute a disclosure statement demonstrating that it has no financial or other interest in the outcome of the project.

### 4.19 Environmental Management System

An environmental management system (EMS) is a management practice that allows an organization to manage its controllable environmental impacts in a systematic way. EMS implementation in Reclamation reflects the International Organization for Standardization 14001:2004(E) model. This model embraces a Plan/Do/Check/Act management cycle where the organization’s environmental impacts are identified, goals and targets related to significant impacts are set, progress is monitored, and adjustments are made in the context of management review to foster continual performance improvement.

EMS differs from NEPA in that the EMS typically requires identification of environmental aspects associated with an organization’s ongoing operations and activities, prioritizing those which have, or can have, significant impacts on the environment. EMS provides a framework to improve day-to-day environmental performance, including the achievement of environmental regulatory compliance, not just “major Federal actions.” EMS also requires continuous review, adjustments, and improvement to reduce environmental impacts year after year. NEPA and EMS are distinct and separate processes at different phases of project planning and operation. However, the results of the NEPA process can be utilized in EMS to identify and prioritize environmental aspects of a proposed activity or of similar ongoing activities. Commitments and mitigation measures established as a result of the NEPA process can be transformed into EMS objectives and
targets and be tracked and monitored through the EMS “Check” process. For more information on EMS and NEPA, please see the CEQ guide entitled “Aligning NEPA Processes with Environmental Management Systems.”
Figure 4.1.—Reclamation contracts and repayment and environmental compliance.
Chapter 4 Useful Links

CEQ’s Guidance Memorandum issued August 10, 1983

CEQ’s Forty Most Asked Questions

CWA
http://epw.senate.gov/water.pdf

Directives and Standards WRT 04-01

EO 11988 - Floodplain Management
http://www.fema.gov/plan/prevent/floodplain/eo_11988.shtm

EO 11990 – Wetlands
http://water.epa.gov/lawsregs/guidance/wetlands/oe11990.cfm

EO 12898 - Environmental Justice

ESA

FWCA

NHPA
http://www.achp.gov/docs/nhpa%202008-final.pdf

Reclamation Reform Act
http://www.usbr.gov/rra/

SOD
http://www.usbr.gov/ssle/damsafety/

Title XVI - Water Reclamation and Reuse Program
http://www.usbr.gov/WaterSMART/title/

Title XVI - Watersmart Program
http://www.usbr.gov/WaterSMART/title/
Water Conservation Field Services Program
http://www.usbr.gov/waterconservation/

16 U.S.C. 590a
http://codes.lp.findlaw.com/uscode/16/3B/590a

36 CFR 800.5 (a)(2)(vii)
http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=74eb81d7638f83d68f67af38f8d58841&rgn=div8&view=text&node=36:3.0.6.1.1.2.1.3&idno=36

40 CFR 1500-1508
http://ceq.hss.doe.gov/ceq_regulations/regulations.html

43 CFR 46
http://www.doi.gov/oepc/nepafr/docs/Federal%20Register%20October%202008%20NEPA.pdf

516 DM 14.5 – Categorical Exclusions

602 DM 2

606 DM 1
Chapter 5

Categorical Exclusion

As explained in chapter 3, a CE applies to actions that do not individually or cumulatively have a significant effect on the human environment. Each CE is approved by CEQ and excludes categories of Federal actions from further NEPA documentation because those types of actions have been shown to have no significant effect on the environment. A CEC is a tool Reclamation uses to document consideration of “extraordinary circumstances” (43 CFR 46.215) in the application of a CE to a particular situation.

As a general rule, preparation of a CEC should be a fairly rapid process, taking a few hours or a few days and involving a little research, a few coordination telephone calls, and/or short face-to-face discussions to get information, as needed, to fill out the checklist. Some internal and external scoping of issues and documentation may also be required. If completion of the CEC is going to take weeks and/or months to scope and document, or if the answer to any question is uncertain or “yes,” an EA should generally be prepared.

5.1 When to Use a Categorical Exclusion
(40 CFR 1508.4 and 43 CFR 46.205-215)

The use of a CE depends upon three basic criteria. First, the action being considered must fit into one of the categories on the list of CEs. Second, the responsible official must believe that there are no potential significant impacts or complications that would make a CE inappropriate; and, third, no extraordinary circumstances apply.

Interior (43 CFR 46.210) has a list of CEs that can be used for any agency’s actions. Additionally, there is a Reclamation-specific list (516 DM 14.5) that can also apply (http://elips.doi.gov/ELIPS/DocView.aspx?id=1727&dbid=0). NEPA compliance for proposed actions that do not fit into any of the categories on these lists, even if there are believed to be no potentially significant effects, should start with an EA. Also, any time a proposed action has any potentially significant complications (such as site-specific circumstances of concern), an EA should be prepared instead. Finally, a CEC should be prepared whenever a Reclamation CE is used (and may be advisable even when using an Interior CE in unique circumstances).

Any action that is normally categorically excluded must be subjected to sufficient environmental review to determine whether any extraordinary circumstances (43 CFR 46.215) apply. If so, an EA (or EIS) must be prepared. Reclamation’s CEC supports the determination that a proposed action qualifies for the cited CE.
The initial determination relative to NEPA compliance and documentation for minor actions, including initiating the appropriate paperwork for a CEC, is the responsibility of the Reclamation office initiating the action.

**5.2 Categorical Exclusion Checklist for Individual Actions**

Completing a CEC should not require extensive research or any substantive data collection. It should include a description of the proposed action, documentation on how it meets the exclusion category, and a list of any environmental commitments associated with the action.

The CEC should be used to evaluate an individual action in relation to the impacts it may cause. Figure 5.1 is an example of the minimum contents of a CEC. The format for a CEC may change between regions, but the wording of the evaluation criteria reflects the language of 43 CFR 46.215, the requirements of several Executive orders, and Reclamation policy on ITAs and, therefore, should not be changed. If all the answers to the checklist are “no,” the action meets the criteria for a CE.

If, after reasonable efforts to clear up uncertainties and compliance questions, an answer is checked “yes,” an EA should be prepared. If it is certain the impacts are potentially significant (40 CFR 1508.27), the EA process may be bypassed, and the preparation of an EIS initiated. If answers are uncertain, an EA may be necessary and additional information gathered to relieve the uncertainty. If project mitigation is required, the action probably should be covered by an EA rather than a CE. Even so, environmental commitments may be made which, when followed, would eliminate the need for specific mitigation measures. These commitments (which would be documented in the CEC) include such measures as stopping work and calling in a cultural resource specialist if archeological resources were uncovered in the course of the action, or consulting with the Service if unexpected evidence of a T&E species were found on the site. These commitments are not an attempt to produce a “mitigated CE” but, rather, an acknowledgment that unexpected things can happen and that Reclamation will respond appropriately if something should occur. This acknowledgment and/or other available and appropriate supporting material (letters from the Service, SHPO, etc.) may be attached to the CEC.

When completing the CEC, answering “uncertain” to any questions does not automatically make the action in question subject to an EA. It may only mean that sufficient data are not available to answer the question “yes” or “no.” For example, if the CEC is filled out and all the questions are answered “no” except for one, which is marked “uncertain,” then more research or consultation is
needed. If, after further research, no significant impact is found in this area, the question can then be answered “no” and a CE can be cited. The results and actions taken should be documented in the “Remarks” section of the CEC.

If additional data are gathered and doubt persists about the significance of the possible impact, an EA should be prepared.

5.3 CEC Criteria for Evaluating Categorically Excluded Actions

(43 CFR 46.215)

The criteria and exceptions included in a CEC that must be considered in evaluating whether or not a CE is applicable and appropriate are listed below. The majority of the criteria and exceptions (extraordinary circumstances) are set forth in 43 CFR 46.215.

Evaluation of Criteria for CE:

1. **This action would have a significant effect on the quality of the human environment (40 CFR 1502.3).**

The response should consider the broad impacts to the physical, biological, social, legal, and economic factors that make up the total human environment and the relative significance of those impacts. Generally, this criterion should be evaluated last, as the information from the others is needed to evaluate this criterion adequately.

2. **This action would have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources (NEPA Section 102(2)(E) and 43 CFR 46.215(c)).**

Controversy is based on the analysis and effects of the proposed action and not merely on whether or not a group or individual likes the project. The term “controversial” refers “to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use.” (N. Am. Wild Sheep v Dept of Agric., 681 F.2d 1172, 1182 (9th Cir. 1982)) (citation omitted)

One should consider the use of available information, consultation with technical experts, limited public involvement, or professional judgment to reach a decision regarding potential resource conflicts, as well as short- and long-term potential uses of the natural resources in question.
3. **This action would have significant impacts on public health or safety** (43 CFR 46.215(a)).

A number of issues may arise relative to public health and safety. The most common concerns are likely to involve water quality and hazardous materials. Other public health and safety considerations may not be as obvious. However, it is important to provide appropriate consideration of the broad range of public health and safety issues.

Activities must not violate applicable Federal, tribal, or State water quality standards. These water quality standards are established to protect the beneficial uses of the designated water body. Where standards have not been established, applicable water quality health goals may be considered.


Many Reclamation activities may directly or indirectly affect public safety. Examples include the application of pesticides, dam construction or repair, development of recreational facilities, canal maintenance, and reservoir operations.

4. **This action would have significant impacts on such natural resources and unique geographical characteristics as historic or cultural resources; parks, recreation, and refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (EO 11990); flood plains (EO 11988); national monuments; migratory birds; and other ecologically significant or critical areas** (43 CFR 46.215 (b)).

Reclamation should consider the effect of its undertaking on unique cultural and historic resources. State SHPOs, historic preservation societies, tribes, the ACHP, and other organizations may be of assistance in identifying these and should be contacted early in the process.

The Service should be contacted to determine whether national wildlife refuge system lands, including waterfowl production areas, are within the affected area and whether these areas may be adversely impacted. State and local management agencies should be contacted if refuges under their management authority may exist in the area.

Land management and conservation agencies, such as the Forest Service, Bureau of Land Management (BLM), National Park Service (NPS), and the Service, should be contacted to help identify wild or scenic rivers; rivers listed in the national inventory of such rivers; park and recreation lands; wilderness areas or
areas proposed for wilderness designation; and national monuments. These agencies can assist in determining whether direct, indirect, or cumulative adverse impacts to these resources may result from the proposed action.

The NPS or its National Natural Landmark (NNL) Web site should be consulted to determine NNL locations and to assist in determining the impacts of the proposed action on those resources.

If the proposed action has the potential to impact ground water, the appropriate State and/or local entities should be contacted to assist in identifying sole or principal aquifers and the impacts to such aquifers.

The Natural Resources Conservation Service (NRCS) can assist in identifying prime and unique farmlands and in determining whether the proposed action will result in adverse impacts. Consideration should be given to the direct, indirect, and cumulative effects the proposed action may have upon prime and unique farmlands in the project area (Reclamation is responsible for determining whether the proposed action may have growth-inducing effects and related impacts upon prime and unique farmland).

Jurisdictional wetlands are wetlands which are regulated under Section 404 of the CWA. The excavation or discharge of dredged or fill material into jurisdictional wetlands is regulated by USACE. Authorization from USACE is required for excavation and fill activities in jurisdictional wetlands, except for those activities which have been exempted or grandfathered through the rulemaking process. The level of authorization necessary can range from a nationwide general permit to an individual permit. USACE regulations in 33 CFR 328.3(b) define wetlands as:

> Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation adapted for life in saturated soil conditions.

Wetlands generally include swamps, marshes, bogs, wet meadows, seasonal wetlands such as vernal pools and prairie potholes, and other similar areas.

All potential Reclamation actions must consider impacts to wetlands. Such consideration should begin with a review of National Wetland Inventory maps, NRCS soil surveys, and/or aerial photography, when available, followed by a field inspection, if necessary, to verify the presence or absence of wetlands. If possible, a representative from the Service, USACE, or NRCS should participate in the field inspection. The results of the field inspection should be documented.

Consideration should be given to whether the proposed action will increase the risk of loss of property from flooding; increase the impact of floods upon human safety, health, and welfare; or hinder preservation and/or restoration of the natural and beneficial values served by flood plains.
Reclamation must determine if a proposed action will result in “take” of migratory birds. A CEC is not appropriate to use for proposed actions that involve intentional take of migratory birds unless a permit has been obtained from the Service. Where unintentional take of migratory birds is anticipated (for example, vegetation clearing during the nesting season), the Service should be consulted and reasonable measures included in the action to minimize any such unintentional take.

5. This action would have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks (43 CFR 46.215(d)).

Activities such as the introduction of a species into previously unoccupied habitat, the eradication of a species from large areas, captive management of T&E species, or innovative mitigation techniques may involve adverse environmental effects which may not have been readily discernible or which may be difficult to quantify with existing data and technology. In addition, the nature and magnitude of some environmental effects may not become apparent until long-term monitoring has been completed. Some research-oriented activities or unique environmental proposals in which the effects cannot be quantified with existing methodologies may warrant checking the “uncertain” blank.

6. This action would establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects (43 CFR 46.215(e)).

If the proposed action is innovative, will facilitate future actions by establishing a base upon which related or connected actions depend for support, or is the initial action in a known series of actions, it may set a precedent for future actions. To mark a “yes” for this item, the Reclamation action should be essential for the subsequent activity to occur (a direct causal link), and Reclamation should have some degree of control and responsibility over the subsequent activities. A “yes” or uncertain response would require Reclamation to analyze the impacts of the action in an EA or EIS.

7. This action would have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects (43 CFR 46.215(f)).

The analysis of cumulative effects is one of the most important and difficult analyses to conduct. Cumulative effects are defined in 40 CFR 1508.7 as:

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

It is normally difficult to predict cumulative impacts which may be expected to reasonably occur in the future. The analysis of cumulative effects associated with reasonably foreseeable future actions should not be speculative but based upon known long-range plans and other plans developed by agencies, organizations, and/or individuals.

Cumulative effects can be additive or interactive. Additive effects tend to emerge from one kind of source through time or space. Interactive effects result from more than one kind of source. Reclamation needs to consider whether a proposed action is one of many similar events that could accumulate effects over time.

8. This action would have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by Reclamation (in coordination with a Reclamation cultural resources professional, LND 02-01)(43 CFR 46.215 (g)).

The National Register is a listing of properties significant in local, State, or national history maintained by the Secretary. National Register properties may be prehistoric or historic sites, districts, buildings, structures, or objects significant in American history, architecture, engineering, and culture. Properties eligible for listing receive the same level of protection as properties listed in the National Register. The SHPO maintains a list of eligible properties for his or her respective State. In some cases, a THPO may maintain a list of eligible properties for the lands of the tribe he/she represents. Unevaluated properties are considered potentially eligible until determined otherwise.

Historic properties are subject to consideration under Section 106 of the NHPA. Federal agencies are encouraged to coordinate compliance with Section 106 and NEPA as early as possible. Even if the action would normally be categorically excluded from NEPA review, Reclamation must determine if it qualifies as an undertaking requiring review under Section 106.

Through the consultation process prescribed in 36 CFR Part 800, Reclamation must determine whether the proposed action will have an effect on historic properties and, if so, whether the effect is adverse. Adverse effects under NHPA do not always constitute potentially significant impacts under NEPA. If an adverse effect on a historic property can be avoided, minimized, or mitigated, the proposed action may be sufficiently modified under NEPA that it no longer has a potentially significant impact. If that is the case, the CEC can be signed. There may be occasions where a proposed action cannot simply be modified to prevent a potentially significant impact. In such cases, an EA (or an EIS) will be required.
The results of compliance with the NHPA should be included on or accompany the CEC to show that compliance with the NHPA has been fulfilled. The CEC should be coordinated with and signed by a cultural resources specialist or other appropriately qualified professional.

9. **This action would have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated critical habitat for these species (43 CFR 46.215 (h)).**

Reclamation must determine if T&E species exist in the project area. This determination must be made with the involvement of the Service and/or NOAA-NMFS, as appropriate, the agencies charged with determining the distribution and critical habitat for listed species. There should also be close coordination with the area or regional ESA specialists or coordinators.

Reclamation must determine if the activity may significantly affect any proposed or listed species or its critical habitat. To reach a conclusion of “no” on the CEC, Reclamation should have determined one of the following: (1) there are no listed species or designated critical habitat in the proposed area, (2) the proposed action would have no effect upon listed species or designated critical habitat, or (3) the effect of the proposed action on listed species or designated critical habitat was insignificant, discountable, or wholly beneficial (this determination requires written concurrence from the Service/NMFS of “is not likely to adversely affect” and, if critical habitat exists, “will not destroy or adversely modify,” critical habitat). See the Service’s Consultation Handbook for additional information.

For those rare situations where a proposed species or proposed critical habitat is present, the test is similar. The reasoning that led to the determination should be documented and included with the CEC.

10. **This action would violate a Federal, tribal, State, or local law or requirement imposed for protection of the environment (43 CFR 46.215 (i)).**

Reclamation should determine the jurisdictional authority for the area to be impacted by the action. This could be a State or Federal agency, or a city, county, or tribal government. Once the jurisdictional authority has been determined, the appropriate applicable environmental laws and regulations for that authority (e.g., CWA Sections 402 and 404) should be reviewed. This may involve laws/regulations for more than one authority (e.g., an area may have to comply with a combination of environmental laws/regulations from tribes, the State, a county, or a city).

Reclamation should determine if Secretarial or Executive orders (including EO 12898, EO 12114, and Secretarial Order 3206, in the attachments) apply to the action.
In responding to this criterion, Reclamation would determine if any environmental laws, enacted by the governmental entity whose jurisdiction encompasses the affected area, would be violated by the action.

11. **This action would affect ITAs (to be completed by Reclamation official responsible for ITAs) (512 DM 2, Policy Memorandum dated December 15, 1993).**

ITAs are legal interests in property held in trust by the United States for federally recognized Indian tribes or individuals. Consideration of potential adverse impacts to ITAs should occur as early as possible in the NEPA compliance process. The initial step should be to identify ITAs in or near the affected area. Identification of ITAs should involve consultation and/or coordination with potentially affected Indian tribes, individuals, or entities; BIA; the Solicitor’s Office; and/or the area and regional Native American Affairs coordinator. As the determination of ITA status is essentially a legal issue, the involvement of the Solicitor’s Office is important when it is essential to state with certainty whether something is an ITA. All impacts to ITAs, even nonsignificant ones, must be considered. Adverse impacts should be avoided when possible and mitigated or compensated when not avoidable. The consultation process should reflect the potential for impacts and be carried out with the affected beneficiary and trustee. If the extent of the effects cannot be agreed upon early on with potentially affected tribes, then consideration should be given to undertaking an EA.

The results of any efforts to resolve ITA concerns should be documented and included with the CEC. The appropriate regional or other director designated as ITA coordinator signs the CEC to concur with the findings. Additional information on ITAs can be found in the attachments.

12. **This action would have a disproportionately high and adverse effect on low income or minority populations (EO 12898) (43 CFR 46.215 (j)).**

Reclamation should determine if minority and low-income populations exist within the project area through the use of census, as well as demographic and economic data. Disproportionate impacts on low-income or minority populations as a result of the action, or not taking the action, should be evaluated. The reasoning used to determine that there will not be a disproportionately high and adverse impact on low-income and minority populations should be documented. Unlike most of the other criteria, environmental justice effects are not based upon any determination of significance but, instead, upon disproportionately high and adverse effects. As a result, some situations may (rarely) occur when an insignificant effect related to environmental justice may trigger additional compliance actions under EO 12898, but no EA would be required, and a CEC could still be signed.
13. **This action would limit access to, and ceremonial use of, Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (EO 13007, 43 CFR 46.215 (k), and 512 DM 3)).**

EO 13007 defines Indian sacred sites as discrete, narrowly delineated locations on Federal land designated as sacred by virtue of established religious significance to, or ceremonial use by, an Indian religion, provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Reclamation should determine if there are Indian sacred sites present, or there is the potential for them to be present, within the affected area. This should be determined in consultation with potentially affected tribes. Actions that may prevent use of the CE may include actions that limit reasonable access to, or ceremonial use of, Indian sacred sites or actions that cause adverse physical impacts to Indian sacred sites.

Sacred sites effects are not based upon any determination of significance but, instead, upon affecting the physical site or limiting access or use.

14. **This action would contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act, EO 13112, and 43 CFR 46.215 (l)).**

Actions should be evaluated for reasonable potential to introduce or spread noxious weeds or non-native invasive terrestrial and aquatic species by considering such factors as:

- Existing populations within the project area
- Potential to increase the rate of establishment or spread of noxious weeds or non-native invasive species by natural or human dispersal to the project area from populations in reasonable proximity to the project area
- Risk of introduction through use of contaminated equipment in the project area
- Potential for the action to provide the necessary environmental conditions for the establishment or spread of noxious weeds and non-native invasive species (i.e., ground disturbance, increased moisture)
5.4 Proposing a New Categorical Exclusion

Reclamation can add to the list of CEs. This requires amending 516 DM 14.5. If an area office or regional office wishes to add an action to the list, the effort should be coordinated with Policy and Administration. The process involves Reclamation-wide review and comment, Interior and CEQ approval, and publication in the FR with associated public review and comment. An action qualifies for a new CE if it can be demonstrated that it has not in the past caused (and is unlikely to ever cause) any significant effects on the environment.

Once an office determines that the addition of a new CE may be warranted and would be beneficial in meeting the goals of NEPA, the requesting office should, under the Regional Director’s signature, provide the draft text of the proposed CE and supporting documentation to Policy and Administration. Regional/area offices may also request that Policy and Administration develop the text and documentation.

The text of the proposed CE should be consistent with the tone and style of existing Reclamation CEs listed in 516 DM 14.5. The category proposed shall be well defined and succinctly stated. Supporting documentation should consist of: draft CE text, draft FR notice, detailed rationale for the proposal, and documentation (generally several EA/FONSIs) supporting the premise that the proposed category of actions does not significantly affect the quality of the human environment. These materials will be used during the coordination process to gain concurrence from other Reclamation offices and to develop the package to put forth for Interior and CEQ review and approval.
# Categorical Exclusion Checklist

<table>
<thead>
<tr>
<th>Project:</th>
<th>Date:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nature of Action:</td>
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## Evaluation of Criteria for Categorical Exclusion

1. This action or group of actions will have a significant effect on the quality of the human environment.  
   - No  
   - Uncertain  
   - Yes

2. This action or group of actions will involve unresolved conflicts concerning alternative uses of available resources.  
   - No  
   - Uncertain  
   - Yes

3. This action will have significant adverse effects on public health or safety.  
   - No  
   - Uncertain  
   - Yes

4. This action will have an adverse effect on unique geological features such as wetlands, wild or scenic rivers, rivers placed on the nationwide river inventory, refuges, floodplains, or prime or unique farmlands.  
   - No  
   - Uncertain  
   - Yes

5. This action will have highly controversial effects.  
   - No  
   - Uncertain  
   - Yes

6. This action will have highly uncertain environmental effects or involve unique or unknown environmental risk.  
   - No  
   - Uncertain  
   - Yes

7. This action will establish a precedent for future actions.  
   - No  
   - Uncertain  
   - Yes

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**Figure 5.1.—Example of a CE checklist sheet.**
8. This action is related to other actions with individually insignificant but cumulative significant environmental effects.  
   No__Uncertain__Yes__

9. This action will adversely affect properties listed or eligible for listing in the National Register of Historical Places.  
   No__Uncertain__Yes__

10. This action will adversely affect a species listed or proposed to be listed as endangered or threatened.  
    No__Uncertain__Yes__

11. This action threatens to violate Federal, state, local, executive or Secretarial orders, or tribal law or requirements imposed for protection of the environment.  
    No__Uncertain__Yes__

12. This action will affect Indian Trust Assets.  
    No__Uncertain__Yes__

13. This action will have a disproportionately high and adverse human health or environmental effects on low income or minority populations.  
    No__Uncertain__Yes__

14. This action will limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites.  
    No__Uncertain__Yes__

15. This action will contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species.  
    No__Uncertain__Yes__

Figure 5.1.—Example of a CE checklist sheet (continued).
**NEPA Action:** Categorical Exclusion __  EA __  EIS __

**Environmental commitments, explanation, and/or remarks:**

Preparer's Name and Title: ___________________________  Date: __________

Regional Archeologist concurrence with Item 9:
See attached concurrence memo

ITA Designee concurrence with Item 10:
See attached concurrence memo

Approved:

_________________________  Date: __________

Regional Environmental Officer

Figure 5.1.—Example of a CE checklist sheet (continued).
Chapter 5 Useful Links

Clean Water Act
http://epw.senate.gov/water.pdf

DM Part 516, Chapter 14

EO 11988 – Floodplains
http://www.fema.gov/plan/ehp/ehplaws/eo11988.shtml

EO 11990 - Protection of Wetlands
http://water.epa.gov/lawsregs/guidance/wetlands/11990.cfm

EO 12114 – Environmental Effects Abroad of Major Federal Actions

EO 12898 – Environmental Justice

EO 13007 – Indian Sacred Sites
http://www.achp.gov/EO13007.html

EO 13112 – Invasive Species

LND 02-01 – Cultural Resources Management
http://www.usbr.gov/recman/lnd/lnd02-01.pdf

National Historic Preservation Act
http://www.achp.gov/docs/nhpa%202008-final.pdf

National Natural Landmarks Web site
http://www.nature.nps.gov/nnl/

National Register of Historic Places
http://www.nps.gov/nr/

National Wetland Inventory maps
http://www.fws.gov/wetlands/

NRCS Soil Surveys
http://soils.usda.gov/survey/
Safe Drinking Water Act  
http://water.epa.gov/lawsregs/guidance/sdwa/text.cfm

Section 102(2)(e) of NEPA  
http://ceq.hss.doe.gov/nepa/regs/nepa/nepaeqia.htm

SO 3175 incorporated into 512 DM 2  

SO 3206  
http://www.fws.gov/nativeamerican/graphics/Sec_Order_3206.pdf

33 CFR 328.3(b)  
http://www.access.gpo.gov/nara/cfr/waisidx_02/33cfr328_02.html

40 CFR 1500-1508  
http://ceq.hss.doe.gov/ceq_regulations/regulations.html

43 CFR 46  
http://www.doj.gov/oepc/nepaf/docs/Federal%20Register%20October%202008%20NEPA.pdf

512 DM 3  
Chapter 6

Environmental Assessments and Findings of No Significant Impact

The EA is a concise public document used to determine whether to prepare a FONSI or EIS. Because CEQ defines the term “environmental assessment” as the basis for either a FONSI or an EIS, this term should not be used for other Reclamation documents.

An EA is a different document from an EIS. Significant differences include required content, degree of public involvement, and the intended purpose (i.e., support for a FONSI or determination that an EIS is necessary).

6.1 When to Use an Environmental Assessment
(40 CFR 1508.9, 43 CFR 46.300-325, and 516 DM 1.12)

An EA will be prepared for all actions except for:

- Actions exempted from NEPA
- Actions covered by an Interior CE
- Actions that qualify for a Reclamation CE based upon the CEC
- Actions which have been sufficiently addressed by an earlier environmental document (generally an EA or EIS)
- Actions for which it is obvious that an EIS will be needed

EAs should be written for actions for which there is not an appropriate CE, or for actions that may fall under an exclusion category but do not qualify under the checklist criteria. These types of EAs may be fairly short if the action is minor with no controversy (disputes over scientific conclusions or impacts of the action).

The average EA should be about 30 pages or less. As the length of the EA increases, the chances increase that an EIS is the correct documentation under NEPA, simply because the number of issues is one indication of the possibility of significant impacts.
An EA may also be prepared when minor changes are made to a proposed action for which an EIS has been completed. As an example, this type of EA may be prepared when a programmatic EIS has been completed but site-specific layout and design of projects have not taken place. Another example occurs when an EIS was done for development of an irrigation district but changes to the delivery system are proposed. This situation is specifically addressed in Interior’s regulations at 43 CFR 46.140 (c). Reclamation does not recommend the use of the term “finding of no new significant impact” to conclude these assessments.

EAs are generally prepared in the regions by either the area or regional offices, and the head of the area or regional office has ultimate responsibility for their adequacy. The TSC may prepare an EA for a region or may (rarely) prepare one for a TSC internal action (e.g., research actions). An environmental specialist with expertise in NEPA should be involved in the preparation and review of all EAs.

In addition, an EA may be used to evaluate any action at any time to assist in planning and decisionmaking. This information would not necessarily lead to a decision to prepare an EIS, but it would provide the decisionmaker with information on environmental issues and effects that may be incorporated upfront in a proposal. Public notification is not required for such an analysis but should be included where appropriate.

Finally, for EAs that are likely to be complex or to address a wide range of issues, a review of EIS actions and content (chapters 7 and 8) is recommended.

6.2 Actions Associated with an EA

The EA process is less formal than the EIS process. For a minor, routine action, an EA may simply be a short document written by a few people within a Reclamation office and approved with a simple public Notice of Availability (NOA) but without any formal public review process. However, there should still be consultation with various agencies and affected interests, including Indian tribes. Information should be provided to the public on the NEPA process and how to get involved. An EA on a complex action with substantial public interest may involve many of the public involvement actions, and other actions, associated with an EIS. Depending on the complexity of the proposal, the following actions may be appropriate:

- Joint environmental documentation with tribal, State, and local agencies
- Scoping (public, interagency, and/or intra-agency)
- News releases through newspapers, newsletters, and the Internet
Chapter 6: Environmental Assessments and Findings of No Significant Impact

- Sending the draft EA to the public for comments
- Public meeting
- Sending the final EA and FONSI to the public
- Consultation and coordination with other agencies
- Requesting that eligible governmental entities (43 CFR 46.225) be cooperating agencies
- Supplementing previous EAs and/or FONSI
- Adoption of an EA

No formal public scoping is required for an EA; however, informal scoping, which may be internal to Reclamation, is needed to define the potentially significant issues and the scope of analysis. Such informal scoping should always involve appropriate disciplines within Reclamation and may involve other agencies or interested parties, depending upon the complexity of, and issues raised by, the proposed action. Where the proposed action is likely to be controversial, or one that usually requires an EIS, formal public scoping meetings should be considered. The extent of public scoping and involvement is at the discretion of the lead office and should reflect potential issues and controversy. All potentially significant issues identified must be analyzed in the EA.

Reclamation is responsible for the adequacy, completeness, and processing of all EAs involving Reclamation actions, projects, and lands. Proponents for actions requiring Reclamation’s approval will normally have to supply the appropriate information needed for any required NEPA document. If a contractor will be developing an environmental report for the proponent to use to comply with NEPA requirements, Reclamation should participate in the selection of the contractor. In addition, the report must meet Reclamation standards. Further, the contractor should provide a disclosure statement specifying that they have no financial or other interest in the outcome of the proposed project. The applicant may bear the costs of gathering environmental information necessary for NEPA compliance or the costs may be shared, depending upon the proposed action and applicable authorities. The applicant may do this by hiring a contractor to obtain the necessary information or by providing funds to Reclamation to do the work (also see section 4.19).

6.3 Timeframe for an EA

The EA should be started as early as possible following definition of the proposed action and be developed concurrently with other studies. The office proposing an
action must schedule sufficient time for the EA to be prepared and obtain sufficient budget for its completion. The time needed for the EA process is highly variable, depending upon the issues and controversy associated with the proposal and the extent of public review and interest. At any time during the preparation of an EA, issues may be identified that indicate the need for an EIS. If the schedule does not allow for such an event, a significant disruption of the schedule could occur.

In addition, the timeframe can be significantly affected by the separate processes associated with NHPA compliance, FWCA requirements, ITA analysis, consultation under the ESA, and others. These factors should be taken into consideration when developing a timeline.

6.4 Content of an EA
(40 CFR 1508.9 and 43 CFR 46.310)

CEQ and Interior regulations require that the EA include, at a minimum, a brief discussion of:

- The proposal
- The need for the proposal
- The environmental impacts of the proposed action
- The environmental impacts of the alternatives considered
- A list of agencies and persons consulted

The EA should be prepared by an interdisciplinary team, rather than a single individual. If it is not possible to assemble a team, different disciplines should be contacted to provide appropriate information and analysis.

An EA should not, in and of itself, conclude whether an EIS or a FONSI should be prepared. Impacts should be identified quantitatively whenever possible or a qualitative analysis given. Statements as to the significance of impacts should not be made because that determination is made in the FONSI. In appropriate circumstances, Reclamation should circulate draft EAs and draft FONSI s to the public for comment.

The level of detail and depth of impact analysis should be limited to that needed to determine if significant impacts will occur. Only those factors of the existing environment which might influence or be significantly affected by the proposed action need be discussed. A statement as to why other factors are not discussed should be included.

Conclusions and analysis should be based upon an unbiased, objective evaluation of data and information presented in the EA. Opinions, justifications, and unsupported “statements of fact” should be avoided.
Information not considered to be general knowledge should be supported by:

- Information that can be found in published material
- Information readily available for inspection in either the area or regional office
- Data collected by Reclamation, other Federal agencies, contractors, or other technically qualified agencies or organizations

Information may be incorporated by reference (40 CFR 1502.21). Figure 6.1 is an example of a short EA.

6.4.1 Need for the Proposal

This section will present a brief statement of what the proposal is and why the action is being considered (i.e., what are the underlying needs to which the agency is responding). This statement should be developed early in the process and used in defining the scope and determining appropriate alternatives. The following information is optional but may be helpful in more fully defining the need: Federal permits, licenses, approvals, and entitlements that will be necessary to implement the project, and ongoing actions that may affect or be affected by the proposed project. This discussion should be kept brief and focused on the need. Regulations only require a statement of need, but the use of the term Purpose and Need is acceptable.

6.4.2 Proposed Action and Alternatives

This section should describe the proposed action (proposal) and appropriate, reasonable alternatives. The proposed action should be defined in terms of the Federal decision to be made. When the proposed action is related to other actions—especially other Federal actions—a careful consideration of the independent value of the proposed action should be made. When the independence of the proposed action is not clear, it may be appropriate to expand the scope to include those other actions.

The need for appropriate and reasonable alternatives is dependent upon (among other considerations) there being no unresolved conflicts about the proposed action with respect to alternative uses of available resources. If none exist, no alternatives need be considered or analyzed. Unresolved conflicts concerning alternative uses of resources are undefined in law or regulation and are to be determined by the responsible official. Considerations include, but are not limited to, the degree of public interest, other priorities, and the potential for environmental effects. If no alternatives are included, this section should present the reasons for that. If alternatives are included, this section should describe all alternatives at a brief, focused, and comparable level of detail.
6.4.2.1 No Action Alternative

While a “no action alternative” is not required in an EA under CEQ or Interior regulations, it is Reclamation’s practice to include it because it provides an appropriate basis by which all other alternatives are compared. In the (not recommended) event that an EA does not contain a no action alternative, the effects should be determined by comparing the impacts of the action alternative(s) to existing conditions. The no action alternative should be presented first so that the reader can easily compare the other alternatives to it. Conditions under the no action alternative should not be considered identical to existing conditions of the affected environment because future actions may occur regardless of whether any of the action alternatives are chosen. These future actions could include other water development projects, land use changes, or municipal development. The no action alternative is therefore often described as “the future without the Federal project.” If other projects in the affected area are likely to occur and the effects are reasonably foreseeable, it should be discussed in the no action alternative. Sufficient discussion should be presented so that readers can make the needed comparisons for the evaluation and understand how the no action alternative is different from existing conditions.

6.4.2.2 Action Alternatives

Action alternatives include the proposed action and all other feasible and reasonable alternatives that will be evaluated in the EA. Each action alternative should fulfill the requirements of the need for the project as described in the “Need” section of the assessment. Alternatives should be based upon needs and relevant issues. The appropriate analysis should be presented for each alternative so that reviewers may evaluate the environmental impacts of each alternative by comparing them to the no action alternative. This analysis should be at a comparable level of detail for all alternatives. These discussions should be brief and tightly focused upon potentially significant issues. An EA does not require the detailed analysis of alternatives presented in an EIS. The proposed action should be identified in the assessment to make readers aware of the action that is being contemplated, allowing them to focus their review on that action. It is possible that only the no action alternative and the proposed action alternatives need to be analyzed if no unresolved conflicts concerning alternative uses of resources exist. If there is consensus among community representatives and stakeholders for a consensus-based alternative (43 CFR 46.110), and it is feasible and meets the purpose and need for the action, then it should also be evaluated in the EA.

There is no requirement to identify a preferred alternative in an EA, although it may be helpful for situations in which a broad range of alternatives is being considered. Similarly, alternatives considered but eliminated from detailed study do not need to be addressed in an EA. But, again, if the situation warrants it, such a discussion may be useful for increased public understanding. As the complexity increases in the EA, it may be useful to refer to the chapters on EISs or consider if an EIS is the appropriate NEPA compliance document.
Alternatives outside the agency’s authority to implement may be considered, if reasonable. If such an alternative became the preferred alternative, implementation would depend on a change in authorization, a change of the lead Federal agency to one with the appropriate authority, or a transfer of the project to a non-Federal entity. It could also lead to the cancellation of the project.

The discussion of the alternatives, including the no action alternative, may include the following items, where appropriate:

- Location of alternatives and alternative project features, including legal description, aerial photography, and a map or sketch
- Amount and ownership of lands to be affected
- Area to be disturbed
- Numbers, locations, and photographs or drawings of structures to be constructed, including utilities
- Water and wastewater quantities, wastewater disposal plans, and water conservation measures
- Description of project operations
- Mitigation and/or restoration plans
- Costs associated with the alternative, including mitigation
- Modifications or removal of existing facilities or structures

Mitigation measures and environmental commitments needed to reduce impacts below significance should be incorporated into the alternatives, where appropriate. These mitigation measures then become an integral part of the alternative. In other words, the alternative cannot be described without the mitigation measures.

### 6.4.3 Affected Environment

An “Affected Environment” section is not required for an EA. It is Reclamation’s practice to include this section because of its usefulness in analyzing the context and intensity of the impacts. The affected environment is considered to be the existing condition. In describing the affected environment, care should be taken to identify the environmental trends that currently exist and the areas of concern that may be impacted by the action or alternatives, not just to provide an inventory of resources.
The EA should emphasize only those resource areas that may be impacted by the action, and only to the extent necessary to enable an understanding of the extent of anticipated impacts. A brief discussion of critical environmental issues—such as ITAs, Indian sacred sites, environmental justice, cultural resources, and T&E species—is necessary to show that they have been considered, even if there are no impacts or only minor impacts. Where ongoing activities have effects in these areas, the discussion should summarize both the context and intensity of the ongoing effect and what specific ongoing activity is causing the effect.

### 6.4.4 Environmental Consequences

The “Environmental Consequences” chapter forms the scientific and analytic basis for the comparison of alternatives, including the proposed action and no action. In this section, the environmental impacts of all action alternatives will be discussed and compared to the no action alternative. The analysis should present facts and information but avoid conclusions regarding significance—that is the function of the FONSI. It is important that analyses are presented in a clear, concise discussion, and only for meaningful project impacts. If the project would have no impact in critical environmental areas or on such issues as those involving wetlands and endangered species, this should also be stated. Note that all impacts to ITAs, sacred sites, and environmental justice need to be considered and addressed, whether minor or potentially significant, in accordance with Reclamation’s ITA policy, procedures, and guidance (also see ECM 97-2 and 95-3 at [http://oepc.doi.gov/ECM/ECM97-2.pdf](http://oepc.doi.gov/ECM/ECM97-2.pdf)).

The analysis of impacts should focus on those resources that may be affected in a significant way by the proposal. It is suggested that a CEC be used to provide a preliminary scope of the issues to be addressed in this analysis. Other resources may need to be examined as well, depending upon the site-specific nature of the proposal.

Potential beneficial and adverse impacts should be presented. The EA should address short- and long-term impacts, direct and indirect impacts, irreversible and irretrievable resource commitments, and residual or net (those remaining after all mitigation measures are implemented) impacts. If appropriate, the EA should also discuss potential cumulative impacts resulting from actions taken by Reclamation, other Federal agencies, and State and local agencies, and how they relate to the action being considered. (For further information on direct, indirect, residual, and cumulative impacts, see chapter 8.)

Mitigation should be addressed following the review of impacts for each resource component being evaluated and should be presented for each alternative. Mitigation measures address impacts not eliminated through avoidance of adverse effects. Mitigation measures necessary to reduce impacts should be considered environmental commitments and should be clearly integrated into the alternatives.
6.4.5 Consultation and Coordination

This section shall include a list of parties consulted including agencies, Indian tribes, affected ITA trustees and beneficiaries, cooperating agencies, and other members of the public (43 CFR 46.155). It should also document field reviews of the project site or location of proposed development, as appropriate. NEPA Implementation Procedures - Appendices I, II, and III and 40 CFR, Chapter V (FR, December 21, 1984) contain lists of Federal and State agencies that may be contacted, as appropriate.

This section should include a record of necessary compliance with other applicable statutes (ESA, CWA, etc.) and of any public involvement activities. All practicable efforts should be made to involve appropriate Federal, tribal, State, and local governmental entities, as well as private organizations and individuals with an interest in the proposal (40 CFR 1506.6 and 43 CFR 46.305). This section should document, in chronological order, the meetings, news releases, and other consultation and coordination activities leading to the selection and development of the action or project.

Comments received on any draft EA could be summarized in this section of the final EA, and any substantive issues raised by those letters should be addressed in the final EA, or FONSI, as appropriate.

To the maximum extent possible, an EA should integrate any surveys and studies required by the NHPA, FWCA, ESA, other environmental laws and EOs, and other appropriate tribal, State, and local laws. An EA can be used as Reclamation’s biological assessment for compliance with the ESA. A discussion of related laws and EOs should be included either as an attachment or in chapter 1. The discussion of related laws and EOs should be integrated with the description of the respective impacted resources.

A list of required permits (Federal, tribal, State, and local), along with a determination of who will be responsible for obtaining these permits, should be included. Some of the actions that may require permits are as follows:

- Burning
- Impacts to water quality
- Changes to nonpoint sources of pollution from agriculture, silviculture, mining, and construction
- Storage of oil and hazardous substances
- Removing fill in waters of the United States
6.4.6 List of Environmental Commitments

A list of environmental commitments for the proposal should be prepared and included in the EA. This list is usually included as an attachment to the EA and contains all mitigation measures integrated into the proposed action (see section 3.11).

6.4.7 Bibliography or References Cited

A bibliography or references cited section is encouraged. The EA should reference any methodologies used and should make explicit reference to any scientific or other sources used. Citations of specific topics should include the pertinent page number.

6.4.8 Distribution List

A distribution list may be included in the consultation and coordination section or as a separate attachment or appendix. The affected and interested publics should be put on the distribution list. In identifying the “affected” publics, those individuals should be considered who are directly or indirectly affected, as well as those who have expressed an interest in the action.

6.5 Format for an EA

There is no required format for an EA. However, all documents should comply with Reclamation’s visual identity requirements (http://intra.usbr.gov/vip/) and should not include any private contractor logos (or other identifiers). A suggested format for EAs is shown below:

- Title page
- Table of contents
- Need for the proposal
- Proposed action and appropriate alternatives
- Environmental impacts
- Consultation and coordination
- References cited

Cases may occur in which a modified outline would facilitate the presentation of environmental information and analyses. Any format, however, must include the required elements discussed in section 6.4 and may be limited to just those five required elements.

Although the EA ordinarily should not exceed about 30 single-spaced pages in length, a proposal of great complexity may require additional description and analysis. As an EA increases in length and complexity, increased consideration should be given to preparing an EIS, rather than an EA, as the appropriate
NEPA compliance document. The document should be written in a clear, concise fashion based on the necessary environmental analysis and kept as brief as possible, using referenced and incorporated material as practicable. Every attempt should be made to avoid overly technical language. The text, appropriate tables, and figures should be presented so the decisionmakers and the public can readily understand them.

6.6 Review and Distribution of an EA

No formal public review of an EA is required—only public notice. However, public review is commonly included in the process and is often helpful (40 CFR 1506.6, 40 CFR 1501.4(e), and 43 CFR 46.305). Public involvement for an EA can be a simple public notice or posting to Reclamation’s Web site that an EA is available, without preparation or distribution of a draft EA, for simple, noncontroversial proposals, or it can be more extensive. On occasion, the review can be similar to an EIS in terms of public involvement, including scoping meetings, publication of a draft EA, public meetings on the draft EA, and formal responses to comments in the final EA (for highly complex, controversial proposals). Again, as complexity, potential significance, and potential controversy (based on the analysis and effects of the proposed action rather than merely whether a group or individual likes the project) increase, the need to consider an EIS as the appropriate NEPA compliance document also increases.

When a draft EA is being prepared, preliminary review of the draft EA by any cooperating entities, such as project sponsors, the Service, EPA, or Indian tribes, is encouraged. The level of the review and selection of the reviewing entities will be at the discretion of the office preparing the draft EA.

As appropriate, the draft EA should be made available for comment to potentially affected Indian tribes, affected ITA trustees and beneficiaries, State and local agencies or organizations, and local offices of Federal agencies with expertise in the field. Obtaining assistance through consultation is encouraged before the EA is written. Holding public meetings on the proposed action may be desirable but is not required. The critical factor is to ensure that all interested parties are notified, regardless of the mechanism used.

Any public review of an EA may also fulfill the public review requirements related to NHPA, EO 11990, EO 11988, and ITAs.

Public notice that an EA is available is required by 40 CFR 1506.6(b) (see also question 38 in CEQ’s NEPA’s Forty Most Asked Questions). A public notice can be as informal as a press release or as formal as a FR notice, depending upon the specific situation.

If a FONSI is contemplated, it is permissible to state this preliminary decision in any published draft EA, and even to include a draft FONSI with the draft EA. In
this circumstance, the cover letter, or the text of the EA, should make it clear that no final decision on a FONSI will be made until the public review is completed and comments are considered.

In limited cases, where the proposed action is similar to one that normally requires an EIS (listed in DM Part 516, chapter 14), or where the nature of the action is without precedent, the FONSI must be made available for public review for 30 days before a final decision is made on whether or not to prepare an EIS. When this 30-day public review of a FONSI is required, it is expected that the EA will also be available for a 30-day public review. These reviews can be, and usually are, simultaneous.

6.7 Results of the EA

The EA will provide sufficient information to determine if an EIS or a FONSI is needed (on rare occasions, a proposal may be dropped entirely). In some cases, it is used to provide information to the planning process without leading to a conclusion on potentially significant issues.

6.7.1 Initiation of an EIS

It is rare that an EA will be finalized, and then an EIS begun, because as soon as the analysis indicates that an EIS is needed, the EA process is generally stopped, and the EIS process is initiated. The EIS process is discussed in considerable detail in chapters 7 and 8. Any analysis prepared for the EA is applicable to the EIS and should be used to reduce delays.

6.7.2 FONSI

6.7.2.1 Description and Purpose

If, based on the EA, the responsible official decides that the impacts of the proposed action are not significant and do not warrant preparation of an EIS, a FONSI will be prepared by the originating office. The FONSI will generally be short and should be no longer than necessary to address the impacts identified in the EA and any other required subjects (e.g., ITAs, sacred sites, etc.). Examples of FONSIs are shown in figures 6.2 and 6.3.

CEQ regulation 40 CFR 1508.13 defines a FONSI as a:

\[\ldots\text{document by a Federal agency briefly presenting the reasons why an action, not otherwise categorically excluded, will not have a significant effect on the human environment and for which an EIS therefore will not be prepared.}\]

The absence of controversy over a proposed action does not necessarily indicate that a FONSI is appropriate any more than the presence of controversy means an EIS is required.
The FONSI is an agency finding supported by the evaluation of impacts in the EA. The EA will be attached to the FONSI. The FONSI shall note any other environmental documents related to the action. Such documents may be EAs/EISs that are completed or being prepared. These documents may be related to, but are not part of, the scope of the proposal under consideration.

The FONSI should explicitly address every impact identified in the EA and present reasons why those impacts are not significant for the preferred alternative. It can be useful to discuss significance in terms of the context and intensity of the impact (40 CFR 1508.27). This would include identifying any mitigation measures that would be adopted to reduce or eliminate impacts, as well as other environmental commitments. A FONSI may be prepared on proposed actions having the potential for significant effects when it can be clearly demonstrated that mitigation which reduces impacts to the point of nonsignificance is proposed as part of the action. (See discussion in CEQs NEPA’s Forty Most Asked Questions, No. 40 and CEQ’s January 14, 2011, memorandum, “Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact.”)

Mitigation measures and other environmental commitments may be adopted as part of Reclamation’s final decision on an action in the same manner as it would be adopted in a ROD. (See discussion in CEQ’s NEPA’s Forty Most Asked Questions, No. 39.) An Environmental Commitments Plan is recommended to ensure that environmental commitments are appropriately implemented.

Actions that may affect T&E species require consultation with the Service and/or NOAA-NMFS. Effects on National Register listed or eligible properties require consultation with the SHPO. A Service or NOAA-NMFS biological opinion indicating jeopardy or adverse modification of critical habitat would generally preclude the preparation of a FONSI.

If Reclamation, in consultation with the SHPO/THPO, determines that a historic property may lose its eligibility for inclusion in the National Register as a result of a proposed action, or if Reclamation and the SHPO/THPO do not agree on mitigation of an adverse effect to a historic property, this situation may preclude preparation of a FONSI. However, a FONSI can always be prepared as long as the proposed action is modified to avoid any potentially significant impacts—also known as the mitigation FONSI (see also Reclamation Manual Directive and Standard LND 02-01).

The FONSI must include a statement that there will be no impacts to ITAs, or else a statement describing the expected impacts; a listing of unresolved issues; a list of commitments to prevent, mitigate, or compensate adverse impacts to these areas; and a summary of any mitigation, monitoring, and enforcement programs related to these areas (ITA guidance, ECM 97-2, and 512 DM 2).
With regard to Indian sacred sites, as defined by EO 13007 (Indian Sacred Sites) and 512 DM 3 (Departmental Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites), the FONSI must include a statement that there will be no impacts that would adversely affect the physical integrity of such sites and that access to, or ceremonial use of, such sites would not be restricted, or a statement describing the anticipated effects or restrictions. It should also include information similar to that provided for ITAs, but with regards to the Indian sacred site, including access. If impacts are anticipated, an explanation must also be provided as to why such impacts cannot be avoided in accordance with EO 13007.

The document should include similar information for environmental justice (EO 12898, Environmental Justice).

The conclusions should be expressed as briefly and concisely as possible and should cover the major issues included in the EA. Topics not covered by analysis in the EA should not be introduced in the FONSI. If significant new environmental information is developed or plans are significantly changed between the time the EA is prepared and the FONSI is scheduled to be signed, the EA should be revised to include the new information before the FONSI is signed. Once the FONSI is signed, new information or a modification to the proposal before the action is completed should trigger a review of the EA/FONSI. This review could result in a determination that no new analysis is needed, a revision of the existing EA/FONSI, a new EA, or (very rarely) an EIS, depending upon the site-specific circumstances.

No action can be taken until there is a final FONSI that addresses the entire proposed action.

6.7.2.2 Processing

The FONSI, including the attached EA, should be distributed to appropriate Federal, State, and local agencies; Indian tribes; affected ITA beneficiaries and trustees; individuals; organizations; and agencies involved in the preparation of, or who commented on, the EA, and to the general public, upon request. The availability of the FONSI and assessment shall be announced to the affected public (40 CFR 1506.6(b)). This notice may be accomplished by posting to a Web site, if appropriate.

If the FONSI covers an action that normally would require an EIS, or is an action without precedent, the FONSI shall be circulated for public review for 30 days with appropriate public notice. The determination to finalize the FONSI or prepare an EIS (40 CFR 1501.4(e)(2)) and the initiation of the proposed action may not occur until this process is completed. It would normally be expected that the EA would be circulated with the FONSI. Also, any EA/FONSI may be circulated for public review whenever circumstances warrant (such as controversy or to assist a local co-lead in meeting procedural requirements).
It is recommended that the region or area office, depending upon regional policy, serially number and file each FONSI that is initiated and prepared. Each FONSI prepared during a calendar year may be serially numbered using either the region or area office designation - FONSI - year - number to date (e.g., GP-FONSI-89-1). This will aid in referencing the document, as well as assist in tracking FONSI decisions Reclamation wide.

Because the FONSI will be used as backup documentation for decisionmaking packages in the regional or area office, it is recommended that each region establish a single repository for all EAs and FONSIs produced.

In instances in which another agency has completed an EA and FONSI on the same action, the appropriate regional or area office official may independently analyze the documents and, if applicable, use them as Reclamation’s NEPA compliance (see section 3.14, “Adoption of Other Documents”). In these instances, a Reclamation cover sheet and a separate discussion on the analysis and reasons for adoption should be prepared. It is also appropriate to adopt a proponent-prepared environmental report in the same manner. Adoption does not eliminate the need for any appropriate public review prior to finalizing the EA/FONSI.

**6.7.2.3 Approval**

FONSIs shall be approved and signed as determined by individual office policies and/or procedures. If the action is to be approved by the Commissioner, and the FONSI is prepared in the TSC, then the FONSI will be approved by the Director, Policy and Administration, at the direction of the Commissioner.
Environmental Assessment

Fee Title Acquisition of the Bayou Vista Property
in Tulare County, California

U.S. Department of the Interior
Bureau of Reclamation
Mid-Pacific Region
Sacramento, California

August 2004

Figure 6.1.—Example of an EA.
Chapter 6: Environmental Assessments and Findings of No Significant Impact

Background

The Bureau of Reclamation (Reclamation) proposes to provide $456,000 to the Sequoia Riverlands Trust (SRT) for fee title acquisition of the Bayou Vista property (515 acres) in Tulare County. The Bayou Vista property is located in the central San Joaquin Valley in an unincorporated portion of Tulare County, on the south side of Ave. 144 approximately five miles southeast of Corcoran, California (See map).

Purpose and Need for Action

Reclamation is required to carry out actions pursuant to the implementation of the Central Valley Project Conservation Program (CVPCP) and the Central Valley Project Improvement Act (CVPIA) Habitat Restoration Program (HRP). These actions include acquisition of lands for the protection of CVP impacted habitats and species. The purpose and need of this action is to provide habitat protection for three federally listed endangered species, the Tipton kangaroo rat, San Joaquin kit fox and blunt-nosed leopard lizard; and protect resident wildlife, including Western burrowing owl and migratory species such as mountain plover. Protection of this parcel from development by fee title acquisition will maintain an important habitat linkage between two existing natural areas in a highly modified and fragmented landscape. Kern National Wildlife Refuge Complex (KNWRC) staff provides management, biological monitoring and logistical support to Kern and Pixley NWRs. If this proposal is funded, the property acquired would be added to Pixley NWR and managed as an addition to existing Refuge lands.

Cultivated agricultural land is located on the west boundary of the parcel and irrigated pasture is adjacent to the east. An active dairy operation, owned and operated by the same party offering to sell the proposed parcel, extends from the pasture on the east. The land in question has been considered for development in the past. Immediate protection is needed to prevent loss of this natural land. While close proximity of the existing dairy to these natural lands does provide management challenges, the location is an unavoidable reality. What is uncertain is future development or adverse impacts from management of the subject property as part of an industrial agribusiness. The continued high-paced conversion of lands to dairy operations in recent years makes parcels containing unique native habitat even more valuable, and the need to establish habitat linkages all the more critical. Acquisition of this parcel will maintain a critical north-south linkage. Future conversion of this parcel (a continuing threat until the property is acquired) would eliminate the last natural connection between Pixley NWR and the Creighton Ranch, forcing terrestrial wildlife species to use intensively cultivated lands when passing from one area to another.

Proposed Action and Alternatives

No Action: Reclamation would not contribute Central Valley Project Conservation Program (CVPCP) and/or Central Valley Project Improvement Act (CVPIA) funds towards the acquisition of the Bayou Vista property. SRT would be required to obtain

Figure 6.1.—Example of an EA (continued).
another source of funding from other private and public sources. If alternative funding cannot be secured, SRT would lose the opportunity to acquire the property at this time.

**Proposed Action:** Reclamation would provide $456,000 in CVCP and CVPIA funds to the Sequoia Riverlands Trust (SRT) for fee title acquisition of the Bayou Vista property (515 acres) in Tulare County. The Sequoia Riverlands Trust (SRT), a nonprofit land trust, will pursue acquisition the Bayou Vista property. The SRT will seek to transfer acquisition rights to the U.S. Fish and Wildlife Service Pixley National Wildlife Refuge (PNWR) prior to closing, or will transfer the title itself in the event SRT closes first. In either case, the Bayou Vista property will ultimately become part of the PNWR and managed by PNWR in accordance with existing refuge operations and planning strategies. The total estimated cost of acquisition and transfer, pending appraisal of the property, and including SRT costs, is $998,875. Funding to complete the acquisition will be sought from public and private sources during 2004, with an additional possible request to the Conservation Program in early 2005.

**Affected Environment and Environmental Consequences**

The subject property is a critical link in the extant native topography of the San Joaquin Valley floor. Many early accounts of the San Joaquin valley describe an area rich in native wildlife. Wildlife use of this area as a corridor connecting native landscapes would be protected by this project. Natural areas along the Tule River incorporated in the Creighton Ranch lie to the north. Protected lands within the existing Pixley NWR are adjacent to the south. Annual grasses and sparse vegetation occupy the site, which is described as California prairie by Kuchler (1977). This type of land form is referred to as California Annual Grassland Series in California Department of Fish and Game’s California Wildlife Habitat Relationships System. The subject parcel represents part of the transition zone between the grassland community of Pixley NWR and seasonal wetlands along the Tule River on the Creighton Ranch to the north. Transition zones between natural areas typically contain high levels of biological diversity.

**Project Benefits**

There are currently several initiatives under way to protect southern San Joaquin valley wetland habitats, including the USDA - Wetland Reserve Program, USFWS planning for conservation easements within a proposed Tulare Basin wildlife management area boundary, creation of a new improvement district by the Tulare Basin Wetlands Association and Semitropic Water Storage District as well as independent acquisition and restoration projects on individual private properties by organizations such as Sequoia Riverlands Trust. While natural upland areas may receive some consideration in these various wetland projects, the greatest limiting factor in this mosaic of natural landscapes are dry upland sites that provide travel corridors between natural areas and safe passage through intensively developed areas. The corridors along the east side of the Tulare Basin are very narrow and need expansion to insure the success of ecosystem restoration and fully functional habitats.

Figure 6.1.—Example of an EA (continued).
Providing connectivity between natural areas is a significant attribute of this site from both a local and regional perspective. Natural lands that have never been cultivated are exceedingly rare in this part of the San Joaquin Valley. An inventory conducted by the California Energy Commission published in 1990 found that only about three percent of the valley floor remains in good or better natural condition. The remaining natural lands on the valley floor occur in scattered parcels, hindering dispersal and persistence of resident and migratory wildlife populations.

Relationship to the Central Valley Project

The project site is located adjacent to Lower Tule River Irrigation District (LTRID), and a LTRID ground water recharge site is immediately east of the property. Pixley NWR lands nearby are surrounded by farms within the Pixley Irrigation District and the Delano-Earlimart Irrigation District.

The nearly complete development of the southern San Joaquin valley floor has been accomplished with use of water stored and conveyed by Central Valley Project (CVP) facilities. Lands outside of CVP-contractor water districts have benefited from CVP facilities on wetter than average years when flood flows and water exceeding reservoir storage capacity is made available at little or no cost to non-CVP contract water districts. The sharing of facilities to transport water and redirect water supplies exceeding storage limitations effectively expands the effects of the CVP to nearly all developed agricultural lands within organized water districts, water conservation and storage districts within the San Joaquin valley. The net result of CVP water supplies imported into this arid San Joaquin Valley is that development of richly productive and intensively managed farms has replaced native landscapes, natural topography and has limited the amount of land available as wildlife habitats.

Habitat Values and Wildlife Species Benefited

According to a February 8, 1995 letter in Refuge files from a previous landowner (Theodore Off), past surveys have documented the presence of Tipton kangaroo rat and San Joaquin kit fox on the subject property. Blunt-nosed leopard lizards have been found immediately adjacent to this parcel on the Los Feliz unit of Pixley NWR and on the Creighton Ranch (when it was managed as The Nature Conservancy’s Creighton Ranch Preserve) during the 1980’s (R. Hansen, field notes).

Swainson’s hawk (Buteo swainsoni), listed as a Threatened Species in the State of California, nests in riparian habitat along the nearby Tule River and forages on this grassland property between March and October (R. Hansen, field notes). Abundant ground squirrel burrows in this open landscape provide ideal habitat for Western burrowing owl (Athene cunicularia), a California Species of Special Concern which is a resident nesting species on this property (R. Hansen, field notes). Other California Species of Special Concern which are year-round residents on the subject property (R. Hansen, field notes) include Northern harrier (Circus cyaneus), California horned lark (Eremophila alpestris actia), and loggerhead shrike (Lanius ludovicianus). California

Figure 6.1.—Example of an EA (continued).
Species of Special Concern that have been observed on the subject property (R. Hansen, field notes) during winter months (outside their normal breeding season) are ferruginous hawk (*Buteo regalis*), golden eagle (*Aquila chrysaetos*), merlin (*Falco columbarius*), prairie falcon (*Falco mexicanus*), mountain plover (*Charadrius montanus*), long-billed curlew (*Numenius americanus*) and short-eared owl (*Asio flammeus*).

Past and present grazing management favors several listed species. The broad open grassland communities have become exceedingly rare in the San Joaquin valley. Surrounding agricultural land and intensive cultivation makes this property a natural bridge between two existing pockets of native habitat. Securing the permanent protection of this property will contribute to maintaining a viable home range for a breeding pair of kit fox. Populations require contiguous blocks of lands of approximately 640 to 7,680 acres (USFWS 1998). The location of this property will add biological value and enhance wildlife use of the adjacent NWR property. Island effects of fragmentation can be prevented with acquisition of this addition to Pixley NWR.

Implementing the proposed action would contribute to attaining the goals of the Central Valley Project Conservation Program to protect, restore, and enhance threatened and endangered species affected by the Central Valley Project.

There would be no change in land use after the property is acquired. The landowner would receive fair market value for the purchase.

Any change in the Tulare County tax base is anticipated to be insignificant because the size of the property is very small when compared to the total acreage of taxable land within Tulare County.

There would be no effect to historic properties.

Indian Trust Assets (ITAs) are legal interests in property or rights held in trust by the United States for Indian Tribes or individuals. Indian reservations, rancherias, and allotments are common ITAs. Other ITAs include traditional use areas. No ITAs have been identified at the property.

Executive Order 12898 requires each Federal Agency to identify and address disproportionately high and adverse human health or environmental effects, including social and economic effects of its program, policies, and activities on minority populations and low-income populations. Since there would be no change in existing or similar land uses, there would be no adverse human health or environmental effects to minority or low-income populations.
Consultation and Coordination with Others

During development of the proposed action, Reclamation met with the Sequoia Riverlands Trust, the Nature Conservancy, and the Service (Pixley NWR staff).

On June 3, 2004, Reclamation initiated informal consultation with the Service on the activities for the overall Conservation Program for Fiscal Year 2004. The Service concurred on July 20, 2004 that Conservation Program projects, including the Bayou Vista Property, would not likely adversely affect listed species.

Figure 6.1.—Example of an EA (continued).
Finding of No Significant Impact  
and  
Environmental Assessment  

Fee Title Acquisition of the Bayou Vista Property  
in Tulare County, California  

U.S. Department of the Interior  
Bureau of Reclamation  
Mid-Pacific Region  
Sacramento, California  

August 2004  

Figure 6.2.—Example of a FONSI.
U.S. Department of The Interior
Bureau of Reclamation
Mid-Pacific Region
Sacramento, California

Finding of No Significant Impact

Fee Title Acquisition of the Bayou Vista Property
in Tulare County, California

Recommended: __________________________ Date: ________
Environmental Specialist

Recommended: __________________________ Date: ________
Program Manager, Central Valley
Project Conservation Program

Approved: __________________________ Date: ________
Chief, Division of Environmental
Affairs

FONSI No. ____________________________

FONSI-2

Figure 6.2.—Example of a FONSI (continued).
Background

Pursuant to implementation of the Central Valley Project Conservation Program (CVPCP) and the Central Valley Project Improvement Act Habitat Restoration Program (HRP), the Bureau of Reclamation (Reclamation) proposes to provide $456,000 to the Sequoia Riverlands Trust (SRT) for fee title acquisition of the Bayou Vista property (515 acres) in Tulare County. The purpose and need of this action is to provide habitat protection for three federally listed endangered species, the Tipton kangaroo rat, San Joaquin kit fox and blunt-nosed leopard lizard; and protect resident wildlife, including Western burrowing owl and migratory species such as mountain plover. The total estimated cost of acquisition and transfer, pending appraisal of the property, and including SRT costs, is $998,875. Funding to complete the acquisition will be sought from public and private sources during 2004, with an additional possible request to the Conservation Program in early 2005. The SRT will seek to transfer acquisition rights to the U.S. Fish and Wildlife Service Pixley National Wildlife Refuge (PNWR) prior to closing, or will transfer the title itself in the event SRT closes first.

Cultivated agricultural land is located on the west boundary of the parcel and irrigated pasture is adjacent to the east. An active dairy operation, owned and operated by the same party offering to sell the proposed parcel, extends from the pasture on the east. The land in question has been considered for development in the past. Immediate protection is needed to prevent loss of this natural land. While close proximity of the existing dairy to these natural lands does provide management challenges, the location is an unavoidable reality. What is uncertain is future development or adverse impacts from management of the subject property as part of an industrial agribusiness. The continued high-paced conversion of lands to dairy operations in recent years makes parcels containing unique native habitat even more valuable, and the need to establish habitat linkages all the more critical. Acquisition of this parcel will maintain a critical north-south linkage. Future conversion of this parcel (a continuing threat until the property is acquired) would eliminate the last natural connection between Pixley NWR and the Creighton Ranch, forcing terrestrial wildlife species to use intensively cultivated lands when passing from one area to another.

Findings

Reclamation prepared an environmental assessment on the grant in August 2004, which is incorporated by reference. The Division of Environmental Affairs of the Mid-Pacific Region of Reclamation has found that the proposed action is not a major Federal action that would significantly affect the quality of the human environment. Therefore, an environmental impact statement is not required for carrying out the proposed action.

Following are the reasons why the impacts of the proposed action are not significant:

1. Existing land use will not change.
2. The current landowner will receive fair market value for the property.

Figure 6.2.—Example of a FONSI (continued).
3. Any change in the Tulare County tax base is anticipated to be insignificant because the size of the property is very small when compared to the total acreage of taxable land within Tulare County.

4. The proposed action will not adversely affect threatened or endangered species. On June 3, 2004, Reclamation initiated informal consultation with the Service on the activities for the overall Conservation Program for Fiscal Year 2004. The Service concurred on July 20, 2004 that Conservation Program projects, including the Bayou Vista Property, would not likely adversely affect listed species.

5. There will be no effect to historic properties.

6. The proposed action will not affect any Indian Trust Assets.

7. Implementing the proposed action will not disproportionately affect minorities or low-income populations and communities since there will be no change in land use.

Figure 6.2.—Example of a FONSI (continued).
FINDING OF NO SIGNIFICANT IMPACT

ADOPTION OF AN INTERIM 602(a) STORAGE GUIDELINE

I. Introduction

The Secretary of the Interior, acting through the Bureau of Reclamation (Reclamation), has proposed the adoption of an interim 602(a) storage guideline that will assist the Secretary of the Interior in making a determination of the quantity of water considered necessary as of September 30 of each year to assist in implementation of and as required by Article II(1) of the 1970 Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs (Long-Range Operating Criteria) pursuant to the Colorado River Basin Project Act of September 30, 1968. See 68 FR 56317 (September 30, 2003).

Section 602(a) of the Colorado River Basin Project Act (codified at 43 U.S.C. § 1552(a)), requires that the Secretary of the Interior make an annual determination of the quantity of water considered necessary to be in storage in Upper Basin reservoirs to provide protection to the Upper Division States of Colorado, New Mexico, Utah, and Wyoming against drought in the Colorado River Basin. This quantity of water is commonly referred to as “602(a) storage.” In years when projected storage in Upper Basin reservoirs is greater than 602(a) storage, and Lake Powell storage is greater than storage at Lake Mead, storage equalization releases are made. Such storage equalization releases are made to maintain, as nearly as practicable, the active storage in Lake Mead equal to the active storage in Lake Powell on September 30 of each year. In years when projected storage in the Upper Basin is less than 602(a) storage, such storage equalization releases from Lake Powell are not made and the operating objective is to maintain a release of a minimum of 8.23 million acre-feet as specified in the Long-Range Operating Criteria.

II. Proposed Action

In July 2000, Reclamation issued a draft environmental impact statement (DEIS) on the proposed adoption of specific criteria, applicable for 15 years, under which surplus water conditions would be determined, and accordingly surplus water made available, for use by the Lower Division States of Arizona, California, and Nevada. During the public comment period for the DEIS, the seven Colorado River Basin States submitted information to the Department of the Interior that contained a proposal for interim surplus criteria and a number of other related issues. This information was published in the Federal Register on August 8, 2000 (65 FR 48531-38). One of the related components of the seven Colorado River Basin States’ proposal not directly related to Lower Division surplus determinations is contained in Section V of the Basin States submission, “Determination of 602(a) Storage in Lake Powell During the Interim Period,” and reads as follows:

During the interim period, 602(a) storage requirements determined in accordance with Article II (1) of the Criteria (Long-Range Operating Criteria) shall utilize a value of not less than 14.85 million acre-feet (elevation 3,630 feet) for Lake Powell (65 FR 48537).

Figure 6.3.—Example No. 2 of a FONSI.
Reclamation did not adopt this aspect of the seven Basin States submission based upon Reclamation’s finding that this proposal was outside the scope of the proposed action for adoption of interim surplus guidelines. See 66 FR 7775 (January 25, 2001).

This proposed action would adopt this aspect of the Basin States’ recommendation and would limit 602(a) storage equalization releases when the storage level in Lake Powell is projected to be below 14.85 million acre-feet (elevation 3,630 feet) on September 30 as an added consideration (guideline) in the annual 602(a) storage determination through the year 2016. Under this guideline, water year releases from Lake Powell would be limited to the minimum objective release of 8.23 million acre-feet when Lake Powell is projected to be below 14.85 million acre-feet (elevation 3,630 feet) on September 30. The proposed guideline would remain in effect through calendar year 2016.

A final environmental assessment (EA), “Adoption of an Interim 602(a) Storage Guideline” (March 2004), has been prepared by Reclamation. In this final EA, the effects of the proposed action (referred to as the Proposed Action Alternative) are analyzed.

### III. Summary of Impacts

Reclamation’s analysis indicates that there will be limited impacts resulting from adoption of the proposed guideline. Computer simulation modeling of the Colorado River concludes that there is an 88 percent probability that the proposed guideline will not result in any change to the operation of the Colorado River reservoirs. Under some possible future runoff scenarios, there could be some change to storage equalization releases made from Lake Powell under the proposed guideline. Modeling results showed that there is a 12 percent probability that the proposed guideline would modify storage equalization releases from Lake Powell to Lake Mead to some degree. Within this 12 percent probability range, effects were generally minimal. Modeling results indicate that the total volume of water released from Lake Powell through 2016 will be unaffected by adoption of the proposed guideline. The proposed guideline resulted in no long-term effects and there were no effects observed beyond the year 2016.

1. **Lake Powell** - There is a 12 percent probability that there could be a temporary increase in the water surface elevation of Lake Powell of 0.01 to 6.4 feet, an increase of up to 407,000 acre-feet of storage (an increase of 2.8 percent).
2. **Lake Mead** - There is a 12 percent probability that there could be a temporary decrease in water surface elevation of 0.01 to 4.1 feet, a decrease of up to 413,000 acre-feet of storage (a decrease of 2.9 percent).
3. **River Flows** - Changes to river flows below Lake Powell, if they occur, are projected to be minor. Releases from Lake Powell, Lake Mead, and reservoirs below Lake Mead are projected to remain within historical normal operating parameters.
4. **Water Supply** - There are no anticipated effects on water supply to the Upper Division States of Colorado, New Mexico, Utah, and Wyoming. There is a very small probability (about 1 percent) that the proposed guideline could reduce surplus deliveries to the Lower Division States of Arizona, California, and Nevada in a single year through the year 2016. Computer model studies showed that the proposed guideline would not increase the frequency or magnitude of future water shortages to the Lower Division States.

**Figure 6.3—Example No. 2 of a FONSI (continued).**
5. Water Deliveries to Mexico - The proposed guideline is not anticipated to result in any change to the delivery of water to Mexico pursuant to the 1944 United States-Mexico Water Treaty.
6. Water Quality - There could be some minor increases in salinity in Lake Mead.
7. Aquatic Resources - There would be no measurable changes to aquatic resources in the area of potential effects.
8. Special Status Species - There would be no effect to special status species caused by the proposed guideline.
9. Recreation – There are no projected adverse impacts to recreation at Lake Powell, Lake Mohave, or Lake Havasu. There would be no anticipated impacts to Colorado River recreation. The proposed guideline could result in some short-term impacts to recreation resources at Lake Mead related to item 2 above.
10. Hydropower - Changes to hydropower production at Glen Canyon Dam and Hoover Dam are projected to be less than 0.01 percent. There could be some minor incremental increases to pumping costs for the Southern Nevada Water Authority which draws water from Lake Mead.
11. Air Quality - There are no projected impacts to air quality.
12. Visual Resources – There are no projected impacts to visual resources.
13. Cultural Resources - There will be no effect to cultural resources as a result of this undertaking. Reclamation is in the process of compiling data regarding the location of cultural resources (and historic properties) within the area of potential effects of the proposed guideline and the Colorado River Interim Surplus Guideline.
14. Indian Trust Assets - There would be no effect to Indian Trust Assets. The proposed guideline does not allocate additional Colorado River water. There would be no effect on existing or additional tribal water rights and/or tribal allocations.
15. Environmental Justice - There are no environmental justice implications from the proposed guideline.
16. River Flows - Changes to river flows below Lake Powell, if they occur, are projected to be minor. Releases from Lake Powell, Lake Mead, and reservoirs below Lake Mead are projected to remain within historical normal operating parameters.
17. Water Supply - There are no anticipated effects on water supply to the Upper Division States of Colorado, New Mexico, Utah, and Wyoming. There is a very small probability (about 1 percent) that the proposed guideline could reduce surplus deliveries to the Lower Division States of Arizona, California, and Nevada in a single year through the year 2016. Computer model studies showed that the proposed guideline would not increase the frequency or magnitude of future water shortages to the Lower Division States.
18. Water Deliveries to Mexico - The proposed guideline is not anticipated to result in any change to the delivery of water to Mexico pursuant to the 1944 United States-Mexico Water Treaty.
19. Water Quality - There could be some minor increases in salinity in Lake Mead.
20. Aquatic Resources - There would be no measurable changes to aquatic resources in the area of potential effects.
21. Special Status Species - There would be no effect to special status species caused by the proposed guideline.

Figure 6.3.—Example No. 2 of a FONSI (continued).
Chapter 6: Environmental Assessments and Findings of No Significant Impact

22. Recreation – There are no projected adverse impacts to recreation at Lake Powell, Lake Mohave, or Lake Havasu. There would be no anticipated impacts to Colorado River recreation. The proposed guideline could result in some short-term impacts to recreation resources at Lake Mead related to item 2 above.

23. Hydropower - Changes to hydropower production at Glen Canyon Dam and Hoover Dam are projected to be less than 0.01 percent. There could be some minor incremental increases to pumping costs for the Southern Nevada Water Authority which draws water from Lake Mead.

24. Air Quality - There are no projected impacts to air quality.

25. Visual Resources – There are no projected impacts to visual resources.

26. Cultural Resources - There will be no effect to cultural resources as a result of this undertaking. Reclamation is in the process of compiling data regarding the location of cultural resources (and historic properties) within the area of potential effects of the proposed guideline and the Colorado River Interim Surplus Guideline.

27. Indian Trust Assets - There would be no effect to Indian Trust Assets. The proposed guideline does not allocate additional Colorado River water. There would be no effect on existing or additional tribal water rights and/or tribal allocations.

28. Environmental Justice - There are no environmental justice implications from the proposed guideline.

IV. Finding

Based on the analysis of the environmental impacts as described in the final EA and on thorough review of public comments received, Reclamation has determined that implementing the proposed guideline will not have a significant impact on the quality of the human environment or the natural resources of the area. A Finding of no Significant Impact is justified for the proposed guideline. Therefore, an environmental impact statement is not necessary to further analyze the environmental effects of the proposed guideline.

V. Decision – Interim 602(a) Storage Guideline

Reclamation hereby adopts the following interim 602(a) Storage Guideline:

1. Through the year 2016, 602(a) storage requirements determined in accordance with Article II (1) of the Long-Range Operating Criteria shall utilize a value of not less than 14.85 million acre-feet (elevation 3,630 feet) for Lake Powell. Accordingly, when projected September 30 Lake Powell storage is less than 14.85 million acre-feet (elevation 3,630 feet), the objective will be to maintain a minimum annual release of water from Lake Powell of 8.23 million acre-feet, consistent with Article II(2) of the Long-Range Operating Criteria.

Figure 6-3.—Example No. 2 of a FONSI (continued).
2. Under the current area-capacity relationship at Lake Powell, a water surface elevation of 3,630 feet corresponds to 14.85 million acre-feet of storage. In the event that a sediment survey is performed at Lake Powell and a revised area-capacity relationship is determined before the year 2016, the revised water storage volume that correlates with the water surface elevation of 3,630 feet at Lake Powell shall be used in Section V(1) of this Interim 602(a) Storage Guideline.

3. The Interim 602(a) Storage Guideline shall be utilized in the operation of the Colorado River in years 2005 through 2016. This guideline will first be implemented in the development of the 2005 Colorado River Annual Operating Plan (AOP) and for all subsequent AOPs through the year 2016.

Approved:

Rick L. Gold, Regional Director
Upper Colorado Region, Bureau of Reclamation

Robert W. Johnson, Regional Director
Lower Colorado Region, Bureau of Reclamation

Figure 6.3—Example No. 2 of a FONSI (continued).
Chapter 6 Useful Links

CEQ’s January 14, 2011 Memorandum on Mitigation and Monitoring
http://ceq.hss.doe.gov/ceq_regulations/guidance.html

CWA
http://epw.senate.gov/water.pdf

Departmental Manual
http://elips.doi.gov/app_dm/index.cfm?fuseaction=home

EO 13007
http://www.achp.gov/EO13007.html

EO 12898

ESA

Federal Register, December 21, 1984
http://www.doe.gov/sites/prod/files/Implem_Appendices_I_II_III.pdf

FWCA

LND 02-01
http://www.usbr.gov/recman/lnd/lnd02-01.pdf

NEPA’s Forty Most Asked Questions

NHPA
http://www.achp.gov/docs/nhpa%202008-final.pdf

40 CFR 1500-1508
http://ceq.hss.doe.gov/ceq_regulations/regulations.html

43 CFR 46
http://www.doiopepc/nepaf/docs/Federal%20Register%20October%202015,%202008%20NEPA.pdf
Chapter 7

Environmental Impact Statement—Actions

7.1 When to Use an EIS
(40 CFR 1502.1, 43 CFR 46.400)

The primary purpose of an EIS is to infuse the policies and goals of NEPA into Federal programs and actions. An EIS shall be prepared to inform decisionmakers and the public of the proposed action, reasonable alternatives, and their environmental impacts. It is to be used by Reclamation officials, in conjunction with other relevant material, to plan actions and to make decisions. A flowchart indicating major steps in the NEPA process is found in chapter 3, figure 3.1.

An EA (as discussed in chapter 6) may sometimes lead to a decision to prepare an EIS; however, there are some general activities for which it is known that there could be significant impacts. For these activities, the need to prepare an EIS is known without first preparing an EA. These activities normally include major actions involving construction of a new water resource project or a major unit of an existing project; proposed modifications to existing projects or actions that could result in changes in the authorized operation of an existing project and new or additional impacts; and new land and water management programs.

7.2 Typical EISs

The most common type of EIS focuses on a site-specific action or project. The next most common EIS type is the programmatic EIS. NEPA requires an EIS to be prepared when potentially significant impacts can result from the establishment of a program or new regulations (a programmatic EIS). A programmatic EIS (40 CFR 1500.4(i), 1502.4(b) and (c), 1502.20) is one that analyzes broad-scope actions that are similar in terms of timing, geography, or other characteristics that provide a basis for evaluating environmental consequences. It provides a generic analysis of impacts that may not attempt to define the site-specific effects in detail but that do present at least a range of effects that reflect the reasonably foreseeable consequences of the program. While site-specific data may not be available, the requirement of NEPA to gather all reasonably available information needed to support a reasoned choice among alternatives does apply to a programmatic EIS. The range of alternatives considered may include various combinations of program elements. Careful screening of alternatives is necessary to keep the analysis manageable.
A programmatic EIS supports broad policy or program decisions that constrain or define specific proposals that may be proposed as part of the program or under the policy. Subsequent analysis of more specific proposals would generally be required under NEPA and would be more specific because it would be of narrower scope. Information from a programmatic EIS can be referenced (“tiered”) in the subsequent NEPA document to reduce redundancy and address broad cumulative effects.

7.2.1 Legislative EIS
(40 CFR 1506.8, 1508.17; 43 CFR 46.445)

Either the site-specific or programmatic EIS can be used to propose legislation. The legislative EIS includes a bill or legislative proposal (including a proposal to reauthorize a project) to Congress, developed by or with the significant cooperation and support of a Federal agency, but it 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 of another source (drafting does not by itself constitute significant cooperation). Only the agency that has primary responsibility for the subject matter involved will prepare a legislative EIS.

There are two types of legislative EISs. The first type is used for proposals that are not site specific. The legislative EIS is filed with EPA, sent with the legislative proposal to Congress, and is intended to be the detailed statement required by law. In this instance, the legislative EIS will be so marked and will not be identified as a “draft” or “final.” This legislative EIS will not be distributed for public review and comment. Reclamation has not prepared this type of EIS recently, if ever.

The second type of legislative EIS is required for proposals for Federal or federally assisted construction or other projects, which the agency recommends to Congress, to be located in a specific geographical area (other categories are detailed in 40 CFR 1506.8). These are essentially routine EISs filed with EPA and sent to Congress as draft legislative EISs no later than 30 days after the legislative proposal is forwarded. A distribution is made for review and comment, a public hearing is held, and a FEIS is prepared and filed. The main advantage of this type of legislative EIS is that the proposal can be sent to Congress for action with only the DEIS. The FEIS is forwarded at a later time. Again, Reclamation has not prepared this type of EIS recently, if ever.

7.2.2 Delegated/Nondelegated EIS
(ESM 11-2)

All of the EISs described in sections 7.2 and 7.2.1 can be delegated or nondelegated, although the vast majority of them are delegated. A delegated EIS is one for which the decision authority on the proposed action rests, by delegation,
with a single Assistant Secretary. The Assistant Secretary, in turn, may delegate this responsibility to individual bureaus (see sections 7.8.1.1 and 7.8.1.2 below). Any EIS signed at the Commissioner’s Office, regional office, or area office level is a delegated EIS.

A nondelegated EIS generally has one of the following features:

- An EIS for which the decision authority on the proposed action requires the approval of more than one Assistant Secretary (or bureaus under more than one Assistant Secretary), or

- An EIS reserved or elevated to the Secretary (or Office of the Secretary) by expressed interest of the Secretary, Deputy Secretary, Chief of Staff, Solicitor, or Assistant Secretary for Policy, Management and Budget, or

- An EIS for which the proposed action is highly controversial in nature or one in which the Secretary has taken a prominent public position in a highly controversial issue, or

- An EIS for which the proposed action faces a high probability of judicial challenge to the Secretary.

Nondelegated EISs are to be reviewed by OEPC. OEPC should provide clearance, to indicate informal, but substantive, approval of a nondelegated EIS prior to Reclamation printing the document. This approval can be accomplished by OEPC’s affirmative response (by any method, including e-mail or a telephone call) to Reclamation’s request to OPEC to print.

7.3 Tiering and Transferred Analyses
(40 CFR 1502.20; 43 CFR 46.120, 46.140; 516 DM 1.18)

Agencies are encouraged to tier their EISs to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (40 CFR 1508.28).

“Tiering” refers to following up on analysis contained in a broader EIS (such as national programs, policy statements, or large geographic areas) with subsequent narrower EISs or EAs (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:
• From a program, plan, or policy EIS to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

• From an EIS 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 (the later stage could address the design and implementation of a project or the proposed modification of a project in response to monitoring and evaluation [adaptive management]). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and to exclude from consideration issues already decided or not yet ripe.

If tiering is anticipated, the entire process should be outlined at the outset, if known, so that the interested public can understand what level of detail and analysis will be included in each tier.

When a broad EIS has been prepared, and a subsequent EIS or EA is prepared on a specific action included within the broad program or policy, the subsequent statement need only summarize the issues discussed in the broader statement. Issues addressed in a broad EIS are incorporated by reference so that the document can concentrate on issues specific to the subsequent or following action. An EA tiered to a broad EIS need only analyze the changes to, or details of, the original proposal not previously analyzed to determine if any of those changes or details result in potentially significant impacts. The subsequent document shall state where the earlier document is available. Preparers must ensure that conditions described in the earlier document are still in effect and that the analysis is reliable. If substantial changes have occurred, the tiered document must include additional documentation, and the analysis must be revised to bring the document up to date. When tiering is anticipated, it is prudent to print a substantial number of extra copies of the document for distribution during review of subsequent documents. For additional information, see ESM 10-17, “Procedures for Implementing Tiered and Transference of Analyses.”

To avoid duplication of effort and reduce paperwork and costs, Reclamation staff are encouraged to utilize environmental information and analyses developed in previous environmental documents when preparing new documents on similar actions. This activity is referred to as “transferred analyses.” It has not been a common practice to do this within Reclamation; however, with the creation of electronic repositories of NEPA documents in the regions, Denver offices, and other agencies, the ability to access documents is now available, and preparers should take advantage of the stored data. Before adopting information, preparers must investigate its reliability, quality, and applicability to the current proposal. Data utilized in previous NEPA documents may be incorporated by reference. See ESM 10-17 and the discussion below (section 7.4) on incorporating by reference.
Chapter 7: Environmental Impact Statement—Actions

7.4 Incorporating by Reference
(40 CFR 1502.21, 43 CFR 46.135)

Incorporating by reference is an acceptable technique when material is readily available. “Readily available” suggests that the public could be expected to gain access to it within the time allowed for comment. Incorporated material shall be briefly described and appropriately cited. An EIS should not be processed for filing unless referenced documents are complete and available at the time of filing with EPA.

7.5 Actions Associated with an EIS

7.5.1 Getting Started

Before an NOI is published in the FR and scoping is formally initiated, a number of steps should be taken. At the beginning of the process, the action and the purpose and need for the action should be explicitly defined. This should involve a multidisciplinary team and management input and approval.

With the definition of the proposed action, other environmental evaluations in the area that may be related to the action should be reviewed. Whenever appropriate, these documents should be adopted or used as a basis for tiering. Every effort should be made to identify existing information and analysis applicable to the current action to reduce redundancy.

7.5.2 Restrictions on Actions

While the EIS is being prepared, Reclamation is limited in the actions it can take. Until a decision is made, no action concerning the project shall be taken that will have an impact on, or preclude the choice of, other reasonable alternatives. Such actions include commitment of funds, personnel, resources, or materials that will advance the proposal to a point from which retreat may be difficult or impractical. (40 CFR 1506.1).

7.5.3 Timeframes
(40 CFR 1501.8, 43 CFR 46.240)

Preparation of an EIS should coincide with Reclamation’s decisionmaking process so that it can be completed in time for the FEIS to be included in, or to accompany, any recommendations or reports. The EIS should be prepared early enough so that it can provide an important contribution to the decisionmaking process. An exception to this would be in circumstances where an emergency exists and there is not time to complete NEPA before action must be taken to protect public safety and/or natural resources.
Reclamation should establish a schedule for each EIS in consultation with the cooperating agencies. Cooperating agencies should be expected to complete any requested reviews and analysis within the defined schedule. Once this schedule is established, Reclamation is not required to (but may agree to) delay preparation of an FEIS if comments are not received within the defined schedule.

In establishing the schedule, several factors need to be considered: (1) issues involved (e.g., potential impact and the nature and extent of the proposed action); (2) public involvement and consultation with agencies and Indian tribes; (3) NEPA process and required time limits; (4) data collection needs; (5) relationship of the proposed action to related processes within and outside of Reclamation; and (6) legal constraints. Adequate time should be allowed for the preparation and processing of the DEIS or FEIS. The process can vary significantly—from less than 18 months to 3 or more years—depending upon the controversy, scope, and issues to be addressed. Sometimes an EIS may be court directed and have a mandatory completion date.

Usually, the more significant the issues, the greater the amount of time needed for preparation of an adequate EIS. If significant public controversy exists, an expanded public involvement program may be helpful in gathering data and reducing the potential for litigation, but it may extend the time needed to complete the EIS.

The NEPA process includes a number of minimum required time limits. These limits may be extended at Reclamation’s discretion. They are as follows:

- The **minimum period** between the notice of a hearing and the actual hearing is **15 days** (40 CFR 1506.6 (c)(2)); however, a 30-day notice is recommended for either a hearing or public meeting.

- The **minimum period** for public review of the DEIS (or any supplements) is **45 days** (40 CFR 1506.10(c) and (d)). There is no maximum time period.

- The **minimum period** between EPA’s FR notice announcing availability of a FEIS and issuing the ROD is **30 days** (40 CFR 1506.10 (b)(2)). There is no maximum time period.

The minimum review period for a DEIS (or any supplements) is 45 days from the date that EPA publishes the “Notice of Availability of Weekly Receipt of Environmental Impact Statements” in the FR (see figure 7.1). This notice, usually published on Fridays, lists all EISs filed with EPA during the preceding week (40 CFR 1506.10(a)). However, for a delegated DEIS, Reclamation has the flexibility to establish a longer comment period while still meeting all minimum review requirements stated above. This longer comment period may begin as
early as when the document is filed with EPA and may be extended as long as Reclamation desires. The longer comment period is generally calculated from the publication date of Reclamation’s NOA in the FR.

Data collection needs can be significant. NEPA requires that the lead agency collect data needed for a reasoned choice among alternatives if it can be collected at a less-than-exorbitant cost (40 CFR 1502.22(a)). The determination of exorbitant costs must include all applicable costs, including consideration of monetized, as well as nonmonetized, costs such as social costs, opportunity costs, and nontimely fulfillment of statutory mandates (43 CFR 46.125). Data collection can require significant time and should be factored into the development of a reasonable timeframe for completion of the EIS (see chapter 8, section 8.8.2).

Finally, the relationship of the proposed action to related processes within and outside of Reclamation must be understood in order to reasonably set an achievable timeframe. Internal processes, such as safety of dams evaluations and contract negotiations, have timeframes and scheduling requirements that should be integrated with the NEPA requirements for those actions into one Reclamation decisionmaking process. External processes such as ESA or CWA Section 404 compliance can significantly affect the development of a reasonable timeframe, so consultation and coordination should begin with the appropriate agencies as early as possible.

7.6 Federal Register Notices Associated with an EIS

7.6.1 Notice of Intent to Prepare an EIS
(40 CFR 1501.7, 1508.22)

An NOI is required by CEQ regulations and notifies the public that an EIS will be prepared and considered. The office originating the action prepares the draft NOI and accompanying draft news release. These two items are reviewed and surnamed in accordance with procedures in the regional offices and Interior. The originating office or appropriate regional office will be responsible for publishing the NOI in the FR and issuing the news release (see section 7.7 below). In accordance with 40 CFR 1508.22, the NOI must briefly:

- Describe the proposed action and possible alternatives.
- Describe the agency’s proposed scoping process, including whether, when, and where any scoping meetings will be held. The timeframe for conducting scoping depends on the document being prepared and the complexity of the issues. It is up to the lead agency to determine how much time it will allow for the scoping process.
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- State the name, address, telephone number, and e-mail address of a person within the agency who can answer questions about the proposed action and the EIS.

The NOI should also indicate if there are any known or possible ITAs or environmental justice issues associated with the proposed action.

As soon as practicable after the decision to prepare an EIS, the lead agency shall publish the NOI in the FR and issue the press release. The NOI may be delayed if there is a lengthy period between the agency’s decision to prepare an EIS and the start of actual preparation. In such a case, the NOI may be published at a reasonable time in advance of preparation of the draft statement (40 CFR 1507.3(e)).

In most cases, planning of a project will occur over a period of several months or even years, and the determination to prepare an EIS is made at the beginning of project planning or shortly after project planning is initiated. It is recommended that the NOI and accompanying news release be prepared at the time the decision is made to prepare an EIS and that updated ones be prepared if there is a long time period before the EIS is actually initiated.

Figure 7.2 illustrates the general format requirements for a FR notice. Figure 7.3 is an example of a combined FR NOI and Notice of Scoping Meetings, and figure 7.4 is an example of the accompanying press release for a NOI and Notice of Scoping Meetings.

7.6.2 Notice of Scoping Meetings
(40 CFR 1506.6)

Agencies are required to make a diligent effort to notify the public of NEPA-related meetings. Notice of Scoping Meetings, if held, may be published in the FR, but it is not required for all actions unless the action is associated with effects of national concern. Any notice should be published at least 15 days before the scoping meeting occurs. It is recommended that offices also publish notices in local media, in advance of, and closer to the day of the scoping meeting to give the public adequate and timely notice of the opportunity to participate in the NEPA process. Normally, Notice of Scoping Meetings is included in the NOI, but if not, a separate notice is required.

For actions with primarily local effects, Notice of Scoping Meetings may be published in local newspapers using a press release and/or paid advertisement, posted on the appropriate Reclamation Web site, and mailed to entities directly affected by the proposal. These actions should be taken at least 15 days before the meeting date. Notice by these methods may also be used for actions of national concern, in addition to FR posting.
7.6.3 Notice of Availability and Public Hearing/Meeting
(ESM 11-2, 40 CFR 1506.6)

Under ESM 11-2, “Procedures for Approving and Filing Environmental Impact Statements,” an NOA is published in the FR when the DEIS becomes available for public review and comment and before any public hearings or meetings are held, or when the FEIS becomes available (figure 7.5 is an example of an NOA for a FEIS). For a DEIS involving formal hearings or public meetings, the notice of the hearings/meetings may be combined with the FR NOA (figure 7.6). The combined Notice of Availability and (if applicable) Notice of Public Hearing should be published in the FR a minimum of 15 days before the first public hearing is held. The Notice of Public Hearing, if separate from the NOA, should be published in the FR a minimum of 15 days before the hearing and at least 15 days after the document is available to the public. For additional information on publishing NOAs, see section 7.7 below.

7.6.4 Joint Lead Notices

There are no procedures written in either the DM regulations or CEQ regulations for preparing joint-lead FR notices. While joint leads are allowed under the CEQ regulations, the CEQ and Interior prefer to have a single agency designated as the lead, with other agencies acting as cooperating agencies. Nevertheless, situations will arise where Reclamation is a joint lead with another Federal or State agency. When this happens, the joint Federal leads must agree on which one of the agencies is going to assume the lead for administrative purposes (i.e., publishing the FR notices, receiving comments on the NEPA documents, filing the documents with EPA, and distributing the documents).

When there are joint leads, a single FR notice should be prepared containing the names of the Departments and the names of both agencies at the top of the first page. Both agencies should sign the notice at the end. The notice should be surnamed by both agencies according to its review procedures. For Reclamation, the notice must be properly surnamed through the review process (see section 7.7 below).

7.7 Federal Register Notice Publication Process

Following are the steps for the FR notice publication process for EISs. Please refer to figure 7.2 for important general format requirements. The format for FR notices is described in detail in the Federal Register Document Drafting Handbook. Copies of the handbook can be accessed online (http://www.archives.gov/federal-register/write/handbook/) or by contacting Reclamation’s Federal Register Liaison (84-21300).
All Reclamation notices to be published in the FR must be reviewed and surnamed in the Commissioner’s Office and appropriate Interior offices. In addition, all notices must be reviewed and approved by the Federal Register Liaison (84-21300). Once approved, notices must be signed and emailed or faxed to the Special Assistant to the Deputy Commissioner, Policy, Administration and Budget (94-00010) with a cc to the Federal Register Liaison).

The Directors, Office of Executive Secretariat and Regulatory Affairs, meet daily with the Interior’s Chief of Staff to recommend or give approval to publish each FR notice. The Federal Register Liaison (84-21300) will notify the originating office when approval to publish has been received. **Under no circumstances should a notice be sent directly to the Office of the Federal Register prior to receipt of approval by Interior. This review process may take up to 30 days or more to complete.** To avoid delays, the originating office should send the NOA ahead of the rest of the EPA filing package for review and surnaming (see section 7.8 for information on preparing EPA filing packages). Publication emergencies can be avoided by allowing for the 30-day review in the FR notice preparation timeline.

Reclamation’s process for preparing FR notices for publication is further described below:

1. The office responsible for the EIS prepares a draft notice. This office is usually a field, area, or regional office. It may also be an office in the TSC under a service agreement with the area or regional office. If this is the case, the draft notice is sent to the region for approval. If the study is Reclamation wide, the notice is prepared by Policy and Administration.

2. The originating office should email a draft notice to the Federal Register Liaison (84-21300) for a review of format. The Federal Register Liaison will email the draft notice back with any suggested changes.

3. **Three original notices** are prepared and routed for surnaming and signature by the appropriate official at the regional or area office level (generally the Regional Director or Area Manager) or by the designated official for Reclamation-wide projects. Directors in the Washington, Denver, and regional offices have the authority to sign program-specific notices for programs under their responsibility. The signatory authority may be delegated to a lower level at the discretion of the Director (Reclamation Manual, ADM 01-02, paragraph 3B). Therefore, each region/office may have different signatory authorities.
While the three originals are being routed for surname and signature, the notice should be copied (MS Word) to a compact disc (CD) for submission to the Office of the Federal Register. For detailed requirements on CD submission, please see chapter 5 in the Federal Register Document Drafting Handbook.

4. General requirements for FR notices are:

- Notices should not be stapled.

- Notices must be signed in blue ink (a signature in black ink is difficult to distinguish from a photocopy).

- Name and title of the signatory official shown on the notice must match the name and title of the person who actually signs the notice. The signatory name, title, and region should be typed directly beneath the handwritten signature. Acting officials may sign, but only if their name and title are typed below the signature line. The date of the actual signature must also be shown. Do not place a signature block on a page by itself (placing text on the signature page helps to ensure the integrity of the document). The date of signature and the name, title, and region of the signatory official should also be added to the file on the CD.

- Notices must include Reclamation’s billing code: 4310-MN-P. The “P” added to the end of Reclamation’s standard billing code (4310-MN) notifies the Office of the Federal Register that the document is being submitted for publication on a CD. The “P” should not be used in the billing code at any other time.

- When submitting the notice on a CD, the CD should be labeled with the name of the project and Reclamation’s billing code (4310-MN-P). If not mentioned in the transmittal letter to the Office of the Federal Register (figure 7.7), the CD should include a statement certifying that the file is a true copy of the original document, as well as identification of the word processing software.

5. After the notice is signed by the appropriate approving official, a copy with the actual handwritten signature will be emailed or faxed to the Special Assistant to the Deputy Commissioner, Policy, Administration and Budget (94-00010) for surnaming. Under no circumstances should a notice be sent directly to the Office of the Federal Register without completion of the review process.
6. For all notices, the originating office prepares a letter transmitting the three signed original notices and the CD to the Office of the Federal Register (figure 7.7). To avoid delays or misplaced mail, express mail should be used for overnight delivery, or the notice can be hand carried by the appropriate Regional Liaison to the Office of the Federal Register at the following address:

Office of the Federal Register
800 North Capitol Street, NW
7th Floor, Suite 700
Washington, DC 20001

7. Additional steps for publishing NOAs (if the NOA is **not** express mailed directly to the Office of the Federal Register by the originating office):

- The three signed original copies of the NOA and the CD are included in the EIS filing package, which is sent to the appropriate Regional Liaison in Washington (see sections 7.8.1.2 and 7.8.2.1).

- Under ESM 11-2, when the EIS package arrives in Washington, it is the responsibility of the Regional Liaison to get a control number from OEPC (in some instances, the region may obtain the number directly from OEPC and provide it to the Regional Liaison). The control number will appear either as **DES___** (for DEISs) or **FES___** (for FEISs). Once assigned, the number should be stamped or written in blue ink by the Regional Liaison on each copy of the NOA after the “ACTION” heading. The Regional Liaison should also insert the control number after the “ACTION” heading on the CD containing the NOA. The Regional Liaison is also responsible for stamping or writing the control number on the front page or cover sheet of each paper copy of the DEIS or FEIS in the filing package. This is not required for copies being distributed to the public (for additional information on this process, see section 7.8.2.3).

- On the day the EIS is ready for filing with EPA (or at least 3 days in advance of the filing date, depending on when the NOA is to be published), the Regional Liaison will hand carry the signed original copies of the NOA and the CD containing the NOA to the Office of the Federal Register (see address above).
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8. The Office of the Federal Register will publish all notices according to its regular schedule:

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7.8 Review, Filing with EPA, and Distribution of EISs (ESM 11-2, ESM 10-14, ESM 10-15; 40 CFR 1503.1, 1506.9, 1506.10)

7.8.1 Review

Each region has internal review requirements that must be followed. These should include a broad review of the preliminary draft and final documents, before filing, by individuals with environmental compliance expertise to ensure adequacy. Review of the documents by any cooperating agencies is also appropriate at this time. Upon request, the TSC and/or Policy and Administration may review and/or assist in the revision of preliminary DEISs and/or FEISs.

A broader review by the Commissioner’s Office may occur on highly complex or controversial actions. The office of the Assistant Secretary for Water and Science, the Office of the Solicitor, and OEPC may also get involved in the reviews. If the Commissioner’s Office in Washington is involved in the review of a NEPA document, the preparing office should provide reviewers with preliminary drafts to avoid delays later on when the NEPA document is ready to be filed. The Regional Liaison usually coordinates the Commissioner’s and applicable DOI office reviews with support from Reclamation’s representative in the office of the ASWS.

7.8.1.1 Delegated EISs

A delegated EIS is one prepared for a proposed action for which decision authority is delegated to a single Assistant Secretary or further delegated to a subordinate bureau (see section 7.2.2). Within Reclamation, delegated EISs may be signed by the Commissioner or Regional Directors.

The area and regional offices are responsible for preparation, adequacy, and internal review of the document. This review will address the legal and technical adequacy of material presented, compliance with NEPA and other environmental laws, and adherence to Interior and Reclamation regulations, instructions, and
policies. Special attention will be given to completeness and accuracy of the analysis. Additionally, the analysis of the alternatives will be critically evaluated to make sure an alternative or alternative feature that has less environmental impact, and that is legally and technically feasible, has not been inadvertently overlooked.

Review of preliminary copies of the DEIS by project sponsors and cooperating agencies is encouraged. The level of review and selection of the reviewing entities should be at the discretion of the office preparing the DEIS.

Technical peer review of the different sections is generally performed by another office. For example, material developed by the area offices would normally be reviewed by the regional office but may also be reviewed, upon request, by the TSC and/or Policy and Administration.

Review of documents covers all aspects, not just environmental compliance, and adequate time is needed to review the document’s contents and to coordinate among the various disciplines involved in the review. These reviews (by sponsors, cooperating agencies, and peers) should be allowed 30 calendar days, whenever possible.

The originating office should make every effort to accommodate the policy and technical recommendations of the reviewing office. If a recommendation cannot be accommodated by the originating office, then the originating and reviewing offices should work together to develop an alternative approach that is acceptable to both offices or refer the disagreement to the decisionmaker for action.

To facilitate preparation of the document, internal regional office comments and recommendations should be forwarded through informal channels (blue envelope, email, etc.) or discussed in a meeting or conference call between the originating office and regional office staff.

In rare instances, a Director or the Commissioner may request that Policy and Administration take the lead within Reclamation to prepare an EIS. This process would generally include the following steps: Policy and Administration would develop a team to prepare the document using resources from the TSC, the Commissioner’s Office, and the regions, as appropriate. The team would then develop an outline of the steps needed to complete the document. The outline would be reviewed internally by Policy and Administration, and other appropriate groups within Reclamation, before being sent to the Commissioner/Director requesting approval to initiate the EIS.

If the proposed action is determined to be of interest Reclamation wide, the preliminary draft would also be offered to all regions and other directors for review. The Director requesting the document would approve the draft before it was filed by Policy and Administration with EPA for public review.
Those regions and other directors who provided input on the draft would be given the opportunity to review the final document. The Director requesting the document would approve the final before it was filed with EPA.

7.8.1.2 Nondelegated EISs
Under ESM 11-2, nondelegated EISs are to be reviewed by the Secretary’s OEPC. The office that originates the EIS will send an email or memorandum to the Director of OEPC requesting its approval to print, along with a copy of the document (see figure 7.8 for an example of an Approval to Print memorandum). To avoid any delays at the time of printing, the preparing office should include OEPC in reviews of preliminary drafts of the EIS or, if that is not possible, send a copy of the EIS to OEPC to review at least 2 weeks in advance of a request for approval to print.

In addition, the filing package for the nondelegated EIS will be somewhat different than that for a delegated EIS. It is likely to require more than the usual number of paper copies and CDs of the EIS. The transmittal letters to the EPA and Office of the Federal Register must be signed by the Director of OEPC. The letters may be prepared in the regional office on Office of the Secretary of the Interior letterhead and mailed to the Regional Liaison in Washington or emailed to the Regional Liaison to be put on Office of the Secretary of the Interior letterhead. The region will also email the NOA to the Regional Liaison. The NOA must include three originals with the OEPC Director’s original signature (in blue ink), title, and date on each copy. The region should also include a copy of the NOA on a CD with the OEPC Director’s name, title, and date of signature typed in the signatory block. A draft press release may also be required by the Office of Public Affairs. When Reclamation is preparing a nondelegated EIS, it will also forward a draft press release through its Assistant Secretary to the OEPC (if required by the Office of Public Affairs).

The filing package for a nondelegated EIS should contain the following:

- Email or memorandum from originating office (usually the Regional Director) to OEPC requesting approval to print (figure 7.8).

- FR NOA and accompanying CD for DEISs and FEISs signed by the Director of OEPC (figure 7.9).

- Letter from the Director of OEPC to the Office of the Federal Register transmitting three signed originals of the NOA and denoting transmission of the CD (figure 7.10).

- Memorandum from the Regional Director to the Commissioner transmitting the filing package to the Regional Liaison (figure 7.12)
Letter from the Director of OEPC to EPA, Office of Federal Activities, transmitting the EIS for filing with EPA and stating that transmittal to all agencies has been completed (figure 7.11).

Memorandum from the Commissioner to the Director of OEPC transmitting the EIS (similar to figure 7.14).

Draft press release.

In addition to the items in the filing package described above, the nondelegated EIS should include an interested party letter, letters to elected officials (optional), and letters to affected Indian tribes signed by the Secretary or Commissioner. Procedures for filing the nondelegated EIS are similar to those followed for a delegated EIS (see section 7.8.2.3 below).

The review procedures for a nondelegated EIS are similar to a delegated EIS but involve more required reviewing offices within Interior. The specific reviewing offices will vary with the proposed action in the EIS but will, at a minimum, include OEPC and the Solicitor’s Office at the administrative draft DEIS and FEIS stages.

For additional details, please see ESM 11-2, “Procedures for Approving and Filing Environmental Impact Statements.”

7.8.2 Procedures for Filing Delegated EISs

The Regional Director will normally approve the EIS and sign the transmittal letters necessary to file the EIS. For EISs on rulemakings, Reclamation-wide issues, and other extremely controversial EISs, the Commissioner or the ASWS may approve the EIS.

7.8.2.1 Preparation of Filing Documents

While the EIS (draft or final) is being reviewed, the originating office (usually the regional office) prepares the following items for filing the EIS with the EPA, which will make up the filing package:

- FR NOA and accompanying electronic versions for DEISs (figure 7.6) and FEISs (figure 7.5). The NOA for a DEIS is generally combined with the Notice of Public Hearing as a Notice of Availability and Notice of Public Hearing.

- Letter from the Regional Director to the Office of the Federal Register transmitting three signed originals of the NOA and denoting transmission of the CD (figure 7.7).

- Memorandum from the Regional Director to the Director, Operations, transmitting the filing package to the Regional Liaison (figure 7.12).
- Letter from the Regional Director to EPA, Office of Federal Activities, transmitting the EIS for filing with EPA and stating that transmittal to all agencies has been completed (figure 7.13). This statement will ensure that the EIS is received by all interested parties by the time EPA’s “Notice of Availability of Weekly Receipt of Environmental Impact Statements” appears in the FR (figure 7.1).

- Memorandum from the Regional Director to the Director of OEPC transmitting the EIS (figure 7.14).

7.8.2.2 Documents Associated with Distribution of the Delegated EIS
In addition to the items in the filing package described above, the originating office or other designated office will prepare other items associated with the release and distribution of the EIS. These items are listed below.

- Letter to interested parties signed by a Reclamation official (i.e., Commissioner, Regional Director, or Area Manager). Examples of interested party letters for a DEIS and FEIS are shown in figures 7.15 and 7.16, respectively.

- Letters to elected officials signed by a Reclamation official (figure 7.17). This letter is optional. Elected officials can instead receive the EIS with the interested party letter instead of an individually signed letter.

- Letters to affected Indian tribes signed by a Reclamation official (figure 7.18).

- The applicable news release for the action. Examples of news releases for a Notice of Availability and Notice of Public Hearings for a DEIS and an NOA for a FEIS are shown in figures 7.19 and 7.20, respectively.

- Distribution list.

After completion of the review and appropriate revision of the EIS, these items are finalized and either incorporated into the EIS or included with it for distribution. If the items are prepared by the TSC, they are sent to the requesting region (or area office) for approval and submission to the program manager.

7.8.2.3 Filing the Delegated EIS
When the regional office and Washington Office have approved the NOA, and when the EIS has been completed, approved by the region, and is ready to file with EPA, the filing package should be sent by overnight mail to the appropriate
Regional Liaison in the Commissioner’s Office using the transmittal memorandum to the Director, Operations, described in section 7.8.2.1. The filing package should include the following:

- At least four paper copies of the EIS and appendices. More may be needed for nondelegated, legislative, and certain other highly controversial EISs.

- At least seven copies of the EIS and appendices in electronic format (more may be needed).

- Three original copies of the FR NOA signed by the Regional Director in blue ink and an electronic version of the NOA (described in section 7.8.2.1).

- A letter from the Regional Director to the Office of the Federal Register transmitting the signed original copies of the NOA and the electronic version (described in section 7.8.2.1).

- A letter from the Regional Director to EPA, Office of Federal Activities, transmitting the EIS for filing (described in section 7.8.2.1).

- A memorandum from the Regional Director to the Director of OEPC transmitting the EIS (described in section 7.8.2.1).

When the document arrives in Washington for filing, the Regional Liaison will obtain a control number from OEPC. It will be either a DES (for DEISs) or FES (for FEISs) number. The EPA and OEPC will not accept the EIS without this number. The Regional Liaison will stamp or hand write this number in blue ink on each copy of the NOA after the “ACTION” heading and insert the number after the “ACTION” heading on the electronic data storage device containing the NOA. The Regional Liaison will also stamp or hand write the number on the front page or cover sheet of each paper copy of the DEIS/FEIS in the filing package. While it is not necessary for the regional or area offices to stamp all of the EIS copies being distributed to the public with the DES/FES control number, the Regional Liaison should provide the number to the regional office for its records. Note: It is possible for someone in the regional office, rather than the Regional Liaison, to obtain the DES/FES control number from OEPC, as long as it is not requested more than 2 weeks before the document is ready to be published. When this is done by the region, the control number will already be included in the NOA and printed on the cover sheet of the document. It should be noted that the control number from OEPC is time sensitive, so if the number is obtained ahead of time, any delay in providing the document to EPA could invalidate the number and cause further delay as a new number is assigned.
The date that comments are due on a DEIS must appear on the cover sheet of the document (CEQ NEPA regulations, 40 CFR, Section 1502.11(f)). If this date is not included on the cover sheet, the Regional Liaison is responsible for stamping or hand writing it on the paper copy of each DEIS in the filing package. The comment due date must appear on the cover sheet of all documents being distributed to the public. **Note:** It is very helpful if the regional/area office calculates the comment due date according to NEPA regulations and includes it on the cover sheet of the document before it goes to print.

All copies of the EIS should be distributed concurrently with the filing date with EPA. At the time of filing, EPA will ask if all copies have been distributed. Therefore, immediately after the Regional Liaison has obtained a DES/FES control number, he or she should coordinate with the regional office to agree on a filing date (see section 7.5.3 for important information on coordinating timeframes and comment periods).

On the day that the document is to be filed with EPA, the Regional Liaison will keep one paper copy of both the EIS and appendices, and one copy of both the EIS and appendices in electronic format, for his or her future use. The Regional Liaison will arrange to hand carry the following:

- **To EPA:** Four copies of the complete EIS, including appendices, along with a transmittal letter to EPA. At least one copy of the entire EIS must be a paper copy; the remaining three copies can be on appropriate electronic storage devices. For filing purposes, EPA specifically allows CDs, USB flash drives, memory cards, or other appropriate electronic storage devices. It is helpful to read EPA’s “Amended Environmental Impact Statement Filing System Guidance” which can be accessed online (http://www.epa.gov/compliance/nepa/submiteis/#more).

- **To OEPC:** One paper copy of the EIS and appendices, and two copies of the EIS and appendices in electronic format—OR three paper copies of the EIS and appendices, along with a transmittal memorandum to OEPC.

- **To the Office of the Federal Register:** Three signed original copies of the NOA, the electronic version of the NOA, and a transmittal letter to the Office of the Federal Register, located at 800 North Capitol Street, NW, 7th Floor, Suite 700, Washington, DC 20001.

- **To Interior’s Natural Resource Library:** One paper copy of the EIS and appendices, and one copy of the EIS and appendices in electronic format (no transmittal memorandum is needed).
When the documents are filed, the Regional Liaison will notify the originating office and applicable regional office (if different) that this has been accomplished. After 1 year, any remaining copies of the draft or final documents should be sent back to the originating office.

The regional office should notify the area office of the filing date when it receives notification from the Regional Liaison that filing has been completed. The Regional Public Affairs Office publishes any accompanying news release as soon as distribution of the document has been completed.

7.8.3 Distribution

Distribution of DEISs and FEISs may be done at the area or regional level, or by the TSC, depending on which is most effective. To guide the use of the Internet and other electronic means, please see ESM 10-15, “Publication and Distribution of Interior NEPA Compliance Documents via Electronic Methods.” The letter transmitting the document to the public (applicable interested party letter) may be signed by the Commissioner, Regional Director, or Area Manager.

Copies of the DEIS should be sent to a wide segment of the public for review. The EIS should be distributed to:

- Appropriate Interior bureaus and offices.
- Federal agencies.
- The Washington offices of senators and representatives.
- State office(s) of congressmen in the affected State(s).
- Potentially affected or interested Indian tribes and affected Indian trust asset beneficiaries and trustees.
- State or area-wide clearinghouses, as appropriate. For additional information, see http://www.whitehouse.gov/omb/grants_spoc or ESM 10-14, “State and Local Agency Review of Environmental Statements.” For questions regarding State clearinghouses, please contact Policy and Administration (84-50000).
- State agencies indicating a desire to review independent of the clearinghouses.
- Local agencies.
- Public libraries.
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- Conservation, environmental, or other interested groups.
- Individuals having an interest or stake in the proposed action.
- Parties that commented on the DEIS.

After filing, the regional and area offices will have copies available for public inspection and a supply to meet reasonable public requests (normally at no cost). EISs shall be transmitted to all commenting agencies and made available to the public no later than the day the EIS is filed with EPA (40 CFR 1506.9).

7.9 Public Hearings and Comment Procedures for an EIS

7.9.1 Review and Comment
(40 CFR 1506.10, 516 DM 4)

The minimum review period for a DEIS (or any supplements) is 45 days starting from when EPA publishes the “Notice of Availability of Weekly Receipt of Environmental Impact Statements” in the FR. This timeframe may be extended at the agency’s discretion (see section 7.9.3 below). However, Reclamation may also start the comment period earlier, while still meeting all the minimum review requirements. This longer comment period may begin as early as when the document is filed with EPA and may extend as long as Reclamation desires. The longer comment period is generally calculated from the publication date of Reclamation’s NOA in the FR. For nondelegated EISs, the originating office would be responsible for consulting with OEPC about any proposed reduction or extension of the commenting process. The OEPC would notify EPA and CEQ about the changes.

7.9.2 Public Hearing Procedures

Public hearings are not required for every DEIS but should be held if: (1) there is substantial controversy concerning the proposed action or substantial interest in holding the hearing; or (2) an agency with jurisdiction over the action requests a hearing supported by reasons why a hearing will be helpful (40 CFR 1506.6(c)). A public hearing is a more formal type of public meeting used to gather comments from the public. While not required, it is recommended that a court reporter and a hearing officer be utilized to conduct the hearing. A hearing is not the place to debate the merits or drawbacks of the project. If a question-and-answer period is desirable, it should be scheduled informally before or after the formal hearing, with the understanding that the informal question-and-answer period is not part of the formal hearing record. A question-and-answer period before the hearing can often aid the public in focusing its comments on the DEIS and the issues related to it. The hearing record should be left open for written public comment for 10 to 15 days after the date(s) of the public hearing(s).
The public hearing session(s) should be conducted by a hearing moderator in a manner that will encourage the fullest possible participation. All written comments from the public hearing and a summary of oral comments at the public hearing, along with Reclamation’s responses, will be made a part of an appendix in the FEIS.

7.9.3 Extending the Comment Period Upon Request

Reclamation may extend the comment period past the length of time stated in the NOA and press release upon request from outside agencies or individuals. If a request is submitted, the preparing office should:

- Evaluate the merits of the request and determine whether there is time to extend it. Reclamation staff will need to examine the reasons why the commenter wants to extend the comment period (i.e., there may be new issues, or they may have received the EIS late or not at all). There may not be time to extend the comment period (i.e., the NEPA process may need to be completed to meet certain statutory requirements or other mandates, such as renewal of water contracts). General practice within Reclamation is to try to accommodate all reasonable requests if there is time.

- If an extension of time is granted, the preparing office should notify the appropriate parties on the mailing list of the extension, put it on the region’s Web site, and consider issuing a press release.

- In cases where a FR notice is prepared, the new notice need only discuss the extension of the comment period. A Notice of Extension of Public Comment Period is shown in figure 7.21.

Even without formal extension of the comment period, Reclamation should make reasonable efforts to fully consider all comments received, even comments received a short time after formal closure of the comment period. However, Reclamation does not have to delay an established schedule in order to consider late comments.

7.10 EIS Comment and Response

(40 CFR 1503.4)

The following paragraph should be included as part of any communication vehicle used to solicit public commentary or as part of any public involvement process. Specifically, this disclosure statement should be included at the end of the “Supplementary Information Section” of any FR notice that invites public participation (e.g., NOI, Notice of Scoping Meeting(s), Notice of Public Hearing(s) or Meeting(s), or NOA for EA and DEIS/FEIS documents):
Before including your name, address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

All substantive written comments received from the public and a summary of the substantive comments from the formal public hearing(s), or meeting(s), should be included in the FEIS (40 CFR 1503.4). Letters of comment are often included in the FEIS, but this is not required. Responses must be given for each substantive comment unless the comments are extremely voluminous. If the comments are voluminous, they may be grouped under categories of issues with broadly covered responses. This situation is rare, however, and individual responses are generally developed. Incoming review comments received in Washington or Denver will be sent to the originating office. The originating office will maintain a log of all comments received.

### 7.11 Supplemental Statements

(40 CFR 1502.9(c), 516 DM 1.14)

A Reclamation EIS should be supplemented when:

- A DEIS has become outdated. Generally, a draft that has not been finalized and is more than 5 years old should be reviewed internally to determine if it needs to be revised and reissued as a supplement.

- Substantial changes have been made in the alternatives that are relevant to environmental concerns.

- Significant new circumstances or information relevant to environmental concerns arise that have a bearing on the proposed action or impacts.

- Review of the DEIS results in the inclusion of a new preferred alternative which was not included as a detailed reasonable alternative in the DEIS, or new material significantly alters previously described impacts.

- It has been over 5 years since the FEIS and ROD have been issued, the project still has not been implemented and conditions in the area have changed, or the project has been substantially modified.

A supplement shall be prepared, circulated, and filed in the same fashion as an EIS, but an FR NOI is not required. A scoping process is not required but may be appropriate, depending upon the reason for the supplement. A hearing may be
necessary for a supplement if the conditions in section 7.9.2 are met. A supplement may be prepared for a DEIS or FEIS. If prepared for a DEIS, the draft supplement should be integrated with the existing DEIS during preparation of the FEIS for the proposed action. If prepared after the EIS is filed, both a draft and a final supplement will generally be prepared. Interior procedures require Reclamation to consult with OEPC and the Office of the Solicitor prior to proposing to CEQ to prepare a final supplement without preparing an intervening draft (516 DM 1.14B).

7.12 Cancellation of an EIS

Occasions may arise when an EIS is to be prepared and, later, the project is canceled, delayed for an indefinite period of time, or drastically modified. In these cases, it may be necessary or desirable to cancel the EIS. This process can also be referred to as withdrawing an EIS, terminating an EIS, or cessation of an EIS. Interior recommends that DEISs that have not had FEISs prepared within 5 years be reviewed to ensure they are still relevant. Interior periodically reviews and develops a list of DEISs that fall within this category and may recommend that Reclamation cancel them. In addition, if an NOI is prepared and a DEIS is not completed within 5 years, a similar review is appropriate to ensure the EIS process is still relevant.

A Notice of Cancellation of a DEIS must be published in the FR and a Notice of Cancellation sent to those agencies, organizations, and individuals that received the DEIS. DEISs canceled by Interior will also be published in the FR. Figure 7.22 is an example of a Notice of Cancellation.

The notice should include a brief description of the proposal, a reference to the earlier FR NOI, NEPA analysis completed to date, and the reason for terminating the EIS. If the reason for terminating the EIS is the abandonment of the proposal, the FR notice should indicate that the NEPA process will be reinitiated if the proposal is revived at a future date.

If an EA and a FONSI are subsequently prepared and substituted for what was originally envisioned to be a DEIS, the FONSI should be made available for a 30-day public review before the action may be implemented.

7.13 Procedures for Response to Referral from Other Agencies on Reclamation Programs
(40 CFR 1504, 516 DM 4.7C)

Other Federal agencies may review EISs prepared by Reclamation, or vice versa (CAA, Section 309; NEPA, Section 102(2)(c)). When this review results in serious interagency disagreements which cannot be resolved, a Federal agency
(including Reclamation) may refer the issue to CEQ for an opinion. Reclamation will notify the Commissioner, ASWS, Solicitor, and OEPC regarding any notice to refer a Reclamation EIS to CEQ.

Not later than 25 days after the referral to CEQ, Reclamation will deliver a response to CEQ and the referring agency through the Commissioner and OEPC. Reclamation may request more time if the response cannot be made within 25 days. CEQ may grant the time extension if Reclamation gives assurance that the matter will not go forward and explains why the time extension requested is reasonable. The response shall address the issues raised in the referral completely, be supported by data, and address the referring agency’s recommendation (40 CFR 1504.3 (d)).

Interested persons or organizations (including the applicant) may deliver their views to CEQ. Views in support of the referral or response shall be delivered at the same time that the referral or response is delivered.

Not later than 25 days after receipt of both the referral and any response, or upon being informed that there will be no response (unless a time extension has been granted), CEQ may take one or more of the following actions as described in 40 CFR 1504.3(f):

1. Conclude that the conflict has been resolved.

2. Initiate discussions of mediation with referring and lead agencies (OEPC will be responsible for coordinating Interior’s position).

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 decisionmaking process.

5. Determine that the issue should be further negotiated by the referring and commenting agencies and recommend that CEQ’s involvement is inappropriate unless the agencies’ disagreements are irreconcilable.

6. Publish its findings and recommendations.

7. When appropriate, submit the referral and the response, together with CEQ’s recommendations, to the President for action.

The CEQ shall complete actions 2, 3, or 5, above, within 60 days. When the referral involves an action required by statute to be determined on the record after the opportunity for an agency hearing, the referral shall be conducted in a manner consistent with the Administrative Procedures Act (5 U.S.C. 557(d)).
Figure 7.1.—Example of EPA’s Notice of Availability of Weekly Receipt of Environmental Impact Statements.
Chapter 7: Environmental Impact Statement—Actions

Figure 7.1.—Example of EPA’s Notice of Availability of Weekly Receipt of Environmental Impact Statements (continued).
Basic Requirements for Documents in the Notices Category of the Federal Register

For more information, the Federal Register Document Drafting Handbook is available on the Internet at: http://www.archives.gov/federal-register/write/handbook/.

Typical notice documents announce: Meetings or hearings, availability or cancellations of draft or final environmental impact statements, certain petitions, orders or decisions affecting named parties, etc.

General format:
- Margins 1 inch on top, bottom, and right; 1-1/2 inches on left.
- Double space entire document.
- Number pages—bottom center.
- Indent paragraphs at least 5 spaces.
- Do NOT staple the notices.
- Single-sided only.

Reclamation’s Federal Register Liaison Officer must review your notice prior to signature. To answer questions on format, please call 303-445-2055 or 202-513-0519 for help.

Disks: (follow these guidelines for documents submitted on disk)
- Are the disk and document identical?
- Is the verification/certification letter included stating that the disk and document are identical?
- Is the disk virus-free, with no trash files, no security codes/passwords, and no backup files included?
- Are you using software that the Office of the Federal Register will accept? (The Office of the Federal Register accepts Microsoft Word.)
- Does the disk have a label that identifies the agency, kind of software, subject matter, and file name?
- Do you have a separate disk for each document?

Copies: Do not list “cc” or “bc” copies at the end of any actual Federal Register notice. List the mail codes for internal distribution and addresses of external parties at the bottom of the transmittal letter to the Office of the Federal Register with an attached copy of the notice. Please include the Office of Policy and Administration (84-50000) and your Regional Liaison in that list.

Mail: Send via Federal Express to: Office of the Federal Register
800 North Capitol Street, NW, Suite 700
Washington, DC 20001

Headings: The following template shows what headings a document published in the “Notices Category” should contain.
Template for Federal Register Notices

(Billing Code): 4310-MN-P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Action, Project Name, Location (i.e., Notice of Availability of Draft Environmental Impact Statement for the Nimbus Hatchery Fish Passage Project, Lower American River, California)

AGENCY: Bureau of Reclamation, Interior.

ACTION: (Describe action, i.e., Notice of availability, Announcement of meeting, etc.; capitalize first letter of first word only.).

SUMMARY: (A brief 1-2 paragraph statement should answer these questions: What action is being taken? Why is this action necessary? What is the intended effect of this action? Do not list statutes in this section, only in the SUPPLEMENTARY INFORMATION section.)

DATES: (Contains review/comment period deadline, request for hearing/meeting deadline, public hearing/meeting dates, any other dates the public may need to know.) No more that four dates. Limit narrative language. List additional dates in the SUPPLEMENTARY INFORMATION SECTION.

ADDRESSES: (Where to mail public comments, hand deliver public comments, attend a public meeting, examine any material available for public inspection, etc.). No more than four addresses. Limit narrative language. List additional addresses in the SUPPLEMENTARY INFORMATION section.

Libraries: This subheading is part of the “Addresses” heading; however, if you include more than four entries, it should be moved under “SUPPLEMENTARY INFORMATION” as a subheading (see Document Drafting Handbook, listed above). It can be used in an NOA to tell people where to locate copies of the EIS.

Figure 7.2.—Format for FR notice (continued).
FOR FURTHER INFORMATION CONTACT: (Name and telephone number and possibly e-mail addresses – may list two or more persons.)

SUPPLEMENTARY INFORMATION: (Contains background information and necessary details; information required by law, agency policy, or Executive Order. Use descriptive headings to highlight topics or organize text – see Document Drafting Handbook, listed above. Include a “Public Disclosure Statement” regarding possible release of names and addresses in Federal Register notices that seek public comment.)

Date: (The Office of the Federal Register recommends a signature date – but it is not required. When a date is furnished, use the date of actual signature. The Office of the Federal Register will not accept a postdated signature or change a signature date. Do not use correction fluid or tape. If there is a problem with the date, the notice is returned to Reclamation’s Federal Register Liaison Officer.)

Signature Block: (Printed name/title of person signing the document should be directly beneath the handwritten signature. The last line of the signature block should indicate the region/office publishing the notice (e.g., UC Region or Denver Office). The Office of the Federal Register requires THREE original copies of the document signed in BLUE INK.)
DEPARTMENT OF THE INTERIOR

Notice of Intent to Prepare an Environmental Impact Statement/Environmental Impact Report and Public Scoping Meetings for the Folsom Dam Safety of Dams Mormon Island Auxiliary Dam Modification, California

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of intent and public scoping meetings.

SUMMARY: The Bureau of Reclamation, the lead Federal agency, and the Sacramento Area Flood Control Agency, acting as the lead State agency, are intending to prepare a joint environmental impact statement/environmental impact report for the proposed Folsom Dam Safety of Dams Mormon Island Auxiliary Dam Modification (Proposed Action). The purpose of the Proposed Action is to reduce the seismic and static risk of failure of the Mormon Island Auxiliary Dam. In this way, the Bureau of Reclamation will achieve the existing standards for dam safety and reduce the risk of injury to those people living and working downstream of the Folsom Dam complex.

DATES: Submit written comments on the scope of the environmental impact statement/environmental impact report on or before January 3, 2009 (if no specific date, use this phrase [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]).

Figure 7.3.—Example of NOI to prepare EIS and Notice of Scoping Meetings.
A series of scoping meetings will be held to solicit public input on the scope of the environmental document, alternatives, concerns, and issues to be addressed in the environmental impact statement/environmental impact report. The scoping meeting dates are:

- Tuesday, December 2, 2008, 1:00 p.m. to 4:00 p.m., Folsom, CA.
- Tuesday, December 2, 2008, 6:00 p.m. to 9:00 p.m., Folsom, CA.
- Thursday, December 4, 2008, 6:00 p.m. to 9:00 p.m., El Dorado Hills, CA.

**ADDRESSES:** Send written comments to Ms. Elizabeth Vasquez, Central California Area Office, Bureau of Reclamation, 7794 Folsom Dam Road, Folsom, CA 95630-1799; or e-mail FolsomDamMods@usbr.gov.

The public scoping meetings will be held at:

- Folsom -- Folsom Community Center, 52 Natoma Street, Folsom, CA 95630.

**FOR FURTHER INFORMATION CONTACT:** Ms. Elizabeth Vasquez, 916-988-1707; FolsomDamMods@usbr.gov.

**SUPPLEMENTARY INFORMATION:** Pursuant to the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA), the Bureau of Reclamation (Reclamation) and the Sacramento Area Flood Control Agency (SAFCA) will prepare the joint environmental impact statement/environmental impact report (EIS/EIR).

Figure 7.3.—Example of NOI to prepare EIS and Notice of Scoping Meetings (continued).
Background

The March 2007 Folsom Dam Safety and Flood Damage Reduction (Folsom DS/FDR EIS/EIR) included NEPA/CEQA analysis of modifying the Mormon Island Auxiliary Dam (MIAD). The analysis in the Folsom DS/FDR EIS/EIR considered several methods to modify MIAD to achieve Reclamation’s risk standards for dam safety. The May 2007 Record of Decision Folsom Dam Safety of Dams and Security Upgrades Project documented that the preferred alternative for MIAD modification was to place an overlay and seepage control filters on the downstream (terrestrial) side of MIAD and reinforce the MIAD foundation using a construction technique known as jet grouting. At that time, some of the required permits and consultations (Endangered Species Act, Fish and Wildlife Coordination Act, and Sec 106 of the National Historic Preservation Act) were also obtained. Subsequent investigations into the feasibility of the MIAD Modification Project as conceived in the Folsom DS/FDR EIS/EIR have indicated that the design of the MIAD Modification Project will need to be changed to achieve Reclamation’s existing risk standards for dam safety. Specifically, the utilization of jet grouting to stabilize the foundation of MIAD is unlikely to meet those risk standards.

The purpose of the Proposed Action is to reduce the seismic and static risk of failure of MIAD. In this way, Reclamation will achieve the existing standards for dam safety and reduce the risk of injury to those people living and working downstream of the Folsom Dam complex. This proposed project is a feature of the Folsom Dam Safety of Dams Project, and the analysis will tier from the March 2007 NEPA/CEQA environmental analysis, the Folsom DS/FDR EIS/EIR.
At this time, there are no known or possible Indian trust assets or environmental justice issues associated with the Proposed Action.

Special Assistance for Public Scoping Meetings

If special assistance is required to participate in the public scoping meetings, please contact Ms. Elizabeth Vasquez at 916-989-7192, TDD 916-989-7285, or e-mail evasquez@usbr.gov. Please notify Ms. Vasquez as far in advance as possible to enable Reclamation to secure the needed services. If a request cannot be honored, the requestor will be notified. A telephone device for the hearing impaired (TDD) is available at 916-989-7285.

Public Disclosure

Before including your name, address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment — including your personal identifying information — may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: October 28, 2008

Signed: /s/ Michael Chotkowski
Michael Chotkowski
Acting Regional Environmental Officer
Mid-Pacific Region
Mid-Pacific Region  
Sacramento, CA  

MP-08-151  

Media Contact: Michelle H. Light, 916-978-5100, mlight@mp.usbr.gov  

For Release On: November 20, 2008  

Scoping Meetings Planned for the Mormon Island Auxiliary Dam Modification Project at Folsom Reservoir  

As part of ongoing Safety of Dams work at Folsom Reservoir, the Bureau of Reclamation will modify Mormon Island Auxiliary Dam (MIAD), also known as Dike 8, to reduce hydrologic (flooding), seismic (earthquake), and static (seepage) risks. Reclamation, the lead Federal agency under the National Environmental Policy Act, and the Sacramento Area Flood Control Agency (SAFCA), the lead State agency under the California Environmental Quality Act, will prepare a joint Environmental Impact Statement/Environment Impact Report (EIS/EIR).  

Reclamation is conducting studies to determine the preferred alternatives to improve the structure while minimizing impacts to the public, the environment, and the surrounding area. Three Scoping Meetings will be held to provide information and solicit public input. The meetings are being held in an open house format. Attendees are welcome to arrive at any time during the scheduled hours and talk with subject matter experts at several stations. Information will be provided, questions answered, and public comments will be welcomed. The Scoping Meetings are scheduled:  

**Two on Tuesday, December 2, 2008:** Folsom Community Center, 52 Natoma Street, Folsom, CA. An afternoon meeting will be held between 1pm & 4pm and an evening meeting will be held between 6pm & 9pm.  

**One on Thursday, December 4, 2008:** El Dorado Hills Community Services District, 1021 Harvard Way, El Dorado Hills, CA. One evening meeting will be held between 6pm & 9pm.  

The Public Scoping Comment Period on the MIAD Modification Project will be open from Tuesday, December 2, 2008, to Monday, January 5, 2009. Written comments on the scope of the project should be mailed to Ms. Laura Caballero at the Bureau of Reclamation, Central California Area Office, 7794 Folsom Dam Road, Folsom, CA 95630-1799, or e-mailed to MIAD_mods@mp.usbr.gov, or faxed to 916-989-7109.  

Individuals who would like to receive updates on the project may contact Ms. Janet Sierzputowski at the Bureau of Reclamation, 2800 Cottage Way, MP-140, Sacramento, CA 95825, or e-mail jsierzputowski@mp.usbr.gov, or phone 916-978-5112 (TDD 916-978-5608), or fax 916-978-5114. For information on the ongoing work at Folsom Dam and Reservoir, please

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Reclamation is the largest wholesale water supplier and the second largest producer of hydroelectric power in the United States, with operations and facilities in the 17 Western States. Its facilities also provide substantial flood control, recreation, and fish and wildlife benefits. Visit our website at http://www.usbr.gov.
DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Notice of Availability of the Final Environmental Impact Statement for the Cachuma Lake Resource Management Plan, Santa Barbara County, California

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability.

SUMMARY: The final Environmental Impact Statement for the Cachuma Lake Resource Management Plan is available for public review. The Bureau of Reclamation has evaluated comments and is recommending a preferred alternative for approval. The Resource Management Plan involves alternatives for future use of the project area for recreation and resource protection and management.

DATES: Submit comments by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The Bureau of Reclamation will not make a decision on the proposed action until at least 30 days after release of the final Environmental Impact Statement.

ADDRESSES: The final Resource Management Plan and Environmental Impact Statement are available for review at

http://www.usbr.gov/mp/nepa/nepa_projectdetails.cfm?Project_ID=283. Send requests for a compact disc to Mr. Jack Collins, Bureau of Reclamation, 1243 N Street, Fresno, CA 93721. See the SUPPLEMENTARY INFORMATION section for locations where copies are available for public view.

Figure 7.5.—Example of NOA for FEIS.
FOR FURTHER INFORMATION CONTACT: Mr. Jack Collins, Bureau of Reclamation, at (559) 349-4544 (TDD (559) 487-5933) or jwcollins@usbr.gov.

SUPPLEMENTARY INFORMATION: Cachuma Lake is an existing reservoir formed by Bradbury Dam, and located in Santa Barbara County, California. The dam, which provides irrigation, domestic, and municipal and industrial water supplies to the City of Santa Barbara, Goleta Water District, Montecito Water District, Carpinteria Valley Water District, and Santa Ynez River Water Conservation District, was constructed in the 1950s. The Cachuma Project has delivered an average of 25,000 acre-feet per year over the past 45 years and encompasses approximately 9,250 acres. In 1956, operation and maintenance of the Cachuma project was transferred from Reclamation to the Cachuma Operation and Maintenance Board. Reclamation still retains ownership of all project facilities and is responsible for the operation of the dam. The RMP will have a planning horizon of 20 years.

The new Resource Management Plan (RMP) would: (1) Ensure safe storage and timely delivery of high-quality water to users while enhancing natural resources and recreational opportunities; (2) protect natural resources while educating the public about the value of good stewardship; (3) provide recreational opportunities to meet the demands of a growing, diverse population; (4) ensure recreational diversity and the quality of the experience; and (5) provide the updated management considerations for establishing a new management agreement with the managing partner.

The final Environmental Impact Statement (EIS) is a program-level analysis of the potential environmental impacts associated with adoption of the RMP. The final EIS outlines the formulation and evaluation of alternatives designed to address these issues by
representing the varied interests present at the Plan Area and identifies Alternative 2 (Enhancement) as the preferred Alternative. The RMP is intended to be predominately self-mitigating through implementation of RMP management actions and strategies, and the EIS also includes measures intended to reduce the adverse effects of the RMP.

A Notice of Availability of the Draft EIS was published in the Federal Register on July 25, 2008 (73 FR 43472). The written comment period on the Draft EIS ended on September 23, 2008. On October 9, 2008 a notice was published in the Federal Register (73 FR 59669) extending the comment period on the Draft EIS until October 31, 2008. The final EIS contains responses to all comments received and reflects comments and any additional information received during the review period.

Copies of the Final EIS are available at the following locations:

- Bureau of Reclamation, Mid-Pacific Region, Regional Library, 2800 Cottage way, Sacramento, CA 94825.
- Bureau of Reclamation, South-Central California Area Office, 1243 N. Street, Fresno, CA 93721.
- Cachuma Lake State Recreation Area, Highway 154, Santa Barbara, CA 93454.
- Santa Maria Public Library, Central Location, 420 South Broadway Avenue, Santa Maria, CA 93454.
- Santa Barbara Public Library, 40 East Anapamu Street, Santa Barbara, CA 93101.
- Bureau of Reclamation, Denver Office Library, Building 67, Room 167, Denver Federal Center, 6th and Kipling, Denver, CO 80225.

Figure 7.5.—Example of NOA for FEIS (continued).
Figure 7.5.—Example of NOA for FEIS (continued).

- Natural Resources Library, U.S. Department of the Interior, 1849 C Street, NW, Main Interior Building, Washington, DC 20240-0001.

Public Disclosure

Before including your name, address, phone number, e-mail address, or other personal identifying information in any correspondence, you should be aware that your entire correspondence – including your personal identifying information – may be made publicly available at any time. While you ask us in your correspondence to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: April 21, 2010

Signature: /s/ David W. Gore
          Assistant Regional Director
          Mid-Pacific Region
DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Notice of Availability of a Draft Environmental Impact Statement and Notice of Public Hearings for the Aspinall Unit, Colorado River Storage Project, Colorado

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability and notice of public hearings.

DES 09-02

SUMMARY: The Bureau of Reclamation, the Federal agency responsible for operation of the Aspinall Unit, has prepared and made available to the public a Draft Environmental Impact Statement on Aspinall Unit operations.

DATES: Submit written comments on the Draft Environmental Impact Statement on or before April 24, 2009, (otherwise use this phrase [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]).

Two public hearings have been scheduled to receive oral and written comments on the Draft Environmental Impact Statement:

- Tuesday, April 7, 2009 – 6:30 p.m. to 9:00 p.m., Gunnison, CO.
- Wednesday, April 8, 2009 – 6:30 p.m. to 9:00 p.m. Delta, CO.

ADDRESSES: Send written comments and requests for copies to Mr. Steve McCall, Bureau of Reclamation, Western Colorado Area Office, 2764 Compass Drive, Suite 106, Grand Junction, CO 81506; facsimile (970) 248-0601; or e-mail smcall@ac.usbr.gov.


Figure 7.6.—Example of NOA and Notice of Public Hearings for DEIS.
The public hearings will be held at:

- Gunnison -- Gunnison County Fairgrounds, 275 S. Spruce Street, Gunnison, CO 81230.
- Delta -- Bill Heddles Recreation Center, 530 Gunnison River Drive, Delta, CO 81416.

See SUPPLEMENTARY INFORMATION section for locations of where copies of the Draft Environmental Impact Statement are available for public review and inspection.

FOR FURTHER INFORMATION CONTACT: Mr. Steve McCall, (970) 248-0638; smccall@uc.usbr.gov.

SUPPLEMENTARY INFORMATION: Pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. Sec. 4332, the Draft Environmental Impact Statement (DEIS) describes the environmental impacts of alternatives to operate the Aspinall Unit to assist in implementing flow recommendations for endangered fish provided by the Upper Colorado River Endangered Fish Recovery Program (Recovery Program). Under the direction of the Recovery Program, Aspinall Unit releases were evaluated beginning in 1992. At the completion of the research, the Recovery Program published the Flow Recommendations to Benefit Endangered Fishes in the Colorado and Gunnison Rivers (McAda, 2003). The recommendations include spring peak and base flow targets for various hydrologic conditions in the Gunnison River Basin.

The purpose of modifying operations of the Aspinall Unit is to provide sufficient releases of water at times, quantities, and duration necessary to avoid jeopardy to

Figure 7.6.—Example of NOA and Notice of Public Hearings for DEIS (continued).
endangered fish species and adverse modification of their designated critical habitat in the lower Gunnison River while maintaining the authorized purposes of the Aspinall Unit.

The Upper Colorado River Basin at one time was inhabited by 14 native fish species, four of which are now endangered. These four fish are the Colorado pikeminnow, razorback sucker, bonytail, and humpback chub. They exist only in the Colorado River Basin. The four fish are endangered because of adverse impacts to their habitat over the last 125 years. The two types of habitat impacts that appear to have had the greatest effect have been water development and introduction of non-native fish (McAda, 2003).

The Bureau of Reclamation (Reclamation) is required to comply with the Endangered Species Act (ESA) for operation of its facilities, including the Aspinall Unit. Within the exercise of its discretionary authority, Reclamation must avoid jeopardizing the continued existence of listed species and destroying or adversely modifying designated critical habitat.

Copies of the DEIS are available for public review and inspection at the following locations:

- Main Interior Building, Natural Resources Library, Room 1151, 1849 C Street, NW, Washington, DC 20240-0001.
- Bureau of Reclamation, Upper Colorado Regional Office, 125 South State Street, Room 7418, Salt Lake City, UT 84138-1147.

Figure 7.6.—Example of NOA and Notice of Public Hearings for DEIS (continued).
• Bureau of Reclamation, Western Colorado Area Office, 2764 Compass Drive, Suite 106, Grand Junction, CO 81506.

Libraries
• Delta County Public Library, Delta, Colorado.
• Mesa County Public Library, Grand Junction, Colorado.
• Montrose County Public Library, Grand Junction, Colorado.
• Gunnison County Library, Gunnison, Colorado.

Background
The Aspinall Unit, located on the Gunnison River in western Colorado, is an authorized storage unit of the Colorado River Storage Project (CRSP). The Aspinall Unit includes three dams and reservoirs (Blue Mesa, Morrow Point, and Crystal) along a 40-mile reach of the Gunnison River. The Aspinall Unit is one of the four key features of the CRSP intended to develop the water resources of the Upper Colorado River Basin and is operated in accordance with the CRSP Act and applicable Reclamation and other Federal laws.

Purpose and Need for Action
Under the proposed action, the Aspinall Unit will be operated to avoid jeopardizing the continued existence of, and assist in the recovery of, the endangered fishes. This will help facilitate future water development to proceed in the Upper Colorado River Basin in compliance with applicable laws, compacts, court decrees, and Indian trust responsibilities. The proposed action is needed because Reclamation is required to comply with the Endangered Species Act for the operation of facilities,

Figure 7.6.—Example of NOA and Notice of Public Hearings for DEIS (continued).
including the Aspinall Unit. Within the exercise of its discretionary authority, Reclamation must avoid jeopardizing the continued existence of listed species or adversely modifying designated critical habitat.

**Proposed Federal Action**

Reclamation proposes to operate the Aspinall Unit to avoid jeopardizing the continued existence of downstream endangered fish species while maintaining and continuing to meet all of the project’s authorized purposes. Reclamation would implement the proposed action by modifying the operations of the Aspinall Unit, to the extent possible, to help achieve river flows recommended by the Recovery Program. This change in Aspinall Unit operations would assist in conserving endangered fish in the Gunnison and Colorado rivers and would maintain authorized project purposes.

**Hearing Process Information**

Oral comments at the hearings will be limited to five minutes. The hearing officer may allow any speaker to provide additional oral comments after all persons wishing to comment have been heard. All comments will be formally recorded. Speakers not present when called will lose their privilege in the scheduled order and will be recalled at the end of the scheduled speakers. Speakers are encouraged to provide written versions of their oral comments, and any other additional written materials, for the hearing/administrative record.

Written comments should be received by Reclamation's Western Colorado Area Office using the contact information provided above no later than Friday, April 24, 2009, for inclusion in the hearing/administrative record. Under the NEPA process, written and
oral comments, received by the due date, are given the same consideration. Written
comments, Reclamation responses, and public hearing statements (oral comments) will be
used in the preparation of the final environmental impact statement.

**Public Disclosure**

Before including your name, address, phone number, e-mail address, or other
personal identifying information in your comment, you should be aware that your entire
comment – including your personal identifying information – may be made publicly
available at any time. While you can ask us in your comment to withhold your personal
identifying information from public review, we cannot guarantee that we will be able to
do so.

Dated: ______________________

Signed: ______________________

Name
Title
Region
Figure 7.7.—Example of letter from a Regional Director to the Office of the Federal Register Transmitting FR Notice for a Delegated EIS.
Figure 7.8.—Example of memorandum requesting approval to print Nondelegated EIS.
DEPARTMENT OF THE INTERIOR

Truckee River Operating Agreement, California and Nevada

AGENCY: Department of the Interior.


SUMMARY: Pursuant to the National Environmental Policy Act of 1969, as amended, (NEPA) and the California Environmental Quality Act (CEQA), the U.S. Department of the Interior (Interior) and California Department of Water Resources (DWR), as co-lead agencies, have jointly prepared a FEIS/EIR for the Truckee River Operating Agreement (TROA) which would implement Section 205(a) of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, Title II of Public Law 101-618 (Settlement Act). The FEIS/EIR has evaluated the proposed action (TROA Alternative), Local Water Supply Alternative, and No Action Alternative. Implementation of the proposed action would not result in any significant adverse environmental effects. A Notice of Availability of the Revised DEIS/EIR was published in the Federal Register on August 25, 2004 (69 FR 52303). The public review period on the Revised DEIS/EIR initially ended on October 29, 2004, but was extended to December 30, 2004.

DATES: No Federal or State decision will be made on the proposed action until a minimum of 30 days after the release of the FEIS/EIR. After this 30-day period, Interior and DWR will complete their respective Record of Decision (ROD) and Notice of Determination (NOD). The ROD and NOD will identify the action to be implemented.
ADDRESSES: A copy of the FEIS/EIR (compact disk or bound) may be obtained by writing to Kenneth Parr, Bureau of Reclamation (Reclamation), 705 North Plaza St., Rm. 320, Carson City, NV 89701 or by calling Reclamation at 800-742-9474 (enter 26) or 775-882-3436 or DWR at 916-651-0746. The FEIS/EIR is also accessible from the following website: http://www.usbr.gov/mp/troa/. See Supplementary Information section for locations where the FEIS/EIR is available for public review.

FOR FURTHER INFORMATION CONTACT: Kenneth Parr, Reclamation, 775-882-3436, TDD 775-882-3436, fax 775-882-7592, kparr@mp.usbr.gov; or Michael Cooney, DWR, 916-651-0746, fax 916-651-0766, mikec@water.ca.gov. Information is also available at the Bureau of Reclamation website: http://www.usbr.gov/mp/troa/.

SUPPLEMENTARY INFORMATION: Copies of the FEIS/EIR are available for public review at:

- California Department of Water Resources, Central District Office, 901 P St., Suite 313B, Sacramento, CA 95814.
- Bureau of Reclamation, Public Affairs Office, 2800 Cottage Way, Sacramento, CA 95825.
- Bureau of Reclamation, 705 North Plaza Street, Carson City, NV 89701.
- Fish and Wildlife Service, 1340 Financial Blvd, Rm. 234, Reno, NV 89502.
- At various county libraries; please call 800-742-9474 (enter 26) for locations.
TROA Background

Section 205(a) of the Settlement Act directs the Secretary of the Interior (Secretary), in conjunction with others, to negotiate an operating agreement governing operation of Federal Truckee River reservoirs and other specified matters. Interior, U.S. Department of Justice, States of California and Nevada, Pyramid Lake Paiute Tribe, Sierra Pacific Power Company, Truckee Meadows Water Authority, and other entities in California and Nevada completed a negotiated agreement (i.e., Negotiated TROA) in February 2007. The Negotiated TROA is available as an appendix to the FEIS/EIR or viewed at http://www.usbr.gov/mp/troa/.

TROA would, in part, (1) enhance conditions for the threatened Lahontan cutthroat trout and endangered cui-ui in the Truckee River basin; (2) increase municipal and industrial (M&I) drought protection for Truckee Meadows (Reno-Sparks metropolitan area); (3) improve Truckee River water quality downstream from Sparks, Nevada; and (4) enhance instream flows and recreational opportunities in the Truckee River basin. At the time TROA takes effect, the Settlement Act provides that a permanent allocation between California and Nevada of water in the Lake Tahoe, Truckee River, and Carson River basins will also take effect. Allocation of those waters has been a long-standing issue between the two States; implementation of TROA resolves that issue. In addition, Section 205 of the Settlement Act requires that TROA, among other things, implement the provisions of the Preliminary Settlement Agreement as modified by the Ratification Agreement (PSA) and ensure that water is stored in and released from Federal Truckee River reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch decree and Truckee River General Electric decree. PSA
is a 1989 agreement between Sierra Pacific Power Company and the Pyramid Lake Paiute Tribe to change the operation of Federal reservoirs and Sierra Pacific’s exercise of its Truckee River water rights to (1) improve spawning conditions for threatened and endangered fish species (cui-ui and Lahontan cutthroat trout) and (2) provide additional M&I water for Truckee Meadows during drought situations. Sierra Pacific’s obligations and associated water rights have since been assigned to the Truckee Meadows Water Authority (TMWA).

Before TROA can be approved by the Secretary and the State of California, potential environmental effects of the agreement must be analyzed pursuant to NEPA and CEQA. Accordingly, Interior and DWR have jointly prepared a FEIS/EIR for that purpose. A DEIS/EIR based on an earlier draft agreement was initially prepared and released for public review in February 1998. Subsequently, ongoing negotiations substantially modified the proposed agreement, resulting in the preparation of a Revised DEIS/EIR released in August 2004. The FEIS/EIR contains responses to comments received on the Revised DEIS/EIR.

**Current Activities**

Following agreement to the Negotiated TROA in February 2007 by the negotiators, a FEIS/EIR was completed. The Negotiated TROA is available as an appendix to the FEIS/EIR or viewed at [http://www.usbr.gov/mp/troa/](http://www.usbr.gov/mp/troa/). The FEIS/EIR considers current conditions as well as three alternatives: (1) No Action Alternative (current reservoir management in the future, without TROA); (2) Local Water Supply Alternative (current reservoir management in the future with modified water sources, without TROA); and (3) TROA (changed reservoir management in the future). Section

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**Figure 7.9.—Example of NOA for Nondelegated FEIS (continued).**
205 of the Settlement Act also requires that TROA, once approved, be issued as a Federal
Regulation. A draft regulation is being prepared for publication in the Federal Register
at a later date. The Secretary cannot sign TROA until a ROD has been completed. The
State of California cannot sign TROA until it has considered and certified a FEIS/EIR.
These and other steps, including approval by the Orr Ditch and Truckee River General
Electric courts, must be completed before TROA may be implemented.

Description of Alternatives

The TROA Alternative is identified in the FEIS/EIR as the preferred and
environmentally superior alternative.

No Action Alternative (No Action). Under No Action, Truckee River reservoir
operations would remain unchanged from current operations and would be consistent
with existing court decrees, agreements, and regulations that currently govern surface
water management (i.e., operating reservoirs in the Truckee River and Lake Tahoe basins
and maintaining current minimum instream flows) in the Truckee River basin. TMWA’s
existing programs for surface water rights acquisition and groundwater pumping for M&I
use would continue. Groundwater pumping and water conservation in Truckee
Meadows, however, would satisfy a greater proportion of projected future M&I demand
than under current conditions. Groundwater pumping in California would also increase
to satisfy a greater projected future M&I demand.

Local Water Supply Alternative (LWSA). All elements of Truckee River
reservoir operations, river flow management, Truckee River hydroelectric plant
operations, minimum reservoir releases, reservoir spill and precautionary release criteria,
and water exportation from the upper Truckee River basin and Lake Tahoe basin under
LWSA would be the same as described under No Action. The principal differences between LWSA and No Action would be the source of water used for M&I purposes, extent of water conservation, implementation of a groundwater recharge program in Truckee Meadows, and assumptions regarding governmental decisions concerning approval of new water supply proposals.

**TROA Alternative (TROA).** TROA would modify existing operations of all designated reservoirs to enhance coordination and flexibility while ensuring that existing water rights are served and flood control and dam safety requirements are met. TROA would incorporate, modify, or replace various provisions of the Truckee River Agreement (TRA) and the Tahoe-Prosser Exchange Agreement (TPEA). As negotiated, TROA would supersede all requirements of any agreements concerning the operation of all reservoirs, including those of TRA and TPEA, and would become the sole operating agreement for all designated reservoirs.

All reservoirs would continue to be operated under TROA for the same purposes as under current operations and with most of the same reservoir storage priorities as under No Action and LWSA. The Settlement Act requires that TROA ensure that water is stored in and released from Truckee River reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch decree and Truckee River General Electric decree, except for those rights that are voluntarily relinquished by the parties to the PSA, or by any other persons or entities, or which are transferred pursuant to State law.

The primary difference between TROA and the other alternatives is that TROA would provide opportunities for storing and managing various categories of credit water, not provided for in current operations. Signatories to TROA generally would be allowed

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**Figure 7.9.—Example of NOA for Nondelegated FEIS (continued).**
to accumulate credit water in storage by retaining or capturing water in a reservoir that would have otherwise been released from storage or passed through the reservoir to serve their respective downstream water right (e.g., retaining Floriston Rate water that would have been released to serve an Orr Ditch decree water right). In cases with a change in the place or type of use, such storage could take place only after a transfer in accordance with applicable State water law. Once accumulated, credit water would be classified by category with a record kept of its storage, exchange, and release. Credit water generally would be retained in storage or exchanged among the reservoirs until needed and released to satisfy its beneficial use. The Interim Storage Agreement (negotiated in accordance with Section 205(b) (3) of the Settlement Act) would be terminated and new storage agreements between the Bureau of Reclamation and TROA signatories desiring to store credit water would be required.

In addition to credit water, TROA also establishes criteria for new wells in the Truckee River Basin in California to minimize short-term reduction in stream flow, provides for the implementation of the interstate allocation between California and Nevada, provides for the settlement of litigation, establishes a habitat restoration fund for the Truckee River, and establishes more strict conditions and approval requirements for pumping or siphoning water from Lake Tahoe, among other benefits.

Dated: ____________________________

Signed: ____________________________
Willie R. Taylor
Director, Office of Environmental Policy and Compliance
Figure 7.10.—Example of letter from the Director of OEPC to the Office of the Federal Register transmitting FR Notice for Nondelegated EIS.
Figure 7.10.—Example of letter from the Director of OEPC to the Office of the Federal Register transmitting FR Notice for Nondelegated EIS (continued).
United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

IN REFERENCE TO
96-42030
ENV-6.00

U.S. Environmental Protection Agency
Office of Federal Activities
Mail Code 2252 – A Room 7241
Areil Rios Building (South Oval Lobby)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Subject: Draft Environmental Impact Statement (Draft EIS) for the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead

In compliance with Section 102(2)(c) of the National Environmental Policy Act of 1969 and in accordance with 40 CFR 1506.9, we are enclosing five paper copies of the subject Draft EIS and appendices. This Draft EIS was prepared by the Bureau of Reclamation.

This Draft EIS has been transmitted to all appropriate agencies, special interest groups, and the general public. If you have any questions or need additional information, please contact Terrance J. Fulp, PhD., at (702) 293-8414 or Randall Peterson at (801) 524-3758.

Sincerely,

Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Enclosures – 5 copies

bc: Director, Operations
Attention: 96-42030, 96-42040
Regional Director, Salt Lake City, Utah
Attention: UC-100, UC-140, UC-413, UC-438, UC-700, UC-720
Regional Director, Boulder City, Nevada
Attention: LC-1000, LC-1140, LC-2600, BC00-1000, BC00-1003
(w/o enclosures)

Figure 7.11.—Example of letter from the Director of OEPC to EPA transmitting Nondelegated EIS.
Chapter 7: Environmental Impact Statement—Actions

MEMORANDUM

To: Director, Operations  
Attention: 96-42040 (UC)

From: Larry Walkoviak  
Regional Director

Subject: Navajo-Gallup Water Supply Project Planning Report and Final Environmental Impact Statement (PR/FEIS) – Filing Package (Control No. FES 09-10) – Filing Date July 6, 2009

Attached for your processing and hand delivery to appropriate entities are the following documents for filing the subject PR/FEIS:

1. Regional Director’s letter to the Environmental Protection Agency (EPA) transmitting one paper copy of the FEIS (Volumes 1-3) and three copies of the FEIS in electronic format.

2. Regional Director’s memorandum to the Office of Environmental Policy and Compliance (OEPC) transmitting one paper copy of the FEIS (Volumes 1-3) and two copies of the FEIS in electronic format.

3. A signed copy of the Notice of Availability for the Navajo-Gallup Water Supply Project PR/FEIS. The signed transmittal letter to the Office of the Federal Register and three signed originals of the Notice of Availability (along with a CD) have already been sent via Federal Express to the Office of the Federal Register for publication. The Notice of Availability will be published in the Federal Register on Monday, July 6, 2009.

4. Four paper copies of the FEIS, Volumes 1-3. The control number for the PR/FEIS has already been obtained from the Office of Environmental Policy and Compliance. The control number for this PR/FEIS is FES 09-10. This number must be printed, stamped, or hand written on the front page or cover sheet of each paper copy of the EIS in the filing package. Of the four paper copies of the document, one copy should be provided to EPA, one copy should be provided to OEPC, one copy should be provided to Interior’s Natural Resource Library (no transmittal memorandum is needed), and one copy should be retained in the Liaison’s Office for future use.

Figure 7.12.—Example of memorandum from the Regional Director to the Director, Operations, transmitting filing package to the Regional Liaison.
5. Seven copies of the FEIS in electronic format. Of the seven copies in electronic format, three copies should be provided to EPA, two copies should be provided to OEPC, one copy should be provided to Interior’s Natural Resource Library, and one copy should be retained in the Liaison’s Office for future use.

The actual filing of the PR/FEIS with EPA should occur on Monday, July 6, 2009. Jayne Kelleher of the regional office will coordinate with you throughout the filing process to ensure that the filing package is processed in accordance with National Environmental Policy Act guidelines. If you have any questions, please contact Ms. Kelleher at 801-524-3680. In addition, please notify Ms. Kelleher immediately upon receipt of this memorandum and attachments and when the documents have been successfully filed.

Attachments

be: UC-413, UC-720
WCG-CDeAngelis, WCG-BUlenberg, WCG-TStroh
WCD-SPowers, WCD-MFrancis
(w/attachments)
UC-413
ENV-6.00

U.S. Environmental Protection Agency
Office of Federal Activities
EIS Filing Section
Ariel Rios Building (South Oval Lobby), Room 7220
1200 Pennsylvania Avenue, N.W.
Washington, DC 20004

Subject: Navajo-Gallup Water Supply Project Planning Report/Final Environmental Impact Statement

In accordance with Section 102(2)(c) of the National Environmental Policy Act of 1969, we are enclosing five paper copies of the Navajo-Gallup Water Supply Project Planning Report and Final Environmental Impact Statement, Volumes 1-3.

Transmittal to the public will be completed the same day this document is submitted for filing. For further information, please contact Terry Stroh at 970-248-0608.

Sincerely,

Larry Walkoviak
Regional Director

Enclosures

bc: 96-42040
UC-413, UC-720
WCG-CDeAngelis, WCG-BUilenberg, WCG-TStroh
WCD-SPowers, WCD-MFrancis
(w/o enclosures)

Figure 7.13.—Example of letter from the Regional Director to EPA transmitting Delegated EIS.
Memorandum

To: Director, Office of Environmental Policy and Compliance
   Department of the Interior, Washington, D.C.

From: Larry Walkoviak
      Regional Director

Subject: Navajo-Gallup Water Supply Project Planning Report and Final Environmental Impact Statement (PR/FEIS)

In accordance with Section 102(2)(c) of the National Environmental Policy Act of 1969, we are attaching one paper copy and two CDs of the PR/FEIS, Volumes 1-3.

If you have any questions or need additional information, please contact Mr. Terry Stroh, Bureau of Reclamation, at 970-248-0608.

Attachments

be: 96-42040
    UC-413, UC-720
    WCG-CDeAngelis, WCG-BUilenberg, WCG-TStroh
    WCD-SPowers, WCD-MFrancis
    (w/o attachments)

Figure 7.14.—Example of memorandum to the Director of OEPC transmitting EIS.
Dear Interested Party:

Enclosed for your review and comment is a copy of the Planning Report and Draft Environmental Impact Statement for the Navajo-Gallup Water Supply Project (PR/DEIS). The PR/DEIS was prepared by the Bureau of Reclamation and provides a discussion for the: (1) various ways to provide a municipal and industrial (M&I) water supply to the Navajo Nation; City of Gallup, New Mexico; and Jicarilla Apache Nation; (2) identification of a preferred alternative; and (3) associated environmental impacts and costs of such an endeavor, should it be undertaken.

The PR/DEIS presents alternatives for providing an anticipated year 2040 M&I water supply for the project area. Alternatives considered include diverting and distributing water from the San Juan River using various configurations, water conservation using existing groundwater supplies, and no action.

The PR/DEIS is now available for a 90-day public review period. Public meetings to obtain input on the PR/DEIS will take place from 6:00 p.m. to 9:00 p.m. and are scheduled as follows:

- **Tuesday, May 22, 2007** – University of New Mexico, Calvin Hall Room 248, 200 College Drive, Gallup, New Mexico

- **Wednesday, May 23, 2007** – Crownpoint Chapter House, Building CO23-001, East Crownpoint Road, Crownpoint, New Mexico

- **Thursday, May 24, 2007** – St. Michaels Chapter House, St Michaels, Arizona

- **Tuesday, June 5, 2007** – Shiprock Chapter House, Highway 61, Shiprock, New Mexico

- **Wednesday, June 6, 2007** – San Juan College, IT Building, Room 7103, 5001 College Blvd., Farmington, New Mexico

To be most helpful, comments on the draft should be as specific as possible and address the adequacy of the document or the merits of the alternatives. Before including your name, address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold

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**Figure 7.15.—Example of letter to interested parties for DEIS.**
your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Reclamation is not required to seek comments on the Planning Report and Final Environmental Impact Statement for the Navajo-Gallup Water Supply Project (PR/FEIS). Therefore, you are encouraged to raise all comments, recommendations, or objections regarding the PR/DEIS so that substantive comments are made available in time for Reclamation to meaningfully consider and respond to in the PR/FEIS.

Written comments from those unable to attend the meetings or those wishing to supplement their comments at the meetings should be addressed to Mr. Rege Leach, Bureau of Reclamation, Western Colorado Area Office, 835 East Second Avenue, Suite 300, Durango, Colorado, 81301. Comments may also be submitted by facsimile at 970-385-6539 or electronically at navgal@uc.usbr.gov. Under the National Environmental Policy Act process, written and oral comments, received by the due date, are given the same consideration. Comments on the PR/DEIS must be received by Thursday, June 28, 2007.

If you would like further information or additional copies of the PR/DEIS (paper or CD ROM), please contact Mr. Rege Leach at the address given above, or you may contact him directly at 970-385-6500. The PR/DEIS is also available for viewing at the following internet location: http://www.usbr.gov/uc/rm/navajo/nav-gallup/index.html.

Thank you for participating in this environmental review process.

Sincerely,

/s/ Rick L. Gold

Rick L. Gold
Regional Director

Enclosure

bc: Regional Director, Salt Lake City, Utah
    Attention: UC-413, UC-720
    Area Manager, Grand Junction, Colorado
    Attention: WCD-RLeach
    (w/o attachments)
Interested Parties (See Enclosed List)

Subject: Navajo-Gallup Water Supply Project Planning Report and Final Environmental Impact Statement (PR/FEIS)

Dear Ladies and Gentlemen:

Attached is a copy of the subject PR/FEIS. The document was prepared by the Bureau of Reclamation and filed with the Environmental Protection Agency on Monday, July 6, 2009.

The PR/FEIS describes the environmental impacts of constructing, operating, and maintaining a water supply system to meet project year 2040 water demands. The purpose of the proposed Federal action is to provide the long-term supply, treatment, and transmission of municipal and industrial (M&I) water to the eastern portion of the Navajo Nation, the Jicarilla Apache Nation, and the city of Gallup, New Mexico. Construction of the Navajo-Gallup Water Supply Project was authorized in Public Law 111-11 (Omnibus Public Land Management Act of 2009).

The PR/FEIS describes and analyzes three alternatives. Under the No Action Alternative, it is assumed that M&I water supplies and delivery systems would not be constructed on the eastern side of the Navajo Nation, for the city of Gallup, or the southwestern area of the Jicarilla Apache Nation. Under the other two alternatives, the project would divert a total of 37,764 acre-feet of water per year from the San Juan River with a resulting depletion of 35,893 acre-feet, based on 2040 projected population with a demand rate of 160 gallons per capita per day.

Under the San Juan River-Public Service Company of New Mexico (SJR-PNM) Alternative, the Cutter diversion would require 4,645 acre-feet per year with no return flow to the San Juan River. The Public Service Company of New Mexico diversion would take the remaining 33,119 acre-feet of diversion, with an average return flow of 1,871 acre-feet.

The Navajo Indian Irrigation Project-Amarillo Alternative would divert all project water through improved Navajo Indian Irrigation Project facilities using both Cutter Reservoir and the Amarillo Canal. This alternative also requires the construction of a 4,500 acre-foot lined storage pond located near the Amarillo Canal.

The PR/FEIS identifies the SJR-PNM Alternative as the preferred alternative. Public Law 111-11 authorizes the Secretary of the Interior, acting through the Commissioner of Reclamation, to design, construct, operate, and maintain the project in substantial accordance with the preferred alternative (SJR-PNM) described in the Planning Report and Draft Environmental Impact Statement for the Navajo-Gallup Water Supply Project.
If you have questions or need additional copies of the PR/FEIS, please contact Mr. Stan Powers at 970-385-6555, Mr. Terry Stroh at 970-248-0608, or for TDD access call 800-346-4128. The PR/FEIS is also available on Reclamation’s web site at http://www.usbr.gov/ue/ (click on Environmental Documents).

Sincerely,

Larry Walkoviak
Regional Director

Enclosure

Figure 7.16.—Example of letter to interested parties for FEIS (continued).
Honorable Jeff Bingaman
United States Senator
703 Hart Senate Office Building
Washington, DC  20510

Dear Senator Bingaman:

Enclosed for your review and comment is a copy of the Planning Report and Draft
Environmental Impact Statement for the Navajo-Gallup Water Supply Project (PR/DEIS). The
PR/DEIS was prepared by the Bureau of Reclamation and provides a discussion for the:
(1) various ways to provide a municipal and industrial (M&I) water supply to the Navajo Nation;
City of Gallup, New Mexico; and Jicarilla Apache Nation; (2) identification of a preferred
alternative; and (3) associated environmental impacts and costs of such an endeavor, should it be
undertaken.

The PR/DEIS presents alternatives for providing an anticipated year 2040 M&I water supply for
the project area. Alternatives considered include diverting and distributing water from the San
Juan River using various configurations, water conservation using existing groundwater supplies,
and no action.

The cost analysis contained in this PR/DEIS is based on an appraisal level of analysis. As part of
Reclamation’s efforts to attain greater transparency and accountability with regards to its
engineering analyses, the cost estimate is being repriced. This means that instead of updating the
2005 cost estimates using engineering cost indices, the components of the project will be
individually repriced in order to gain greater confidence in the estimate. Once the repricing is
completed, which we anticipate to occur during the 90-day public comment period, Reclamation
will update the PR/DEIS through an addendum or potentially the use of errata sheets.

Reclamation historically supports projects for construction after a feasibility report is completed
which includes a feasibility level cost estimate. This appraisal level cost estimate does not meet
that requirement. Additional analysis, detail, and updating of the appraisal level cost estimate
presented in this draft report are needed before project construction authorization can be
supported. Failure to complete this additional effort may result in reliance on a cost estimate for
the project which is not sufficient to characterize the expected project cost. The appraisal level
design must be upgraded to feasibility level before Reclamation would begin construction. The
cost of, and time for completing this additional work, would be substantial.

Figure 7.17.—Example of letter to elected officials (optional).
Reclamation has developed this PR/DEIS pursuant to Public Law 92-199 and the general authority to conduct water resources planning under the Reclamation Act of 1902 and all acts amendatory thereof and supplementary thereto. Reclamation, however, does not have the current substantive or budgetary authorization that is required to construct, operate, and maintain any proposed facilities discussed in this PR/DEIS, and it will take an act of Congress to provide such authority. In addition, Reclamation takes no position on whether such a project should be authorized. The indication of a preferred alternative is solely to meet the requirements of the National Environmental Policy Act of 1969 and is not an indication that a particular alternative should be pursued since, as noted earlier, there is no project authorization that would allow Reclamation to commence this project. Finally, we are aware that the Navajo Nation and the State of New Mexico have reached an agreement concerning the settlement of the Navajo’s water rights in the San Juan River Basin in New Mexico and that a part of the settlement is the construction, operation, and maintenance of the Navajo-Gallup Water Supply Project. We wish to be clear that neither Reclamation, the Department of the Interior, or the Administration have taken a position on the Navajo-San Juan Settlement executed between the Navajo Nation and the State of New Mexico and that nothing herein is any indication of any position regarding the overall settlement.

The PR/DEIS is now available for a 90-day public review period. Public meetings to obtain input on the PR/DEIS will take place from 6:00 p.m. to 9:00 p.m. and are scheduled as follows:

- **Tuesday, May 22, 2007** – University of New Mexico, Calvin Hall Room 248, 200 College Drive, Gallup, New Mexico
- **Wednesday, May 23, 2007** – Crownpoint Chapter House, Building CO23-001, East Crownpoint Road, Crownpoint, New Mexico
- **Thursday, May 24, 2007** – St. Michaels Chapter House, St Michaels, Arizona
- **Tuesday, June 5, 2007** – Shiprock Chapter House, Highway 61, Shiprock, New Mexico
- **Wednesday, June 6, 2007** – San Juan College, IT Building, Room 7103, 5001 College Blvd, Farmington, New Mexico

To be most helpful, comments on the draft should be as specific as possible and address the adequacy of the document or the merits of the alternatives. Reclamation is not required to seek comments on the final PR/EIS. Therefore, you are encouraged to raise all comments, recommendations, or objections regarding the PR/DEIS so that substantive comments are made available in time for Reclamation to meaningfully consider and respond to them in the final PR/EIS.

Written comments from those unable to attend the meetings or those wishing to supplement their comments at the meetings should be addressed to Mr. Rege Leach, Bureau of Reclamation, Western Colorado Area Office, 835 East Second Avenue, Suite 300, Durango, Colorado 81301.

Figure 7.17.—Example of letter to elected officials (optional) (continued).
Comments may also be submitted by facsimile at 970-385-6539 or electronically at navgal@uc.usbr.gov. Under the National Environmental Policy Act process, written and oral comments, received by the due date, are given the same consideration. Comments on the PR/DEIS must be received by Thursday, June 28, 2007.

If you would like further information or additional copies of the PR/DEIS (paper or CD ROM), please contact Mr. Rege Leach at the address given above, or you may contact him directly at 970-385-6500. The PR/DEIS is also available for viewing at the following internet location: http://www.usbr.gov/uc/cm/navajo/nav-gallup/index.html.

Thank you for participating in this environmental review process.

Sincerely,

RICK L. GOLD

Rick L. Gold
Regional Director

Enclosure

bc: Regional Director, Salt Lake City, Utah
Attention: UC-413, UC-720
Area Manager, Grand Junction, Colorado
Attention: WCD-RLeach
(w/o attachments)

WBR:JKelleher:glittle:03/20/07:801-524-3680
R:\RMD\JKelleher\Navajo-GallupDEISInterParties

Figure 7.17.—Example of letter to elected officials (optional) (continued).
Honorable Joe Shirley
President, Navajo Nation
P.O. 9000
Window Rock, Arizona 86515

Subject: Navajo-Gallup Water Supply Project Planning Report and Final Environmental Impact Statement

Dear Honorable [Name]:

Enclosed is a copy of the Navajo-Gallup Water Supply Project Planning Report and Final Environmental Impact Statement (PR/FEIS). The document was prepared by the Bureau of Reclamation and filed with the Environmental Protection Agency on Monday, July 6, 2009.

The PR/FEIS describes the environmental impacts of constructing, operating, and maintaining a water supply system to meet project year 2040 water demands. The purpose of the proposed federal action is to provide the long-term supply, treatment, and transmission of municipal and industrial (M&I) water to the eastern portion of the Navajo Nation, the Jicarilla Apache Nation, and the city of Gallup, New Mexico. Construction of the Navajo-Gallup Water Supply Project was authorized in Public Law 111-11 (Omnibus Public Land Management Act of 2009).

The PR/FEIS describes and analyzes three alternatives. Under the No Action Alternative, it is assumed that M&I water supplies and delivery systems would not be constructed on the eastern side of the Navajo Nation, for the city of Gallup, or the southwestern area of the Jicarilla Apache Nation. Under the other two alternatives, the project would divert a total of 37,764 acre-feet of water per year from the San Juan River with a resulting depletion of 35,893 acre-feet, based on 2040 projected population with a demand rate of 160 gallons per capita per day.

Under the San Juan River-Public Service Company of New Mexico (SJR-PNM) Alternative, the Cutter diversion would require 4,645 acre-feet per year with no return flow to the San Juan River. The PNM diversion would take the remaining 33,119 acre-feet of diversion, with an average return flow of 1,871 acre-feet.

The Navajo Indian Irrigation Project-Amarillo (NIIP-Amarillo) Alternative would divert all project water through improved NIIP facilities using both Cutter Reservoir and the Amarillo Canal. This alternative also requires the construction of a 4,500-acre-foot lined storage pond located near the Amarillo Canal.

The PR/FEIS identifies the SJR-PNM Alternative as the preferred alternative. Public Law 111-11 authorizes the Secretary of the Interior, acting through the Commissioner of Reclamation, to design, construct, operate, and maintain the project in substantial accordance with the preferred

Figure 7.18.—Example of letter to affected Indian tribes.
alternative (SJR-PNM) described in the Planning Report and Draft Environmental Impact Statement for the Navajo-Gallup Water Supply Project.

If you have questions or need additional copies of the PR/FEIS, please contact Mr. Stan Powers at 970-385-6555 or Mr. Terry Stroh at 970-248-0608. The PR/FEIS is also available on Reclamation’s web site at http://www.usbr.gov/uec (click on Environmental Documents).

Sincerely,

Larry Walkoviak
Regional Director

Enclosure

Identical letters sent to the following American Indian Tribal Governments:

Honorable Levi Peseta
President, Jicarilla Apache Nation
P.O. Box 507
Dulce, New Mexico 87528

Honorable Matthew Box
Chairman, Southern Ute Indian Tribe
P.O. Box 737
Ignacio, Colorado 81137

Honorable Ernest House, Sr.
Chairman, Ute Mountain Ute Tribe
P.O. Box 248
Towaoc, Colorado 81334

bc: 96-42040
   UC-413, UC-434, UC-720
   WCG-CDeAngelis, WCG-BUilenberg, WCG-TStroh
   WCD-SPowers, WCD-MFrancis
   (each w/o enclosure)
DEPARTMENT OF THE INTERIOR
Bureau of Reclamation


AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of extension.

SUMMARY: The Bureau of Reclamation is extending the review period for the draft Environmental Impact Statement to October 31, 2008. The notice of availability of the DEIS was published in the Federal Register on July 25, 2008 (73 FR 43472). The public review period was originally to end on September 23, 2008.

DATES: Submit written comments on the draft Environmental Impact Statement on or before October 31, 2008.

ADDRESSES: Send written comments and requests for copies to Mr. Jack Collins, Bureau of Reclamation, 1243 N Street, Fresno, CA 93721; or call 559-349-4544 (TDD 559-487-5409); or e-mail jcollins@mp.usbr.gov. The draft Environmental Impact Statement is also accessible from the following website:


See SUPPLEMENTARY INFORMATION section for locations where copies of the draft Environmental Impact Statement are available for public review.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Collins, 559-349-4544 (TDD 559-487-5409); jcollins@mp.usbr.gov.

Figure 7.19.—Example of news release for an NOA and Notice of Public Hearings for DEIS.
SUPPLEMENTARY INFORMATION: Due to public interest in an extended comment period, Reclamation is revising the close of the comment period to October 31, 2008.

Copies of the draft Environmental Impact Statement are available for public review at the following locations:

- Bureau of Reclamation, Mid-Pacific Region, Regional Library, 2800 Cottage Way, Sacramento, CA 95825.
- Bureau of Reclamation, South-Central California Area Office, 1243 N Street, Fresno, CA 93721.
- Cachuma Lake State Recreation Area, Highway 154, Santa Barbara, CA 93105.
- Santa Maria Public Library, 420 South Broadway Avenue, Santa Maria, CA 93454.
- Santa Barbara Public Library, Central Location, 40 East Anapamu Street, Santa Barbara, CA 93101.
- Bureau of Reclamation, Denver Office Library, Building 67, Room 167, Denver Federal Center, 6th and Kipling, Denver, CO 80225.

Public Disclosure

Before including your name, address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment - including your personal identifying information - may be made publicly available at any
time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: September 12, 2008

Signed: /s/ Susan M. Fry
Susan M. Fry
Regional Environmental Officer
Mid-Pacific Region

Figure 7.19.—Example of news release for an NOA and Notice of Public Hearings for DEIS (continued).
DEPARTMENT OF THE INTERIOR
Bureau of Reclamation

Notice of Cancellation of Environmental Impact Statement/Environmental Impact Report
on the Proposed Amendment of the Water Service Contract Between the United States of
America and the Sacramento Municipal Utility District, Sacramento, California

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of cancellation.

SUMMARY: The Bureau of Reclamation and the Sacramento Municipal Utility District
are canceling plans to continue work on a joint environmental impact
statement/environmental impact report on a proposed amendment of the water service
contract between the United States and Sacramento Municipal Utility District. The
reason for canceling is that the project will be addressed as part of the environmental
review processes for both the Freeport Regional Water Project and the American River
Division long-term contract renewal.

FOR FURTHER INFORMATION CONTACT: Mr. Rob Schroeder, Bureau of
Reclamation, (916) 989-7274.

SUPPLEMENTARY INFORMATION: The Bureau of Reclamation and the
Sacramento Municipal Utility District had proposed to amend the existing contract to

Figure 7.20.—Example of news release for an NOA for FEIS.
change the point of diversion of 30,000 acre-feet annually of contract water for municipal
and industrial uses for Sacramento County Water Agency.

Dated: (date signed)                  

Signed: /s/ Frank Michny
        Frank Michny
        Regional Environmental Officer
        Mid-Pacific Region

Figure 7.20.—Example of news release for an NOA for FEIS.
DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Cachuma Lake Resource Management Plan, Santa Barbara County, California

AGENCY: Bureau of Reclamation, Interior.


SUMMARY: The Bureau of Reclamation is extending the review period for the DEIS to October 31, 2008. The notice of availability of the DEIS was published in the Federal Register on July 25, 2008 (73 FR 43472). The public review period was originally to end on September 23, 2008.

DATES: Written comments on the DEIS will be accepted on or before October 31, 2008.

ADDRESSES: Send written comments on the DEIS and requests for copies to Mr. Jack Collins, Bureau of Reclamation, 1243 N Street, Fresno, CA 93721; or call 559-349-4544 (TDD 559-487-5409); or e-mail jcollins@mp.usbr.gov. The DEIS is also accessible from the following website:


See Supplementary Information section for locations where copies of the DEIS are available for public review.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Collins, 559-349-4544 (TDD 559-487-5409); jcollins@mp.usbr.gov.
SUPPLEMENTARY INFORMATION: Due to public interest in an extended comment period, Reclamation is revising the close of the comment period to October 31, 2008.

Copies of the DEIS are available for public review at the following locations:

- Bureau of Reclamation, Mid-Pacific Region, Regional Library, 2800 Cottage Way, Sacramento, CA 95825.
- Bureau of Reclamation, South-Central California Area Office, 1243 N Street, Fresno, CA 93721.
- Cachuma Lake State Recreation Area, Highway 154, Santa Barbara, CA 93105.
- Santa Maria Public Library, 420 South Broadway Avenue, Santa Maria, CA 93454.
- Santa Barbara Public Library, Central Location, 40 East Anapamu Street, Santa Barbara, CA 93101.
- Bureau of Reclamation, Denver Office Library, Building 67, Room 167, Denver Federal Center, 6th and Kipling, Denver, CO 80225.

Public Disclosure

Before including your name, address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment - including your personal identifying information - may be made publicly available at any
time. While you can ask us in your comment to withhold your personal identifying
information from public review, we cannot guarantee that we will be able to do so.

Dated: September 12, 2008

Signed: /s/ Susan M. Fry
        Susan M. Fry
        Regional Environmental Officer
        Mid-Pacific Region

Figure 7.21.—Example of Notice of Extension of Public Comment Period
(continued).
DEPARTMENT OF THE INTERIOR

Bureau of Reclamation


AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of cancellation.

SUMMARY: The Bureau of Reclamation (Reclamation) and the Sacramento Municipal Utility District (SMUD) are canceling plans to continue work on a joint environmental impact statement/environmental impact report (EIS/EIR) on a proposed amendment of the water service contract between the United States and SMUD. The reason for canceling is that the project will be addressed as part of the environmental review processes for both the Freeport Regional Water Project and the American River Division long-term contract renewal.

FOR FURTHER INFORMATION CONTACT: Mr. Rob Schroeder, Reclamation, at (916) 989-7274.

SUPPLEMENTARY INFORMATION: Reclamation and SMUD had proposed to amend the existing contract to change the point of diversion of 30,000 acre-feet

Figure 7.22.—Example of Notice of Cancellation.
annually of contract water for municipal and industrial uses for Sacramento County Water Agency.

Dated:  (date signed) 

Signed:  /s/ Frank Michny 
Frank Michny 
Regional Environmental Officer 
Mid-Pacific Region
Chapter 7 Useful Links

Administrative Procedures Act

Clean Air Act
http://www.epa.gov/air/cca/

Clean Water Act
http://epw.senate.gov/water.pdf

Departmental Manual
http://elips.doi.gov/app_dm/index.cfm?fuseaction=home

Endangered Species Act

ESM 10-14

ESM 10-15

ESM 10-17
http://oepc.doi.gov/ESM/ESM%2010-17(Tiered%20and%20Transference%20of%20Analyses).pdf

ESM 11-2

Federal Register Document Drafting Handbook

National Environmental Policy Act
http://ceq.hss.doe.gov/laws_and_executive_orders/the_nepa_statute.html

Reclamation Manual, AMD- 01-02
40 CFR 1500-1508
http://ceq.hss.doe.gov/ceq_regulations/regulations.html

43 CFR 46
http://www.doi.gov/oepc/nepafr/docs/Federal%20Register%20October%202015,%202008%20NEPA.pdf
Chapter 8

Environmental Impact Statement—Content

8.1 Preparation (40 CFR 1501 through 1502 and 43 CFR 46.415)

To achieve NEPA’s purposes for an EIS (see chapters 2 and 3), Reclamation offices shall prepare EISs in the following manner:

EISs shall:

- Be prepared by an interdisciplinary team, formed as soon as an EIS is determined to be likely, and integrated into all aspects of project development.

- Be analytic rather than encyclopedic.

- Discuss impacts in proportion to their significance, with only a brief discussion of less-than-significant issues. As in an EA, only enough discussion should be included to show why more study is not warranted.

- Be concise and no longer than absolutely necessary to comply with NEPA and CEQ regulations. Length should vary primarily with potential environmental issues and then with project complexity.

- State how alternatives considered in the EIS and decisions based on it will or will not achieve the objectives defined in Sections 101 and 102(1) of NEPA and other environmental laws and policies.

- Present a range of alternatives to be considered by the ultimate agency decisionmakers.

The document should not be written in such a way that it appears to justify decisions already made or to promote an alternative. The analysis must remain objective and free from editorial comment.

EIS preparers should strive to keep EISs within the normal 150-page limit set by the CEQ regulations. For proposals of unusual scope and complexity, the CEQ regulations state that documents shall normally not exceed 300 pages in length. However, proposals of great complexity sometimes result in EISs that require more analyses and documentation and can be even greater in length. This
should be the exception and not the norm. The document should be written in a clear, concise fashion, based on the necessary environmental analysis. Every attempt should be made to avoid overly technical language or jargon. The text and appropriate graphics should be presented so the decisionmakers and the public can readily understand them.

8.2 Format and Organization
(40 CFR 1502.10 and 43 CFR 46.415)

CEQ regulations (40 CFR 1502.10) identify a preferred standard format that can be modified to fit a particular situation. The regional and Policy and Administration environmental staff should be consulted before a nonstandard format is used.

The standard CEQ format includes:

- a. Cover sheet
- b. Summary
- c. Table of contents
- d. Purpose of and need for action
- e. Alternatives including the proposed action
- f. Affected environment
- g. Environmental consequences
- h. List of preparers
- i. Distribution list
- j. Index
- k. Appendices (if any)

Sections a, b, c, h, i, and j are required and shall be in any format used. The substance of sections d, e, f, g, and k shall also be included in any EIS.

The EIS may be organized in several ways. Some of the more common variations are:

- A combined “Affected Environment” and “Environmental Consequences” discussion

- Separate “Affected Environment” and “Environmental Consequences” sections

- Display effects on an alternative-by-alternative basis, analyzing each affected resource or feature under one alternative before turning to the next alternative and its effects
• Describe one affected resource, or a group of similar resources, followed by a comparison of the impacts of each alternative upon it on an alternative-by-alternative basis.

All of these approaches, or different combinations of them, are acceptable. Generally, the combined “Affected Environment/Environmental Consequences” chapter is more difficult to write but is considered by some to be easier for the reader, and it reduces redundancy. An EIS with more than a few alternatives and resources to be analyzed may use separate chapters to best present the information so readers can compare alternatives. The EIS team should carefully consider which of these presentations is most appropriate for a particular EIS. Each environmental resource or feature should be analyzed by alternative in the same manner; each should have the net environmental effects, or residual impacts, given in summary form either at the beginning or end of the discussion. When the analyses are complete, their net effects should be summarized and placed in tabular form at the conclusion of the section.

Alternatives and resources should be presented in the same order throughout the document. Generally, the no action alternative is presented first to form the basis for comparison of impacts among the action alternatives. If the impacts of an alternative are the same as those of a previously presented alternative, then this fact should be noted, and the impacts should not necessarily be restated. If the impacts of the alternative are significantly different than those of the previously presented alternatives, these significant impacts should be described in detail.

When listed species or designated critical habitat, ITAs, sacred sites, or environmental justice may be affected, impacts should be specifically addressed in separate, identified sections. If appropriate, the EIS should explicitly state that there are no ITA or environmental justice issues related to the proposed action.

8.2.1 Organization by Affected Resources or Features

The most commonly used organization of analysis is by affected resource area (e.g., water quality impacts are discussed in one location for all the alternatives). If the affected resources approach is used, the resources to be affected are discussed along with historic and present conditions and no action conditions; then, the impacts of the alternatives on the affected resource or feature are presented alternative by alternative and are compared to the no action alternative. If a resource or feature will not be affected by the alternatives, and the resource or feature is of significant local concern, the fact that the parameter will not be affected should be stated. The fact that alternatives may have the same or similar impacts should be stated and supported—it is not necessary to redescribe each and every impact of similar alternatives upon a given resource or feature.
8.2.2 Organization on an Alternative-by-Alternative Basis

The impacts analysis can, instead, be presented on an alternative-by-alternative basis, in which all of the impacts of one alternative for all of the affected resource areas are grouped together; then, the impacts of the next alternative are presented, etc. If the alternative-by-alternative approach is used, the impacts of each alternative are described on a resource-by-resource basis under each alternative. The impacts of the action alternatives are determined by comparison to the no action alternative. In the absence of reasonably foreseeable changes, the no action alternative may be no different than the existing affected environment. If it is different, the differences between the existing affected environment and the no action alternative should be discussed.

When separate alternatives have the same impact on a resource or feature, redundancy can be reduced by analyzing the impacts of one alternative and simply referring back to that analysis for other alternatives with similar impacts.

8.3 Cover Sheet
(40 CFR 1502.11)

CEQ regulations require the use of a cover sheet, unless there is a compelling reason not to do so. The cover sheet should not exceed one page (figure 8.1) and should include:

- A list of the responsible agencies, including the lead agency and any cooperating agencies.

- The title of the proposed action (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.

- The name, address, and telephone number of the person at Reclamation who can supply additional information. In most cases, this person will have had overall direct responsibility for the development of the EIS.

- A designation of the statement as a draft or final, or as a draft or final supplement, and the name of any other document with which it is integrated (EIS/feasibility study, etc.).

- A one-paragraph abstract of the EIS to include a statement as to whether the EIS is intended to serve any other review or compliance requirements (i.e., Section 404(r) exemption or compliance with EOs 11988 and 11990).

- Due date for comments in the case of a DEIS.
8.4 Summary
(40 CFR 1502.12)

The summary may be a separate document to stand in place of the EIS and can be circulated separately if the EIS is unusually long. It should adequately and accurately summarize the EIS and contain at least four elements—the purpose and need statement, the alternatives considered, a comparison of impacts of the alternatives, and identification of the preferred alternative (if known for the DEIS, and always for the FEIS). The summary shall emphasize the major conclusions, areas of controversy, issues raised by agencies and the public, and the issues to be resolved, including the choice of alternatives. It should include a clear definition of the action and the alternatives considered in the EIS (including the no action alternative). It should also include a comparison of the alternatives that highlights unresolved or controversial issues, with appropriate discussion of ITA, sacred sites, and environmental justice issues. It should not contain material not found in the main EIS and should be less than 15 pages long. The format should parallel the format of the EIS.

8.5 Purpose and Need Statement
(40 CFR 1502.13)

This section shall present a brief statement explaining why the action is being considered—the underlying purpose and need to which the agency is responding. This brief statement is a critical element that sets the overall direction of the process and serves as an important screening criterion for determining which alternatives are reasonable. All reasonable alternatives examined in detail must meet the defined purpose and need.

Interior’s regulations at 43 CFR 46.420(a)(1) indicate that, in accordance with 40 CFR 1502.13, “purpose” and “need” may be described as distinct aspects defining the underlying situation that the agency is responding to. The “need” for action is the underlying problem the agency wants to fix or the opportunity to which the agency is responding with the action. The “purpose” is the goals or objectives that the agency is trying to achieve. Under this language, the purpose may be equated with the desired future condition. Note that this separate treatment of purpose and need is not required, and a single brief statement addressing purpose and need together may be adequate. The presentation is at the responsible official’s discretion.

A brief background discussion may be included for additional information, as appropriate. Appropriate background information can include a brief history leading to the current situation, a summary of the authorizations that exist for the action, the legal constraints that limit action, and other information that assists a
reader in understanding how the purpose of and need for the project came to exist. This background discussion should be general and not tied to any specific alternative.

Care must be taken to ensure an objective presentation rather than a justification. A purpose and need statement will generally allow a limited range of reasonable alternatives. If a purpose and need statement appears to allow only one reasonable solution, the statement, as well as the reasons for rejecting other alternatives, should be re-examined and confirmed or revised, as appropriate.

8.5.1 Defining the Federal Action

Simultaneously with the development of the purpose and need statement, the EIS should define, in a brief statement, what Federal action is under consideration. The Federal action is not necessarily the same thing as the preferred alternative, nor (especially for applicant-driven actions) the proposed action. The Federal action is the general response to the purpose and need and has a number of alternatives. For example, if the purpose and need statement indicates that a refuge is suffering from disease problems because of low water during the summer months, the proposed Federal action could be defined as supplying water to the refuge; the alternatives would encompass ways in which to supply water to the refuge (ground water, pipeline, new reservoir, etc.).

The proposed action should be defined in terms of the Federal decision to be made. When the proposed action is related to other actions—especially other Federal actions—a careful consideration of the independent value of the proposed action should be made. When the independence of the proposed action is not clear, it may be appropriate to expand the scope to include those other actions.

8.6 Description of Alternatives

(40 CFR 1502.14 and 43 CFR 46.415 (b) and 46.110)

The CEQ NEPA regulations characterize the alternatives chapter as “the heart of the environmental impact statement.” When preparing a planning report/environmental impact statement (PR/EIS), the PR portion must consider the P&G, and the EIS portion must consider CEQ regulations. Whenever two similar, but different, levels of requirements are to be met, every effort should be made to meet both levels of requirements. In every case, Reclamation shall meet the most extensive analysis requirements that are applicable. The discussion of alternatives shall include:

- 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.
Devote substantial treatment to each alternative considered in detail (reasonable alternatives), including the preferred alternative, so that reviewers may evaluate their comparative merits.

Include reasonable alternatives not within the jurisdiction of the lead agency.

Include the no action alternative. “No action” may be interpreted differently depending upon the nature of the proposal. No action can mean “no change” from current management or operations; or in a case where a new project is proposed, it can mean “no project.”

Identify the agency’s preferred alternative, if one or more exists in the DEIS, and identify such alternatives in the FEIS.

Include appropriate mitigation measures not already included in the alternatives. This will include identification of mitigation measures requested by an agency with jurisdiction by law, but not included. The reasons for not including the recommendations should be provided.

Reclamation will identify any consensus-based alternative(s) developed using consensus-based management.

The physical features and operational criteria of each reasonable alternative should be described in a concise fashion and a map included, if needed, to distinguish among alternatives. The descriptions are to help the reader understand the environmental impacts that will be discussed later.

A recommended order for the presentation of alternatives is:

- General discussion of the basis for the selection of alternatives (linkage between underlying purpose and need for action and alternatives).

- No action.

- Action alternatives—The alternatives should be presented in a logical order. This may be from simplest to most complex, or the preferred alternative may be first, or some other logical sequence may be followed. The same order of presentation should be used throughout the document. Note that the preferred alternative should be identified (if known for the DEIS, and always for the FEIS). Brief summary of alternatives considered, but not studied in detail, along with the reasons for their having been eliminated.
When preparing an EIS, the preferred alternative and other action alternatives studied in detail should receive comparable levels of analysis. CEQ requires the environmental impacts of the preferred alternative and reasonable alternatives to be presented in comparative form, sharply defining the issues and providing a clear basis for choice (§ 1502.14). The emphasis is upon comparability of the environmental effects, not on whether every alternative has been developed to exactly the same degree of detail. The presentation of alternatives should focus on differences—where alternatives are the same, the text can be reduced by referring to the descriptions of alternatives already discussed. Mitigating measures to reduce or eliminate adverse environmental consequences should be integrated into the action alternatives.

8.6.1 No Action Alternative

A no action alternative must always be evaluated in the EIS. Because the no action alternative is the basis to which all other alternatives are compared, it should be presented first, so the reader can easily compare the other alternatives to it. “No action” represents a projection of current conditions and reasonably foreseeable actions to the most reasonable future responses or conditions that could occur during the life of the project without any action alternatives being implemented.

The no action alternative should not automatically be considered the same as the existing condition of the affected environment because reasonably foreseeable future actions may occur whether or not any of the project action alternatives are chosen. When the no action alternative is different from the existing condition, as projected into the future, the differences should be clearly defined. Differences could result from other water development projects, land use changes, municipal development, or other actions. “No action” is, therefore, often described as “the future without the project.” Sufficient discussion should be devoted to the no action alternative so that readers can make the needed comparisons for the evaluation. For O&M studies, the no action alternative assumes continuing current O&M activities with no change.

For projects with staged development, in which major features have been constructed but the project is not yet operational, it is not appropriate to select a no action alternative that assumes existing project facilities would not be used or would be removed. The appropriate characterization would be to assume an operational scenario based on those existing facilities. In some cases, however, it may not be possible to operate a project that is only partially constructed. In those instances, the no action alternative could describe a situation in which existing facilities would not be put into service. Authorized projects in the area being carried out by Reclamation, other Federal agencies, or other entities, with a reasonable certainty of occurring, should be considered in the no action alternative as being constructed. A project may be reasonably foreseeable if it is
included in a party’s master plans or development plans, the necessary approvals have been granted, funds appropriated, and other necessary compliance requirements met.

8.6.2 Action Alternatives

In examining the range of alternatives, CEQ’s memorandum of July 22, 1983, states, in part, that “an agency’s responsibilities to examine alternative sites have always been bounded by some notion of feasibility.” CEQ stresses that agencies should not disregard the “common sense realities” of a given situation in developing alternatives. While this guidance is aimed at considering alternatives to an applicant’s proposal, it has equal relevance in considering proposals generated within Reclamation (i.e., when considering the range of viable alternatives to the preferred action, the agency should strive for a realistic range of alternatives that reasonably could be considered and that will accomplish the project purpose and need). The range should include alternatives based upon input from other agencies, the public at large, and local community interests. If one or more community alternative(s) exist, and it is feasible and practical, it should be included in the EIS.

The lead agency has the ultimate responsibility to determine the appropriate range of alternatives. This decision can be controversial. Where substantial controversy may exist concerning the range selected, the criteria used to limit the alternatives should be explicitly defined by Reclamation and logically supported.

Action alternatives include the proposed action and all other feasible and reasonable alternatives that will be evaluated in the EIS. Reclamation must consider potentially reasonable alternatives beyond its own jurisdiction and consider the jurisdictions of other agencies (Federal and otherwise) when determining what reasonable alternatives should be considered. If an alternative outside an agency’s authority became the preferred alternative, implementation would depend on a change in authorization, a change of lead Federal agency to one with the appropriate authority, or a transfer of the project to a non-Federal entity. It could also lead to the cancellation of the project.

Each action alternative should address the purpose of and need for the action as described in the “Purpose and Need” chapter of the document. The discussion of alternatives should also state how each alternative would or would not achieve the requirements of Section 101 and 102 (1) of NEPA and other environmental laws and policies. The appropriate discussion should be presented for each alternative so that reviewers may evaluate the environmental impacts of each alternative by comparing them to the no action alternative. The proposed action (see section 7.5.1) should be identified in the document to make the readers aware of the action that is being contemplated, allowing them to focus their review on that action.
Because issues and objectives may be complex and sometimes competing, a particular alternative should be a distinctly different approach from others and may emphasize the achievement of some objectives at the expense of others. Minor variations should be considered subalternatives rather than separate alternatives. Any reasonable alternative with anticipated environmental consequences that differ significantly from those of the preferred alternative should be considered a major alternative and analyzed fully.

For clarity, each major alternative should be given a descriptive name, number, or letter, although a descriptive name is preferred to a number or letter. When an alternative is assigned a number or letter the first time it is presented, and, thereafter, it is presented by the letter or number, it can be problematic because it is difficult for most readers to retain and associate the number or letter with that particular alternative throughout the remainder of the EIS. For instance, it is easier for the reader to associate an alternative with a name like “San Juan Alignment” than it is to retain “Alternative 3” or “Alternative C.” In addition, it is easier to change the order in which alternatives designated by name appear than it is to change those designated by letter or number.

The discussion of the alternatives should conclude with a graphic comparison of the alternatives that is based mainly on the impact summaries found in the “Environmental Consequences” chapter.

Mitigation measures and environmental commitments that are to be incorporated as a result of the EIS’s analyses should be integrated into the appropriate alternatives. These mitigation measures then become an integral part of those alternatives—in other words, those particular alternatives cannot be described without the mitigation measures. However, other alternatives without the integrated mitigation measures may also be reasonable and should still be included.

Any additional mitigation measures not integrated into the action alternatives will be included in the “Environmental Commitments” section of the EIS. For those mitigation measures requiring approval or permits from another entity, agreement may be necessary with the USACE, Service, BIA, and other responsible Federal agencies and should be described in the “Consultation and Coordination” chapter of the EIS.

The discussion of the alternatives should include, where appropriate:

- Location of alternatives and alternative project features, including a legal description and a map or sketch
- Amount and ownership of lands to be affected
- Area to be disturbed
- Numbers, locations, and photographs or drawings of structures to be constructed, including utilities
- Water and wastewater quantities, wastewater disposal plans, and water conservation measures
- Mitigation plans and landscape restoration plans
- Costs associated with the alternative, including those for mitigation
- Descriptions of operational criteria

8.6.3 Alternatives Eliminated from Detailed Study

Other alternatives considered, but not found to be technically feasible or reasonable, should be presented briefly, along with the reasons they were eliminated from further analysis. Examples of reasons for elimination include:

- Failure of the alternative to meet the requirements of the purpose and need for the action.
- The alternative is prohibitively greater in cost or in environmental impacts than the other alternative.
- The alternative cannot be reasonably implemented, whether because of technical limitations or other considerations.

This list is for example purposes only, and many factors may play a role in appropriately limiting the range of alternatives considered, including the ability to meet the need in a timely fashion, social and economic factors, and legal constraints. The instruction in the CEQ regulations to “Include reasonable alternatives not within the jurisdiction of the lead agency” (40 CFR 1502.14(c)) indicates that alternatives beyond an agency’s authority may be included, but other factors may still cause such an alternative to be unreasonable and not analyzed in detail.

A complete listing of all alternatives seriously considered or publicly discussed in the scoping process should be included. If the public involvement process was unusually complex, it may be appropriate to provide an appendix that summarizes those alternatives identified during public involvement and later considered and eliminated.

The issue of reasonableness is a judgment call by Reclamation. Usually, after scoping an action, Reclamation will have an idea if an alternative may be unreasonable to implement due to social, cultural, or political realities. During the process of eliminating alternatives, the interdisciplinary team should develop a set
of screening criteria against which all alternatives should be measured. This will assist in making the process more objective and defensible. The criteria could include such items as cost limits, geographic boundaries, scheduling goals, or time constraints. Some of these items may be dictated by the authorization for the project.

8.6.4 Identifying a Preferred Alternative

Reclamation shall identify an agency-preferred alternative in the FEIS (unless prohibited by law) (40 CFR 1502.14(e) and 43 CFR 46.425). It should be noted that CEQ regulations do not require the identification of a preferred alternative in a DEIS if none has been determined. If an alternative exists which has the consensus of the affected community and it is reasonable and practicable, meets the purpose and need for action, and is within Reclamation’s statutory authority to implement, Reclamation should designate it as the preferred alternative or explicitly explain why it was not so designated (43 CFR 46.110).

The preferred alternative should be an alternative that completes the action and that best meets the purpose and need for the action as defined in the EIS. Defining the preferred alternative does not define the agency’s final decision. It is not necessary to provide a separate discussion in the EIS on the rationale for selection of a preferred alternative. That specific discussion is most appropriate for the ROD. The intention is to let the public know what the agency considers the best alternative, based upon the information available. Public comments or other considerations may result in a change in the preferred alternative and may even result in the final decision (recorded in the ROD) not being the preferred alternative in either the DEIS or the FEIS.

8.6.5 Environmentally Preferable Alternative

The alternative, or alternatives, considered to be environmentally preferable may be specified. The “environmentally preferable alternative” is defined as “the alternative that will best 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 that best protects, preserves, and enhances historic, cultural, and natural resources (CEQ’s Forty Most Asked Questions, No. 6a). To be selected for implementation, the environmentally preferable alternative must be a reasonable alternative (40 CFR 1502.14 (a)). Reclamation must identify the environmentally preferable alternative in the ROD and may do so in the FEIS. Reclamation must consider, but is not obligated to select, the environmentally preferable alternative in its decision on the proposal (40 CFR 1505.2 (a) and 43 CFR 46.450).
8.6.6 Summary Comparison of Alternative Impacts

A summary table comparing the impacts of all alternatives (including no action) should be attached to the end of the alternatives chapter. Whenever possible, numerical comparisons should be used. Brief narrative comparisons are permissible if numerical comparisons cannot be made. In the case of the PR/EIS, tables displaying information required by the P&G should be included. The graphic display should provide a comparison of the tradeoffs between alternatives and a listing of proportionate effects and merits of each alternative. If more explanation is required, footnotes may be used to qualify the importance of a particular impact.

8.7 Affected Environment

(40 CFR 1502.15)

This section should begin with a general description of the physical environment of the project area and a map defining the project area, the associated ecosystem(s), and the affected environment. The entire area of potential effect is included in the discussion of affected environment, including potentially affected areas outside the immediate project area. If available, the historic changes and trends affecting a resource or feature, up to and including present conditions, should be described to set the stage for the projection of future changes and trends concerning the resource or feature. Emphasis should be placed on environmental parameters that would be significantly affected by the alternatives. Only brief treatment should be given to characteristics that would not be affected. This brief treatment can include a statement that no further analysis of the resource is included in the EIS. All EISs should include a clearly labeled discussion of cultural resources, sacred sites, ITAs, and environmental justice.

For critical environmental areas or issues—such as ITAs, invasive species, environmental justice, cultural resources, and T&E species—a brief discussion of ongoing activities that may affect them is needed. When ongoing activities may be having significant effects upon these areas or issues, the discussion should summarize both the significance of the ongoing effect and what specific ongoing activity is causing the effect, even when the alternatives do not address these effects.

The general description constitutes a basis from which specific environmental effects can be assessed. The general description should include not only the physical setting for the project, but it should describe those features—geographic, cultural, recreational, or unique or significant wildlife or vegetation—that distinguish the affected area from other areas.

When discussing the area resource or feature affected by each alternative, the discussions become far more specific than in the general description and provide
details on those features which would be affected by the project. For instance, if alternative B is found in the Sonoran Desert Life Zone but is in an area with a high number of Joshua trees, the Sonoran Desert Life Zone should be discussed in the general description, and the specific description of the Joshua trees should be saved for the vegetation parameter under the alternative. This organization allows the flexibility to provide a complete general description of the project area, while at the same time avoiding detailed and specific description of parameters that will only be affected by one alternative.

If two or more alternatives share the same affected environment (as will often be the case), it is not necessary to repeat the description of that environment. Instead, reference should be made to the description already provided. For instance, if the preferred alternative would affect 300 acres of riparian vegetation, the area should be described in sufficient detail that the extent and severity of the impact on it are understood. However, if another alternative involves the same 300 acres of riparian vegetation, plus an additional 50-acre parcel of the same vegetation, the description of the original 300 acres would not be repeated for this other alternative.

8.8 Environmental Consequences
(40 CFR 1502.16)

This discussion forms the basis for the comparison of alternatives. The impacts of each alternative should be quantified and analyzed separately in an organized and logical manner. This impact analysis should include at least the following items:

- The direct effects and their significance
- The indirect effects and their significance
- Quantification of the impact (when possible)
- Mitigation for the impact
- The resultant net, or residual, impact
- Cumulative effects
- ITAs
- Indian sacred sites

The impact analysis should focus on potentially significant effects and should not include discussion of impacts that are minor and short term.

Whenever possible, data from the Service, U.S. Geological Survey, or other technically acceptable sources should be used to support the impact analysis.
CEQ characterization of “effect,” as described in Section 1508.8, cites:

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.1 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.

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

The analysis will compare the reasonable action alternatives to the no action alternative to determine the net effect or impact of each of the action alternatives. This allows the analysis to focus upon the impacts that would be the result of the action under consideration, sharply distinguishing the different impacts associated with each of the alternatives.

This section should also include discussions of any potential conflicts with existing land use policies or energy requirements of the various alternatives and any differences in energy conservation potential, ITAs, Indian sacred sites, and environmental justice. An example of a residual or net impact:

If the preferred alternative of a certain project would result in the loss of 300 acres of riparian vegetation, and Reclamation has developed a mitigation plan that would mitigate for this 300 acres of riparian vegetation, then the net loss, or residual impact of the proposal on riparian vegetation, amounts to 0 acres.

If, however, alternative B would result in the loss of 350 acres of riparian vegetation, and the mitigation plan is the same (mitigation of only 300 acres), the net effect of alternative B would be the loss of 50 acres of nonmitigated riparian vegetation.

This same procedure should be followed throughout the impact analysis of all the parameters. Once the residual or net impacts have been determined, they are transferred to a chart that can be used to compile the tabular comparison of alternatives.

1 This definition is consistent with “reasonably certain to occur” definition in ESA regulations.
8.8.1 Issue Tracking

All discussions of potential impact areas should track the same basic sets of issues that have been identified by scoping. The EIS should be prepared so that any reader can track any of the identified issues easily and quickly throughout the document. This can be done in headings, footers, side icons, and other methods.

8.8.2 Analysis in the Absence of Information

(40 CFR 1502.22 and 43 CFR 46.125)

When the agency is evaluating reasonably foreseeable adverse impacts, and there is incomplete or unavailable information, the agency shall make clear that such information is lacking. Every effort should be made to collect all information essential to a reasoned choice between alternatives. If the information relevant to a reasoned choice cannot be collected because of exorbitant cost or because no means exists to gather the information (i.e., it does not exist, or there is no way to get it), the agency shall, in the EIS:

- State that such information is incomplete or not available
- Indicate the relevance of the incomplete or unavailable information to reasonably foreseeable adverse impacts
- Include a summary of existing credible scientific evidence relevant to the foreseeable adverse impact
- Include an evaluation of the reasonably foreseeable adverse impact, based upon theory or research methods generally acceptable to the scientific community

Reasonably foreseeable adverse impacts must be within the “rule of reason” standard (i.e., it is based upon credible scientific evidence and the agency’s efforts to take a hard look at the information,\(^2\) not just conjecture. Impacts of low probability but having catastrophic consequences, if supported by credible evidence and the rule of reason, must be displayed (§ 1502.22 (b)).

The EIS analysis is not limited to readily available information. If information exists that is relevant to a potentially significant adverse impact, that information should be included in the analysis. If new information is needed that is relevant to reasonably foreseeable significant adverse impact and that can be gathered at reasonable expense, the information should be gathered and incorporated into the analysis. Exorbitant costs may preclude the gathering of information desired for the best possible analysis. All costs must be considered when making this determination, including such things as social costs, delays, opportunity costs, and nontimely fulfillment of statutory mandates. This determination should be

\(^2\) See Oregon Natural Resources Council v. Lowe, 109F.3d 521 (9th Cir. 1997)
made by the responsible official and the reasons documented as part of the discussion required by 40 CFR 1502.22 and this section. See also this handbook’s discussion of Adaptive Management (section 8.9).

8.8.3 Direct and Indirect Impacts
(40 CFR 1502.16 (a)(b) and 40 CFR 1508.8)

The direct and indirect impacts on the human and natural environment also must be identified and quantified. Project activities may directly result in the relocation of people, power lines, pipelines, oil and gas wells, mining roads, and railroads and may also result in such indirect impacts as the loss of agricultural lands. These relocations and losses, and the indirect losses associated with them, must be identified and quantified, as appropriate. Additional social and economic impacts, such as impacts to cultural or ethnic groups, should be addressed.

Impacts may be either beneficial or adverse. Examples of some environmental parameters that may be affected by the preferred alternative are identified in Section 8.7, Affected Environment.

The appropriate investigations, data collection, and data analysis that are required to identify and quantify direct and indirect impacts and to develop project features, including enhancement and mitigation features, should be conducted by technically qualified persons.

Some examples of direct impacts are those associated with highway and railroad relocations; reductions in downstream flows; loss of a natural stream or river; or losses of fish, wildlife, endangered species, archeological sites, farmland, wetlands, homes, oil wells, or unique areas caused by the construction of a dam and related water conveyance system.

Although indirect impacts are frequently difficult to identify and measure, the indirect impacts that can reasonably be expected to occur, should Reclamation proceed with a given proposal, need to be analyzed. However, such potential indirect effects can only be meaningfully analyzed if they are measurably different from no action conditions.

Indirect effects, as defined in the CEQ regulations (40 CFR 1508.8(b)), may include growth-inducing effects, changes in land use, changes in population density, or changes in growth rate and related effects on natural systems. The potential for a Reclamation proposal to cause these types of indirect effects must be examined in light of whether the proposal is the principal cause of these effects (the “but-for” issue) or is incidental (secondary) to effects that are likely to occur anyway because of some other activities. Future development projects may be determined by reviewing local planning documents and zoning ordinances. If the proposal’s effects are incidental to development and land use that is planned and addressed in local planning documents, this should be documented, and no further analysis is necessary. Other types of analysis may also adequately document that
Reclamation actions do not have indirect effects. For example, analysis may show that Reclamation actions related to water supply delivery are not responsible for indirect effects when the water supply is a replacement supply or when it can be demonstrated that other water supply alternatives would reasonably be implemented (because of cost and availability) in lieu of the Reclamation action. See discussions in Section 4.13, Changing Water Use, and Section 11.6, How Much is Enough? in this handbook.

State and local administrative requirements that could have an effect on the proposal or range of alternatives must be considered in arriving at a net impact scenario. However, there must be a high degree of certainty that applicable legal requirements (e.g., issuance of permits) would be implemented in a timely manner should the Federal action take place.

8.8.4 Cost-Benefit Analysis of Alternatives
(40 CFR 1502.23)

An EIS is not required to contain a cost-benefit analysis if such an analysis is not relevant to the choice among action alternatives. The situation calling for such an analysis will likely be rare but may occur in some proposals for environmental enhancement and other projects. If a cost-benefit analysis is relevant to the choice among environmentally different alternatives, it shall be included in the EIS—either in the text or appendices.

8.8.5 Cumulative Impacts
(40 CFR 1508.7, 1508.25, and 43 CFR 46.115)

CEQ regulations implementing NEPA define cumulative impacts as:

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

Cumulative impacts are to be considered along with direct and indirect effects in determining the scope of an EIS. The scoping process should be designed to identify associated actions (past, present, or future) which, when viewed with the proposed or alternative actions, may have cumulative significant impacts. Future cumulative impacts should not be speculative but should be based upon known or reasonably foreseeable long-range plans, regulations, operating agreements, or other information that establishes them as reasonably foreseeable. An office may establish explicit criteria for an individual EIS to define future actions which are reasonably foreseeable in a particular situation.

Note that the definition of cumulative impacts is different under NEPA than ESA. CEQ’s definition in its NEPA regulations is broader than the ESA and encompasses all reasonably foreseeable future actions, including Federal actions.
Cumulative impacts under the ESA include those actions under NEPA (State, tribal, local, and private actions) but exclude Federal actions unrelated to the proposed action that have not undergone ESA Section 7 consultation. This distinction should be noted if a BA is being integrated into the NEPA document as opposed to being appended to it.

Cumulative impacts can be categorized as additive or interactive. An additive impact emerges from persistent additions from one kind of source, whether through time or space. An interactive impact results from more than one kind of source. Piecemeal physical destruction of wetlands is additive; physical destruction of wetlands combined with damage from toxic substances is interactive.

The courts have addressed different aspects of cumulative effects analysis in NEPA documents, including an agency’s failure to address additive and interactive effects and the methodology used to analyze cumulative effects. Reclamation needs to undertake a thorough analysis of cumulative effects in its NEPA documents and to ensure that the scientific methodology it is using is appropriate and accurate. CEQ guidance (June 24, 2005) and Interior regulations (43 CFR 46.115) both indicate that an exhaustive analysis of past actions is not necessary. Past actions are to be analyzed in the context of the information’s usefulness to the agency’s analysis of the proposed action and alternatives. Reclamation retains considerable discretion “as to extent of such inquiry and the appropriate level of explanation.”

Cumulative impacts can be presented in the document in a variety of ways. Inclusion of past and present cumulative impacts in the affected environment and reasonably foreseeable future actions in the no action alternative is encouraged. This approach aids the reader in making the comparison of action alternative effects to no action as required by CEQ regulations (40 CFR 1502.14). Alternatively, a separate section that consolidates all cumulative impacts can be prepared, but this approach often results in repeating background information and leads to a disjointed analysis. While commonly used, this approach is not now generally recommended. Either of these presentations can also be used with a resource by resource basis, which is recommended. That is, when discussing wetlands, for example, all the direct, indirect, residual, net, and cumulative impacts to wetlands related to the alternative being presented would be described.

While an expectation exists among reviewers and the public that there will be a separate section discussing cumulative impacts, the most appropriate means to include cumulative impacts within the document is at the discretion of Reclamation. There is no required format for presenting cumulative impacts. It is required, however, to include cumulative impacts within the scope of the analysis. It is recommended that the discussion(s) of cumulative impacts be clearly labeled so that, even if not in a unique section, the reader can readily find and understand how cumulative effects are presented in the document.
8.8.6 Energy and Depletable Resources  
(40 CFR 1502.16(e) and EO 13514)  
Energy requirements and conservation potential shall be discussed, as applicable, as part of the EIS for each alternative. This discussion shall include appropriate analysis of energy usage and alternative energy sources.

8.8.7 Mitigation Measures  
(40 CFR 1502.14 (f), 1502.16 (h), 1508.20, and 43 CFR 46.130)  
A discussion of reasonable and appropriate mitigation is required for identified impacts. When the proposed action is an applicant’s proposal, the proposal must include, at a minimum, those design elements required to comply with all applicable environmental laws. Reclamation should analyze the applicant’s proposal and may propose additional, reasonable mitigation to address impacts. This additional mitigation may, with the applicant’s approval, be integrated into the proposal or may be presented as a separate alternative.

Mitigation measures can include proposals that avoid an impact, changes that minimize an impact, actions that reduce an impact, or actions that compensate for the impact. Effective mitigation should result in a real change to an impact. Mitigation can relate to either site-specific effects (the most usual case) or to ecosystem effects.

The effects of mitigation measures should be analyzed in the Environmental Consequences discussion in two ways. First, the impacts of the mitigation feature will be discussed. For example, if Reclamation purchases a 500-acre farm as wildlife habitat replacement, certain social and economic impacts occur by taking this farm out of agricultural production and off the local tax rolls. These impacts come from the purchase of the mitigation feature and need to be analyzed. Second, the mitigation potential of the habitat replacement area and the extent to which this will reduce the impacts on a given environmental resource or feature should be addressed. In the case of the 500-acre farm, this would be an analysis of its habitat potential and how much this would lessen the impact on wildlife habitat. The change in net wildlife habitat due to the alternative under discussion, including the 500-acre habitat replacement, is the impact.

8.8.8 Unavoidable Adverse Impacts  
(NEPA Section 102(2)(c)(ii) and 40 CFR 1502.16)  
Unavoidable adverse impacts are those environmental consequences of an action that cannot be avoided, either by changing the nature of the action or through mitigation if the action is undertaken. The discussion of impacts for all alternatives will include a discussion of the adverse impacts that cannot be avoided. These should also be highlighted in the summary discussion of alternatives.
8.8.9 Relationship Between Short-Term Uses and Long-Term Productivity
(NEPA Section 102(2)(c)(iv) and 40 CFR 1502.16)

Each resource area should include a discussion of long-term versus short-term effects (positive and negative). When a short-term positive effect is counterbalanced by a long-term negative effect (and vice versa), this should be highlighted in alternative descriptions. This is an area where analysis is difficult, and some special effort may be required to develop an adequate analysis.

8.8.10 Irreversible and Irretrievable Commitments of Resources
(NEPA Section 102(2)(c)(v) and 40 CFR 1502.16)

NEPA requires that the environmental analysis identify “any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented.” The Act, CEQ NEPA regulations, and NEPA guidance, however, do not define “resources” and how this requirement is to be applied.

Reclamation and other Federal agencies have interpreted irreversible and irretrievable commitments to mean the use of nonrenewable resources and the effects this use would have for the future. Irreversible commitment of resources occurs as a result of the use or destruction of a specific resource (e.g., minerals extraction, destruction of cultural resources) which cannot be replaced or, at a minimum, restored over a long period of time and possibly at great expense. Irretrievable commitment of resources refers to actions resulting in the loss of production or use of natural resources. It represents opportunities foregone for the period of time that a resource cannot be used (e.g., land conversion to new uses; construction of levees preventing the natural flooding of flood plains).

The analysis shall, for each alternative, identify those commitments of resources that are irreversible and irretrievable.

8.8.11 Environmental Justice
(EO 12898)

When potential impacts to minority or low-income populations are identified, the chapter describing environmental impacts will contain a section entitled Environmental Justice. The section will include a full analysis of such impacts, or a summary of impacts will be fully described elsewhere in the chapter. When impacts to a minority or low-income population are identified, the discussion should address whether the populations are being disproportionately affected by the action and the reasonable efforts made to avoid any disproportionate effect. If the alternative had no disproportionate impact on minority or low-income populations, this should be so stated. Finally, the discussion of public involvement in the EIS will include a summary of the efforts made to ensure that
all income groups and minority populations within the area potentially affected by the action were included in the public involvement process, including the means used to overcome language and cultural barriers to participation.

8.8.12 Impacts on Other Federal and Non-Federal Projects and Plans
(40 CFR 1502.16(c))

Every EIS shall discuss all related Federal and non-Federal projects in the study area. The effects of the proposed action, either positive or negative, shall be presented in the EIS and shared as soon as available with the Federal or non-Federal project operators. Possible conflicts with all existing land use plans, policies, and controls shall be discussed. Reasonable options to avoid and/or mitigate negative effects should be investigated and presented in the EIS.

8.8.13 International Impacts
(43 CFR 46.170 and EO 12114)

Reclamation will consider the effects of Federal actions upon the environment outside the United States. This consideration shall follow the provisions and procedures of EO 12114. The effects encompass transboundary effects resulting from Federal actions within the United States and may be addressed appropriately in either an EA or an EIS. When transboundary effects are an issue for a proposed action, Reclamation shall coordinate with Interior through OEPC. Interior shall consult with the Department of State, which is responsible for coordination of all communications with foreign governments. Additionally, where international boundary commissions exist (with Mexico and Canada) and are applicable to the proposed action, appropriate information concerning potential effects shall be shared with such commissions.

NEPA practitioners should be aware that the application of NEPA in regard to transboundary effects of Federal actions has been undergoing legal review. Consequently, for any Reclamation action that could have transboundary effects, the appropriate Reclamation office should contact the Office of the Solicitor for guidance on how to proceed.

8.8.14 Indian Trust Assets

All EISs shall address the potential effects of alternatives upon ITAs. The discussion of ITAs should appear in a clearly labeled section. (See Indian Trust Asset Policy and Guidance.) If no effects to ITAs are foreseen, the EIS should explicitly say so.

8.8.15 Indian Sacred Sites

All EISs shall address the potential effects of alternatives upon Indian sacred sites, consistent with EO 13007. When there are potentially significant impacts, there should be a discussion under a separately labeled section in the
Environmental Consequences section. When there are no impacts or only “insignificant” ones, the scoping section should contain a discussion of the impacts or a statement that there are none.

8.9 Adaptive Management
(43 CFR 46.145 and 522 DM 1)

Sometimes there is not sufficient scientific data or knowledge available to make an accurate prediction regarding the social, economic, and ecological impacts of a proposed action or alternatives, or from proposed mitigation. If the impacts could be significant and there is considerable controversy over the outcome, the decisionmaker should consider developing an adaptive management program to monitor the results of the decision.

Adaptive management is not specifically defined in CEQ regulations or guidance. Adaptive management provides for adjustments to management actions or alternatives based upon new information. Given that adaptive management is only applicable where uncertainty exists concerning impacts, it is unlikely that adaptive management can be applied to a proposed action being addressed by an EA.

Adaptive management may be carried out by appropriate staff and managers according to the following steps:

- Determine measurable goals for outcome of management actions.
- Outline current understanding of system functions and outputs.
- Establish quantified objectives and controls.
- Initiate the action.
- Monitor and evaluate the outcomes.
- Review goals and objectives.
- Redirect the action, if necessary.

An adaptive management plan should be developed in coordination and collaboration with other governmental agencies, stakeholders, and interest groups, as appropriate. The proposed plan should be detailed in the DEIS for public review and comment. The ROD would lay out the final plan as part of the Environmental Commitments program. If it becomes necessary to adjust an action or alternative, additional NEPA compliance may be required if the change is not within the range evaluated in the original NEPA analysis. The public should be made aware in the ROD that this possibility exists.

Additional information on adaptive management can be found online in the 2007 Department publication entitled, Adaptive Management – The U.S. Department of the Interior Technical Guide, at http://www.doi.gov/initiatives/AdaptiveManagement/index.html (See also ESM 10-20.)
8.10 Consultation, Coordination, and Cooperation

This chapter of the EIS should describe the history of relevant public involvement activities that have taken place or are expected to take place during the planning of the project. The history should include any information sessions held to improve the public’s understanding of the NEPA process. The chapter should provide a listing of the official cooperating agencies and the names of any other agencies or technical experts that were consulted and contributed to the EIS analysis. The chapter should also include separate, titled sections summarizing or describing public involvement activities undertaken to identify and assess impacts to ITAs and minority or low-income populations.

This chapter may contain a listing or description of specific work meetings, scoping sessions, public meetings, news releases, newsletters, and any other consultation and coordination activities. It should include discussions and consultation with agencies or experts who provided significant information for the analysis, including FWCA recommendations, ESA consultation, and cultural resources coordination. Times and dates of meetings or activities, and the purpose and results of the meetings or activities, should be included.

8.10.1 Related Laws, Rules, Regulations, and Executive Orders

CEQ regulations (40 CFR 1500.2 and 1502.25) encourage related environmental laws, rules, regulations, and EOs to be integrated concurrently to the fullest extent possible in an EIS. Brief explanations of how the EIS has complied with these legal requirements may be added to the Consultation and Coordination chapter or to the Purpose and Need chapter.

The EIS shall list all Federal permits, licenses, and other entitlements that must be obtained to implement the proposal and include the status of meeting such requirements. The laws, rules, regulations, and EOs that usually are addressed in an EIS include:

- Fish and Wildlife Coordination Act, P.L. 85-624
- Wild and Scenic Rivers Act, P.L. 90-542
Chapter 8: Environmental Impact Statement—Content

- Executive Orders 11988 (Floodplain Management), 11990 (Protection of Wetlands), 12898 (Environmental Justice), 13007 (Indian Sacred Sites), 13112 (Invasive Species), and 13186 (Migratory Birds)

- CEQ memorandum dated August 11, 1980, Prime and Unique Agricultural Lands and the National Environmental Policy Act

Additional permits, compliance activities, and other processes may be necessary for State, tribal, local municipality, or other Federal agency compliance. Chapter 3 has additional information on the requirements of related laws, rules, regulations, and EOs. A list of other related environmental laws and EOs is included in chapter 12.

8.10.2 Cooperating Agencies
(40 CFR 1501.6, 1508.5, and 1508.15; 43 CFR 46.155, 46.225, and 46.230)

Cooperating agencies are governmental entities with jurisdiction by law or special expertise in the proposed action or potential issues. Cooperating agencies may be Federal or non-Federal (i.e., tribal, State, local). Nongovernmental entities may not be cooperating agencies. A governmental entity is generally an entity with the ability to tax. A cooperating agency provides information, data, and analysis related to its specific area of jurisdiction and expertise. Generally, a cooperating agency will use its own funds for this activity.

Cooperating agencies are to be invited by the lead agency or may request to participate in a particular EIS as a cooperating agency. Interior regulations require that all eligible governmental entities be invited to be cooperating agencies. Additionally, Reclamation must consider any request by a governmental entity to be a cooperation agency and, if the request is denied, must provide the reasons in the EIS. The EIS should identify all agencies that are cooperators.

Each cooperating agency should have an MOU signed between Reclamation and the cooperating agency. Such an MOU is required if the cooperating agency is a non-Federal agency and is recommended if the cooperating agency is a Federal agency. The MOU lays out the respective roles, issues to be addressed, schedules, and staff commitments and should be developed early in the EIS process. MOUs with non-Federal agencies must include a confidentiality commitment. Where potential conflicts exist with State public disclosure laws, consult your solicitor.

Reclamation will collaborate to the fullest extent possible with all cooperating agencies concerning those issues related to their jurisdiction and/or special expertise. Cooperating agencies should participate in scoping and provide requested information, staff, and analysis within the agreed upon timeframes.
Cooperating agencies do not have a veto over the scope of the action, the range of alternatives, or the lead agency’s purpose and need. The responsibility of the lead agency to determine that the NEPA analysis is appropriate is not changed by the existence of cooperating agencies. However, every effort should be made to resolve all issues raised by a cooperating agency early in the process and under the terms of the MOU.

The requirement for cooperating agencies to be invited applies only to EISs but should be considered, as appropriate, for EAs.

8.10.3 Distribution List

An EIS distribution list is required and may be included in the Consultation and Coordination chapter or as an attachment (see figure 8.2 for a suggested distribution list, which will be project specific for each EIS).

In the FEIS, the distribution list should be updated to include other agencies, organizations, and individuals who requested copies of the FEIS, and an asterisk (*) may be included before those organizations or individuals who commented on the DEIS. A double asterisk (**) may be used to denote those who made statements or commented at the public hearings.

8.11 List of Preparers and Other Sections

(40 CFR 1502.17)

The EIS shall list the names, together with the qualifications (expertise, experience, professional discipline), of the persons who were primarily responsible for preparing the EIS.

Figure 8.3 is an example of a list of preparers. The list will include persons from other agencies who furnish substantive information, as well as people who provide information under contract or cooperative agreement, since all disciplines may not be represented on Reclamation staffs.

A References Cited section should be included after the list of preparers, which may be followed by an optional glossary. An optional list of abbreviations and acronyms can be included as appropriate.

8.12 Environmental Commitments

The DEIS and FEIS shall present reasonable mitigation proposals for all alternatives analyzed in detail. A separate list of commitments is recommended in the FEIS for the preferred alternative. If the preferred alternative from the FEIS is selected in the ROD, this list can be used to meet the requirement to
identify mitigation in the ROD (see Section 9.3, Environmental Commitments). If a different alternative is selected in the ROD, however, a comparable list, relative to the selected alternative, shall be developed for the ROD.

8.13 Index

The index, which is required for the FEIS and recommended for the DEIS, should be arranged in a double-column format and placed at the end of the report, before appendices and attachments. The style for entries may be found in the 2008 Government Printing Office Style Manual. To prepare an adequate index, the following points should be kept in mind:

- An introduction to the index should be prepared to explain symbols or abbreviations used. The introduction also explains anything unique or different about the index.

- The index is a listing of names, places, and topics in alphabetical order with page numbers indicating where they are discussed. It helps the reader find information. Therefore, headings and topics selected should be those most familiar to the average reader. However, the index may be cross-referenced with the specialist in mind.

- The index should be as specific as possible. For example, biological entries should be at the species level; air quality entries should be by components (sulfur dioxide, particulates); socio-economic entries would be by specific unit of measurement (housing, elementary schools, police protection, fire protection); and so on.

- Two categories—one specific and one general—should not be enumerated for the same entry. For example, if a species like “bald eagle” is enumerated under “endangered species,” the general heading should not also be enumerated (an entry “endangered species” could be used, but it should be further broken down into species).

Example:

*Endangered Species*
Bald Eagle, 17, 34, 85
California Condor, 26, 85, 101

The subtopics under the main topics above are listed in alphabetical order. This is the preferred way, unless some other arrangement is required for consistency or logic. For example, a chronological arrangement could be used when timing is important.
A large number of undifferentiated page listings after a topic in the index should be avoided. A good index entry should not exceed 5 to 6 page numbers. In some cases, the page listings may approach 9 to 10 page numbers, but this number of listings should be rare. If the page number listings following an entry exceed 10 page references, an attempt should be made to further break this topic into subtopics.

Examples:

**Bad Listing**

**Good Listing:**
School, 5, 25, 108, 224
Junior High, 10, 17, 36, 215-219
Senior High, 119, 124, 201
Junior College, 138, 145, 176, 209

The most common synonyms should be used as cross-references. When a large part of the expected readership might be familiar with one particular term rather than its synonyms, both terms and cross-references should be indexed (generally from the less well-known term to the better known one). For example, if a number of readers use the term “air pollution” and are not familiar with the fact that such topics are discussed under “air quality,” then “air pollution” should be an index entry which refers the reader to “air quality.”

Items that might be confusing to the reader should be defined. For example:

Water and Power Resources Service (see Bureau of Reclamation)

Bureau of Reclamation (formerly Water and Power Resources Service)

Material in footnotes should also be referenced in the index if it contains significant information. In addition, index material in plates, tables, and maps should be indexed.

A common mistake in preparing indexes is to heavily index the first 50 pages of the document and then slide over the remaining pages. To avoid this error, some criterion of selection has to be...
used to pick out the significant topics. For the EIS, impacts, description of environmental parameters, and the comparison of alternatives are the most important topics.

An ideal index should cover the complete contents of a document, including the summary, introduction, footnotes, and bibliography if these contain important information not found elsewhere in the document. However, if it becomes necessary to make choices, the most significant topics should receive the best coverage in the index.

The key element in any index is consistency. Once a certain selection method has been used, it should be used throughout. Once symbols, abbreviations, or acronyms have been designated, these same symbols, abbreviations, and acronyms should be used throughout. An arbitrary and preselected index should not be imposed on the document. The index must grow from within the document. Reclamation may prepare the index or it may be prepared under contract.

The index should not be prepared until the document has received final review and has final page numbers. When authorization to print the EIS is received, the index can be prepared and added.

8.14 Attachments and Appendices

Attachments are for amplification or support of critical analysis of the EIS. They are not a data bank and library for its total reference support. They should contain only major substantiating data, essential relevant descriptions of environmental components, important professional reports, copies of major legislative and executive documents, and other information necessary for complete use of the EIS for analytical and decisionmaking purposes. Negotiated agreements regarding various compliance requirements (endangered species, cultural resources) are also included.

CEQ regulations (40 CFR 1502.18) state that:

If an agency prepares an appendix to an EIS, the appendix shall:

Consist of material prepared in connection with an EIS (as distinct from material that is not so prepared and that is incorporated by reference (1502.21)).

Normally consist of material which substantiates any analysis fundamental to the EIS.

Normally be analytic and relevant to the decision to be made.

Be circulated with the EIS or be readily available on request.
Typical material in attachments includes:

- A listing of all the environmental commitments made for any aspect of the proposal covered by the EIS. It should be included in both the DEIS (if available) and FEIS. (See Section 8.12, Environmental Commitments, and Section 9.3, Environmental Commitments.)

- Letters and comments received on the DEIS (see section 8.15.2).

- FWCA recommendations with analysis of the disposition of the recommendations made. The recommendations and Reclamation’s responses should be included as a part of the Consultation and Coordination chapter. If not too long, the FWCA report may be attached.

- Documentation of compliance with other legal requirements (ESA, NEPA, and others).

8.15 FEIS

8.15.1 Revising the DEIS

After public circulation of the DEIS, the public and other agencies will generally provide comments on the DEIS. Reclamation shall assess and consider the comments, both individually and collectively, and respond to the comments in one of several ways, as described below (40 CFR 1503.4).

If (and only if) the only changes needed to the DEIS are minor factual corrections, the FEIS may consist of an errata sheet attached to the draft statement. In these cases, only the comments, the responses, and the changes need be circulated; however, the entire draft document, with the new cover sheet and errata, will be filed as the FEIS (see section 8.15.3).

Changes to the EIS involving new or modified alternatives that do not have any significant differences in environmental impacts compared to alternatives analyzed in the draft may be fully incorporated into the document and circulated as the FEIS. A modified analysis that is within the range of impacts analyzed in the draft, or that does not significantly change the results relative to impacts in the draft, may also be integrated into the document and circulated as the FEIS. New alternatives, modified alternatives, or new analyses that are outside the range displayed in the DEIS, or that are significantly different from the alternatives or analysis presented in the draft, will require the circulation of a supplemental or revised DEIS.
The discussion on supplemental EISs (section 7.11) described appropriate actions if the changes to the proposed action are substantial and relevant to environmental concerns or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action.

8.15.2 Responding to Comments

Substantive comments must be specifically identified in and attached to the FEIS, and a Reclamation response provided. Comments can be received in various media, and each missive received must be examined to determine the number and nature of substantive comments. Comments simply expressing support or nonsupport need not be displayed. Responses to comments must be factual and nonargumentative, and should clearly address the issue(s) raised. In preparing the FEIS, CEQ regulations in 40 CFR 1503.4 (b) state that responses to comments may include:

- Modifying alternatives, including the proposed action
- Developing and further evaluating alternatives not given serious consideration
- Supplementing, improving, or modifying the analyses
- Making factual corrections
- Explaining why the comments do not warrant further agency response, citing the sources, authorities, or reasons that support Reclamation's position and, if appropriate, indicating those circumstances which would trigger agency reappraisal or further response
- Acknowledging the comment if it is simply offering an opinion or if it contains advice not pertinent to the EIS.

8.15.2.1 Format of Responses to Comments

Two commonly used formats for comments and responses exist: (1) the comment and response are placed opposite each other on the same page, and (2) the responses to comments follow each letter. When comments are repetitive, the significant comments may be summarized and consolidated to condense the volume of the responses. Even in this case, all comments should be addressed and a clear reference to each comment made so that an individual commenter can track individual comments. Some circumstances may dictate an alternative approach that would be more effective. Any corrections to the body of the statement should be referenced by section title and/or page number so the reviewer will be able to find the new material. A list of the commenters may be provided before the Comment and Response section to aid in identifying the location of the comments. The preferred approach is to place letters received in the same order as they appear on the distribution list.
8.15.2.2 Public Hearing Comments
If public hearing(s) on the DEIS were held, the comments received should be summarized and included in the Response to Comments attachment. All substantive comments received at the hearing should be reviewed and responded to in a manner similar to that described in section 8.15.2. The entire verbatim testimony should not be included in the FEIS, nor should hearing transcripts be appended to the FEIS. The hearings, including all relevant and substantive comments, should be summarized and included in the Response to Comments attachment. For each individual who testifies, the relevant points that directly pertain to the document or the proposal should be specifically identified and answered. Relevant points include questions on the proposal or the analysis, contradictions, identification of new data, or discussion of deficiencies or omissions. Expressions of support or opposition to a proposal need not be acknowledged. Each individual who made the effort to testify should be acknowledged.

It is permissible to group commenters and their concerns in those instances where numerous similar concerns were raised. In this case, the issue should be listed, identifying all the individuals who expressed the concern, followed by a response.

Where verbal comments are received in a nonhearing format (i.e., where no formal record is made), it is recommended that the commenter be asked to provide any substantive comments in writing.

8.15.2.3 Request for a Time Extension to Prepare Comments
The request for a comment period time extension may originate with the public, other agencies, or from within Reclamation. The decision to extend the comment period is the responsibility of the originating office.

If a general extension of time is granted, a notice should be prepared by the originating office and placed in the FR. The manager will also notify EPA of the extension. The originating office will also publish a news release on the time extension.

8.15.2.4 Late Comments
The lead agency will establish a timeframe for comments (minimum 45 days). This timeframe may be extended at the discretion of the lead agency. However, an agency does not need to delay issuance of an FEIS when any Federal, State, local agency, or tribal government, from which comments are expected, does not provide comments within the prescribed time period (43 CFR 46.435(d)). Every reasonable effort should be made to accommodate such entities; however, where delays are unreasonable, the FEIS may be published without such late comments. Some explanation should be provided in the EIS for this situation.
8.15.3 Abbreviated FEIS

An abbreviated FEIS may be prepared when the only changes to the DEIS are: (1) to make factual correction(s), or (2) to explain why the comments on the DEIS do not warrant further response.

The following format is recommended for abbreviated FEISs:

- **Cover sheet**—Prepared according to 40 CFR 1502.11.
- **Foreword**—Explains that the document is an abbreviated FEIS and that its contents must be integrated with the DEIS (giving name, filing number, date of issuance, and availability source) to be considered a complete document reflecting the full proposal, its alternatives, and all significant environmental impacts.
- **Errata sheet(s)**—Prepared according to 40 CFR 1503.4(c).
- **Comments and responses**—Prepared according to 40 CFR 1503.4 and organized according to section 8.15.2 of this handbook. The abbreviated FEIS should contain the summary from the DEIS, the DEIS distribution list, and a list of agencies, organizations, and persons who commented on the DEIS.

Once prepared, only the abbreviated FEIS is distributed to the public.
Draft Environmental Impact Statement
Delta Export Water Contracting Program
Fresno, Kern, Kings, Madera, Merced, San Joaquin, Tulare, Monterey,
San Benito, Santa Clara, and Santa Cruz Counties, California

Prepared by __________________________
In cooperation with ________________________

This Environmental Impact Statement (EIS) is prepared in compliance with the National
Environmental Policy Act (NEPA) and Bureau of Reclamation (Reclamation) NEPA procedures.

Reclamation is proposing to resume long-term contracting of approximately 1.5 million acre-
feet/year (af/yr) of available and uncommitted water from the Central Valley Project (CVP). The
water proposed for contracting originates from existing storage reservoirs in the northern CVP
(Shasta, Trinity River, and American River Divisions). The 1.5 million af/yr would be sufficient to
meet a portion of the 3.4 million af/yr of the identified CVP water needs.

This EIS analyzes the impacts of Reclamation's Proposed Action in the Delta Export Service Area
(DESA), which calls for contracting up to 880,150 af/yr of firm yield and intermittent water within
the DESA for agricultural, municipal and industrial, and wildlife refuge uses. In addition to the
Proposed Action, the EIS also analyzes the impacts of several alternatives, including the No Action
alternative.

The EIS focuses on the regional impacts of water contracting within the DESA, emphasizing
impacts on surface water, groundwater, fish and wildlife, recreation, aesthetics, economics, land use,
and cultural resources. The EIS also assesses cumulative impacts of water contracting within all
three service areas (Sacramento River, American River, and Delta Export) on CVP-wide resources,
the Sacramento-San Joaquin Delta, and San Francisco Bay. Subsequent site-specific NEPA
reviews, of much narrower scope, will be conducted prior to execution of contracts with individual
agencies.

Comments must be received by ______________________________.

For further information regarding this EIS, contact Mr. Bill Payne, Bureau of Reclamation, MP-750,
2800 Cottage Way, Sacramento, California 95825-1898, telephone 916/978-5488.

Figure 8.1.—Example of an EIS cover sheet.
SUGGESTED DISTRIBUTION LIST

To be distributed for review and comment
1. Federal agencies (Washington level)
2. National environmental groups

To be distributed for information
1. U.S. Senators
2. U.S. Representatives

To be distributed by the Regional Director or Area Office for review and comment
1. Federal agencies (local level)
2. Governors of the states affected by the project
3. Potentially affected Indian tribes
4. State agencies
5. Local agencies, private organizations, and individuals
6. State and local environmental groups
7. Identified potentially affected individuals, including Indian trust beneficiaries and trustees.

To be distributed by the Regional Director or Area Office for information
1. U.S. Senators (local offices)
2. U.S. Representatives (local offices)
3. State Senators
4. State Representatives
5. Libraries
6. News media

Figure 8.2.—Example of a distribution list.
LIST OF PREPARERS

This environmental impact statement was prepared by Bureau of Reclamation, Lower Colorado Region, Post Office Box 427, Boulder City, Nevada 89005. A list of persons who prepared various sections of the statement, significant background material, or participated to a significant degree in preparing the statement is presented below:

<table>
<thead>
<tr>
<th>Name</th>
<th>Qualifications</th>
<th>Participation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Richard G. Bauman</td>
<td>B.S. Wildlife Biology; Natural Resources protection, USFS, 4 years</td>
<td>Biological Resources data collection and analysis</td>
</tr>
<tr>
<td>Thomas G. Burbey</td>
<td>B.S. Civil Engineering: water resource planning and project operation, Bureau of Reclamation, 19 years</td>
<td>Water quality surface and ground-water resources</td>
</tr>
<tr>
<td>Donald C. Campbell</td>
<td>B.S. Forestry; land management and land acquisition, Corps of Engineers, National Park Service, and Bureau of Reclamation, 20 years</td>
<td>Portions of EIS</td>
</tr>
<tr>
<td>Gail E. Cordy</td>
<td>B.S., M.S. Geology; Engineering Geologist, Dames and Moore, 2 years; Bureau of Reclamation, 1 year</td>
<td>Geology portion of EIS</td>
</tr>
<tr>
<td>E. Frank Disanza</td>
<td>B.S. Engineering, P.E.; Civil Engineer, Bureau of Reclamation, 6 years</td>
<td>Planning team leader; overall review</td>
</tr>
<tr>
<td>Bruce E. Ellis</td>
<td>B.A. Anthropology; Environmental Specialist, Bureau of Reclamation, 3 years</td>
<td>Overall EIS Coordinator</td>
</tr>
<tr>
<td>Bradley K. Flint</td>
<td>Realty technician; Bureau of Reclamation, Power, 4 years</td>
<td>Land use and ownership maps</td>
</tr>
<tr>
<td>Christopher R. Gehlker</td>
<td>B.A. Economics; Economist, Corps of Engineers, 8 years; Planning economist, Bureau of Reclamation, 1 year</td>
<td>Economic and social assessment</td>
</tr>
</tbody>
</table>

Figure 8.3.—Example of a list of preparers.
Chapter 8 Useful Links

CEQ Guidance
http://ceq.hss.doe.gov/nepa/regs/Guidance_on_CE.pdf

CEQ’s Forty Most Asked Questions

CEQ’s Guidance on Transboundary Effects
http://ceq.hss.doe.gov/nepa/regs/transguide.html

CEQ’s Memorandum of July 22, 1983

Clean Water Act
http://epw.senate.gov/water.pdf

Endangered Species Act

EO 11988 - Floodplains
http://www.fema.gov/plan/ehp/ehplaws/eo11988.shtm

EO 11990 - Protection of Wetlands
http://water.epa.gov/lawsregs/guidance/wetlands/ eo11990.cfm

EO 12114 - Environmental Effects Abroad of Major Federal Actions

EO 12898 - Environmental Justice

EO 13007 – Indian Sacred Sites
http://www.achp.gov/EO13007.html

EO 13112 – Invasive Species
http://ceq.hss.doe.gov/nepa/regs/eos/ eo13112.html

EO 13186 - Migratory Birds
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=fr17ja01-142.pdf
EO 13514 – Federal Leadership in Environmental, Energy, and Economic Performance

ESM 10-20 – Coordinating Adaptive Management and NEPA Processes

Fish and Wildlife Coordination Act

Migratory Bird Treaty Act
http://www.fws.gov/laws/lawsdigest/MIGTREA.HTML

National Historic Preservation Act
http://www.achp.gov/docs/nhpa%202008-final.pdf

Prime or Unique Agricultural Lands and the National Environmental Policy Act
http://ceq.hss.doe.gov/nepa/regs/exec81180.html

Section 101 and 102 (1) of NEPA
http://ceq.hss.doe.gov/laws_and_executive_orders/the_nepa_statute.html

Section 404 of the Clean Water Act
http://epw.senate.gov/water.pdf

Selected Policies, Guidance, and Procedures for Working with Federally Recognized Indian Tribes

Wild and Scenic Rivers Act

http://www.gpoaccess.gov/stylemanual/browse.html

40 CFR 1500-1508
http://ceq.hss.doe.gov/ceq_regulations/regulations.html

43 CFR 46
http://www.doi.gov/oepc/nepafr/docs/Federal%20Register%20October%202015.%2002%2008%20NEPA.pdf
Chapter 9

Record of Decision

The ROD is a concise public record of an agency’s decision or an agency’s recommendation to Congress. It is prepared at the end of an EIS process and may not be finalized until at least 30 days after publication of the NOA of the FEIS in the FR. The ROD may be a separate document, or it may be integrated into any other appropriate decision document.

9.1 When to Issue a Record of Decision

(40 CFR 1506.10(b)(2))

The ROD cannot be issued until at least 30 days after EPA has published the NOA for the FEIS. It can be released later, at the discretion of the lead agency. If there is a decision made to select the no action alternative (as a decision, not as a determination that no decision exists), a ROD should be issued documenting that decision. In the unusual circumstance where an EIS was prepared for an action and, upon further analysis, Reclamation determines there is no decision to be made, a ROD will not be issued.

9.2 Content

(40 CFR 1505.2 and 43 CFR 46.110)

A ROD shall be prepared to accompany a decisionmaking package through the decision process. A ROD will apply only to actions for which an EIS has been prepared. There is no required format for a ROD, but certain topics must be addressed. The ROD, whether separate or as part of another decision document, must address:

- The decision and the alternatives considered, which should be the same ones covered in the EIS or PR/EIS, including the preferred plan. The decision should be within the range of alternatives addressed in the FEIS.

- The alternative(s) considered to be environmentally preferable.

- The factors that were considered with respect to the alternatives. Factors—including considerations of national policy—that were evaluated will be identified, and the ROD will state how those considerations entered into the decision. Additional factors that may be weighed include environmental impacts; social, economic, or
technical considerations; Reclamation's statutory mission and authorities; water policy directives; and other related factors. If the information is included in existing decision documents, the final ROD will need to identify the alternative selected.

- Whether or not all practicable means to avoid or minimize environmental harm for the alternative selected have been adopted, and if not, why. A summary of environmental commitments and mitigation measures should be presented, where applicable.

- Any monitoring and enforcement program established to ensure that identified mitigation measures are accomplished. The ROD should also address actions Reclamation would take if monitoring shows that mitigation is inadequate, unnecessary, or unsuccessful (also, see section 8.12, Environmental Commitments). See figure 9.1 for an example of a ROD.

Additionally, the ROD should address significant comments received on the FEIS during the period between the filing of the FEIS with EPA and preparation of the ROD, along with Reclamation’s responses, as appropriate. See further discussion in section 9.4 below. Significant issues raised on the FEIS should generally be identified in the transmittal of the ROD. There is no appeals process provided for RODs under the CEQ regulations.

The ROD will also include a statement that there will be no impacts to ITAs or a statement describing the expected impacts of the proposed action on ITAs; a listing of any unresolved ITA issues; a list of commitments to prevent, mitigate, or compensate adverse impacts to ITAs; and a summary of any mitigation, monitoring, and enforcement programs related to ITAs (Reclamation memo, December 15, 1993).

The ROD should explain how the outcome of community involvement in the NEPA process may have influenced the final decision (i.e., consideration of any community alternatives, mitigation measures, and monitoring plans that were developed using consensus-based management, if applicable). (See Guidance Memorandum entitled Guidance on Use of Consensus-Based Management in the National Environmental Policy Act (NEPA) Process, September 21, 2004, in attachments). On items where consensus was reached within the community and Reclamation decided to take a different course, the ROD should explain what legal and substantive considerations entered into the decision.

The ROD must discuss any consensus-based alternatives developed during the EIS process. This discussion should include how consensus-based management was applied to the process and what alternatives (if any) were developed using consensus-based management.
9.3 Environmental Commitments

In all cases of NEPA compliance, means to mitigate significant adverse environmental impacts should be presented and adopted, wherever possible. NEPA does not require mitigation measures to be adopted for all impacts; however, it does encourage mitigation of impacts to the fullest extent possible and wherever practicable. Additionally, other statutes (e.g., ESA, NHPA) may require mitigation actions, which should also be identified here. Any environmental mitigation or enhancement measures that Reclamation plans to implement are termed “environmental commitments.” Once in the ROD, these are legal commitments, and Reclamation has clear obligations to implement them. They must be presented clearly in the final NEPA document and ROD or FONSI (as applicable), funded appropriately, included in plans and specifications, and followed as an integral part of the action to ensure that they are implemented and operating as planned. Specifications writers and inspectors should be very aware of environmental commitments as they conduct their work to ensure the commitments are integrated with other project work.

9.3.1 List of Environmental Commitments

A list of environmental commitments is an appropriate part of any environmental document and is especially important in a ROD, when the list of commitments is a part of the required description of the action. If there are no environmental commitments, this fact should be noted. Figure 9.1 includes an example of a ROD that contains a list of environmental commitments. The list of environmental commitments should consist of those identified in the compliance documents, MOUs, and/or correspondence with other agencies and public or private entities.

Types of environmental commitments include, but are not restricted to, the following examples. An actual list should specifically define the actions to be taken.

- Protection and enhancement of Federal- and State-listed threatened and endangered species
- Protection and enhancement of wetlands
- Protection and avoidance of historic properties
- Protection and enhancement of rare and unique areas
- Maintenance of streamflow (especially low flows)
- Proper disposal of hazardous waste materials
• Construction and provision for the O&M of recreation areas

• Leaving selected areas of standing timber within the conservation pool elevation

• Providing multiple-level water outlet structures for downstream releases

• Spacing power lines to prevent bird electrocution

• Watering disturbed areas for dust abatement

9.4 Addressing Comments on the FEIS

The ROD would generally contain a summary of the substantive comments received on the FEIS. This summary should be brief and should only address the significant issues raised by the comments received. Only in special circumstances should any specific comments be responded to in the ROD. If the comments raise significant issues that have not been addressed, the need to supplement the FEIS should be considered and a determination made (please see section 7.11, Supplemental Statements, in chapter 7). The ROD should also identify particular areas of controversy and any unresolved issues that exist.

9.5 Processing the ROD

A draft ROD will generally be prepared by the staff responsible for developing the EIS or PR/EIS. After approval by the program or area manager, the draft ROD is usually submitted to the Office of the Director, who has the authority to sign the ROD. The appropriate staff in these offices (most likely the environmental staff) will review the ROD for policy compliance and format. Staff in these offices may already be involved in drafting the ROD. Any necessary revisions will usually be made by the originating office. For EISs prepared in the area offices and regional offices, the Regional Director usually signs the ROD. The Commissioner, the Assistant Secretary for Water and Science, or the Secretary may sign some controversial or programmatic RODs. Upon signature, the signed original will be returned to the originating office for retention. A ROD cannot be executed until 30 days have elapsed after EPA publishes notification of FEIS filing in the FR, except under the conditions of 40 CFR 1506.10.

On actions requiring a decision by the Secretary, the ROD is usually prepared for the Commissioner’s signature with a line for the Secretary's signature. The ROD will be transmitted from the Commissioner, through the Assistant Secretary for Water and Science for concurrence, and then to the Secretary. RODs are
considered public documents and must be provided to the public upon request (40 CFR 1506.6 (b)). There is no requirement to formally publish the ROD in the FR or the media. However, the responsible official in the region must ensure that the affected public is aware of the availability of the ROD. Appropriate means must be used to ensure widespread notification to involved agencies, organizations, and communities.

9.6 Rescinding a ROD

Sometimes, because of procedural errors or administrative decisions, the rescinding of a ROD will have to take place. In order to rescind a ROD, Reclamation should develop a notice for the FR that is similar to a Notice of Cancellation, but it will be a Notice of Rescission. Development of notices must follow the format requirements of the FR. To ensure consistency with current format requirements, the notice should be sent via e-mail to the Federal Register Liaison Officer currently located in Denver (84-213000).

9.7 Implementing the Decision

(40 CFR 1505.3)

Reclamation offices shall provide for appropriate monitoring to ensure that decisions are carried out in accordance with commitments made in the ROD. As prescribed by CEQ regulations, Reclamation shall implement mitigation and other conditions established in the EIS. As a lead agency, Reclamation is also required to:

- Include appropriate conditions in grants, permits, or other approval
- Condition funding of actions on performance of mitigation
- Inform, upon request, cooperating or commenting agencies on progress in carrying out mitigation measures that were proposed and adopted by the agency making the decision
- Make available to the public, upon request, the results of relevant monitoring

9.7.1 Environmental Commitments Program

For RODs that include environmental commitments, the appropriate program director, usually the Regional Director, should consider developing an environmental commitments program. The environmental commitments program helps to ensure that all environmental project features (mitigation and enhancement) are included, developed, and operated concurrent with other project features. There is no required content or format for the program, but it is
recommended that an environmental commitments program include the preparation of an environmental commitments plan (ECP); if necessary, a program to adaptively manage the outcome of the decision; an environmental commitments checklist (ECC); and postconstruction environmental commitment summaries.

9.7.2 Environmental Commitment Plan

The ECP is a master in-house environmental management plan for projects requiring the preparation of NEPA documents. The ECP is based on the list of environmental commitments included in the NEPA document and other subsequent commitments such as those listed in the Clean Water Act 404 permits, MOAs, and correspondence with other agencies, private entities, etc. The ECP should be prepared prior to the initiation of the action. The responsible director or the designated representative(s) should approve the ECP and identify the means of determining successful completion of the commitments.

9.7.3 Environmental Commitment Checklist

The ECC should be a part of the ECP. It lists and summarizes the commitments from the ECP that are related to specific construction activities (whether they are performed in-house or by contractors) that are to be followed and/or monitored in the field. The project features identified in these commitments should be made a part of any construction contract or other appropriate action.

9.7.4 Adaptive Management Program

If it is necessary to develop an adaptive management program, the ROD should outline the elements of the program, which should have been discussed in more detail in the text of the EIS (i.e., who was involved in the development of the program, which entities will conduct the monitoring, indicators of change, how new information will be analyzed and evaluated, and the timeframe for the program). The ROD should indicate how the public will be kept informed about the progress of the program. The ROD should indicate that additional NEPA compliance may be necessary if new information requires reconsideration of the decision.

9.7.5 Postdecision Environmental Commitment Summary

After construction or implementation of the appropriate environmental commitments associated with project features identified in the ECP and ECC, it is recommended that within 1 year, and periodically thereafter as appropriate, following construction, a postdecision environmental commitment summary be prepared. This helps ensure that mitigation is being carried out in accordance with 40 CFR 1505.3. It is suggested that the summary address the status of environmental commitments (e.g., when they were implemented, the effectiveness...
of the mitigating activity, any suggested improvements, and others). The summary may also include recommendations for the inclusion of additional environmental project features.

The area manager or responsible director should approve the postdecision environmental commitment summary. As appropriate, it is included in the project package that is provided to the operating office or agency for future followup actions. Periodic monitoring for compliance with the continuing activities listed in the postdecision environmental compliance summary should be incorporated into the ECP.

The regional office should receive copies of these summaries and make them available to the public upon request.
RECORD OF DECISION

for the

FINAL ENVIRONMENTAL IMPACT STATEMENT

ANGOSTURA UNIT
CONTRACT NEGOTIATION AND WATER MANAGEMENT

in the

Cheyenne River Basin
South Dakota

January 2003

Approved

Regional Director
Bureau of Reclamation, Great Plains Region

Date

Figure 9.1.—Example of a ROD.
SUMMARY OF ACTION

The Bureau of Reclamation (Reclamation) has completed a final environmental impact statement (EIS) on the proposed renewal of a long-term water service contract for the Angostura Unit in the Cheyenne River Basin in South Dakota. Under the contract, water service will continue to be provided for agricultural irrigation uses in accordance with Reclamation law and policy. In addition, the contract includes provisions intended to increase operational efficiency and protect environmental resources. The final EIS was prepared in cooperation with the Angostura Irrigation District, Oglala Sioux Tribe, Cheyenne River Sioux Tribe, Lower Brule Sioux Tribe, South Dakota Department of Game, Fish and Parks, U.S. Geological Survey, U.S. Natural Resources Conservation Service, U.S. Bureau of Indian Affairs, and the South Dakota Department of Environment and Natural Resources. The U.S. Environmental Protection Agency and the U.S. Fish and Wildlife Service also participated in the project under their statutory authorities.

This Record of Decision (ROD) documents Reclamation’s decision to provide long-term water service for the Angostura Unit. This ROD has been prepared in accordance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality’s NEPA implementing regulations (40 CFR 1500-1508), and Reclamation’s NEPA Handbook. The decision made herein is based on the information and analysis contained within the final EIS for the Angostura Unit: Contract Negotiation and Water Management, published in August 2002, and on the results of consultation and coordination with public agencies, tribes, the irrigation district, special interest groups, and individuals. Reclamation has considered all comments received on the proposed contract in developing this ROD. This action is consistent with the provisions of the 1939 Reclamation Project Act, as supplemented on July 2, 1956 (70 Stat. 483), which provides contractors a first right to renew long-term water service contracts.

RECLAMATION’S DECISION

Reclamation has decided to implement the Improved Efficiencies Alternative (Reclamation’s Preferred Alternative) as described in the final EIS. This alternative provides for continued irrigation through execution of a 25-year contract with the District and incorporates features intended to address issues raised during public scoping, including concerns regarding water quantity and quality, stream corridor health, reservoir operations, and fisheries.

In making this decision, Reclamation will take steps to increase efficiency of both the District’s water delivery system and on-farm water use. Efficiency improvements would include measures such as lining canals and laterals, putting laterals into pipe, improving water measuring devices, leveling fields, irrigating by gated pipe or sprinkler, installing automated turnouts, providing education on irrigation and instituting Best Management Practices (BMPs). Specific locations for implementing these measures have not been determined. These efficiencies are expected to result in saved water that could then be used, subject to current authorization and law, for recreation, fisheries, downstream flows, irrigation or other uses. Reclamation will establish a
public process to determine how best to use the saved water. Efficiency improvement savings are estimated to be 1,870 to 3,200 acre feet annually from delivery system improvements and another 4,320 to 6,160 acre feet from on-farm improvements. Together, delivery system and on-farm improvements could provide an estimated 6,190 to 9,360 acre feet of saved water annually. Water savings will not be immediate and are expected to develop over time as improved efficiency measures are implemented.

This decision will be implemented by approving and executing a long-term water service contract, including appropriate environmental provisions which have been negotiated with, agreed to by, and made a part of the contract to be executed with the Angostura Irrigation District. Several environmental commitments will be implemented by Reclamation as described in the ENVIROMENTAL COMMITMENTS section of this ROD. No significant adverse impacts are anticipated to result from implementing this alternative.

ALTERNATIVES CONSIDERED IN THE FINAL EIS

Reclamation carefully considered public comments, NEPA and its implementing regulations, and Reclamation law in determining the range of contract renewal alternatives to be addressed in the final EIS. The contract renewal process involved a variety of interested and affected parties with diverse views about contract renewal of the federal irrigation project within the Cheyenne River Basin, which is reflected in the diversity of the alternatives. The draft and final EIS considered four alternatives with varying objectives, including the Improved Efficiencies Alternative (Reclamation’s Preferred Alternative) described in the preceding section (RECLAMATION’S DECISION). The other three alternatives considered in detail in the final EIS are summarized below.

No Action Alternative
Under this alternative, Reclamation would renew the existing water service contract with the District for a 25-year term, making only minor modifications to assure that the new contract conformed with Reclamation law and the agency’s contract policy. Reservoir storage, releases to the river and deliveries to the District would continue in the same patterns established under the previous contract. The District would be able to irrigate up to the full 12,218 acres within their boundaries. Recreation and fisheries in the reservoir and flows in the river downstream of the dam would be dependent on inflows into the reservoir, and would be secondary to District irrigation.

Reestablishment of Natural Flows Below the Dam Alternative
This alternative would reestablish, as closely as possible, natural flows in the Cheyenne River downstream of Angostura Dam by setting new operating criteria for the reservoir. Radial gates at the dam would be opened and inflows to the reservoir would be allowed to pass through to the river below. The maximum reservoir elevation would equal the spillway crest elevation of 3,157.2 feet.
This alternative would not provide water for irrigation and no contract would be signed with the District.

Reservoir Recreation and Fisheries Alternative
This alternative would identify reservoir recreation and fisheries as the management priority for Angostura Reservoir. A minimum reservoir elevation of 3170 feet would be established to maximize availability of boat ramps and boater access to the reservoir. In addition, this alternative would set target elevations of 3187.2 feet December-May; 3186 feet in June; 3185 feet in July; and 3184 feet August-December. These targets would facilitate beach establishment, promote fish propagation, and maintain a larger reservoir water surface area. Water conservation measures would be used when the reservoir elevation dropped below 3173 feet to minimize drawdown.

Irrigation would be secondary to reservoir recreation and fisheries, and subordinate to meeting the target reservoir elevations. Consequently, the contract signed with the District would specify that when water was available up to 12,218 acres could be irrigated, but when there is no water available in excess of the established targets, there would be no irrigation deliveries.

ENVIRONMENTALLY PREFERABLE ALTERNATIVE
NEPA defines the environmentally preferable alternative as “... the alternative that will promote the national environmental policy as expressed in NEPA. 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.” It is implicit in NEPA that the environmentally preferable alternative must be reasonable and feasible to implement.

Based on the environmental analysis in the final EIS, each alternative was ranked on its relative impact on biological, physical and essential resources. For each resource evaluated, the alternatives were given a rank from 1-4 with 1 representing the least impact on the resource of the four alternatives. For example, surface water quality resource impacts were measured based on impacts to the reservoir eutrophication index, reservoir total dissolved solids (TDS), and river TDS. When the rankings for each of the resource measures was totaled, the No Action, Improved Efficiencies, Reservoir Recreation and Fisheries Alternative all received a score of 3, while Reestablishment of Natural Flows Below the Dam Alternative received a score of 9. The conclusion from this ranking was that three alternatives would have similar impacts and the Reestablishment of Natural Flows would have the greatest impacts on surface water quality.

When the rankings for all biological and physical resources were totaled, the Improved Efficiencies Alternative had the lowest overall score. In addition, the Improved Efficiencies Alternative had the lowest score when the rankings for all resources were totaled. Thus, the Improved Efficiencies Alternative had the least adverse impacts to resources when compared to
each of the other alternatives analyzed and has been determined to be the Environmentally Preferable Alternative.

**BASIS FOR DECISION**

Public input was considered by Reclamation in developing alternatives to be examined in detail in the draft EIS. The major areas of public concern included the new water service contract, the Winters Doctrine and Tribal water rights, water quantity and quality, reservoir operations, sedimentation, riparian zones along the river, reservoir and stream fisheries, wildlife, economic benefits/impacts, cultural resources and Indian Trust Assets.

The final EIS and the negotiated contract address concerns associated with the Winters Doctrine and Tribal water rights. The following provision from the proposed contract addresses these concerns and is consistent with how they were addressed in the final EIS: "Nothing in this Contract shall be construed as affecting the obligations of the United States or the Trust responsibilities of the Secretary [of the Interior] to any Indian or Indian Tribe; or as impairing the rights of any Indian or Indian Tribe including any prior paramount rights or Federally reserved rights, to the water of the Cheyenne River established under existing treaties, compacts, or law."

Protection of surface water, both quantity and quality, was of particular interest during development of the EIS and contract negotiations. Based on the analysis in the final EIS, the Improved Efficiencies Alternative would be superior to the other alternatives evaluated in terms of impacts on water quantity and quality, including social and economic effects. Specifically, the Improved Efficiencies Alternative would improve water utilization by reducing the water necessary for irrigation of District lands. Under the Improved Efficiencies Alternative, irrigating 12,218 acres would require 33,600 AFE/year, while the No Action and Reservoir Recreation and Fisheries Alternatives would require 41,800 AFE/year to irrigate 12,218 acres. (No irrigation deliveries would be made under the Reestablishment of Natural Flows Below the Dam Alternative.) The saved water would then be available to mitigate or improve water quantity and quality related concerns. In addition, this alternative would result in some improvement in the reservoir eutrophication index and TDS load in the reservoir when compared to existing conditions.

The Improved Efficiencies Alternative would also be superior to other alternatives in the areas of irrigation and recreation economies. Annually, District farming activities generate $525,000 in benefits to the nation, $1,160,000 in household income from all sectors, $540,000 in agricultural income, and provide 47 jobs. The Improved Efficiencies Alternative is the only alternative evaluated that would improve on these values. From a recreational standpoint, current operations of Angostura Reservoir account for 271,000 visitor days annually, which generate an estimated $7,080,000 of total benefits, $1,200,000 in household income, and 92 jobs. The Improved Efficiencies Alternative provides for some flexibility in operations, and depending on reservoir

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**Figure 9.1.—Example of a ROD (continued).**
elevation, could contribute from 7,900 to 14,600 additional visitor days of use and from $207,000 to $382,000 of additional revenues annually from recreational activities.

Reclamation also evaluated the effects of the proposed alternatives on fisheries, wildlife, wetlands, sediment, the stream corridor, and cultural and paleontological resources. The alternative with the least adverse effects or the greatest benefits, varied among resources. For example, for the stream corridor and wildlife resources, the Reestablishment of Natural Flows Below the Dam Alternative would provide the greatest benefits, while the Reservoir Recreation and Fisheries Alternative would provide the most benefits to wetlands, and cultural and paleontological resources. In terms of sediment buildup within the reservoir and sediment impacts on water quality downstream of the reservoir, the No Action, Improved Efficiencies, and Reservoir Recreation and Fisheries Alternatives would have similar affects, while the Reestablishment of Natural Flows Below the Dam Alternative would result in greater impacts than the other alternatives. Finally, the Improved Efficiencies and Reservoir Recreation and Fisheries Alternatives would be the most beneficial for the reservoir fisheries resource. Overall, when the impact indicators for these resources were ranked and these values totaled, the Improved Efficiencies and Reservoir Recreation and Fisheries Alternatives’ scores were similar and more favorable than the other two alternatives.

Reclamation’s decision to implement the Improved Efficiencies Alternative is based on the following rationale. First, the Improved Efficiencies Alternative was determined to be the Environmentally Preferable Alternative, providing the greatest overall resource benefits of any of the alternatives. Second, the Improved Efficiencies Alternative would have less impacts to resources identified as important to the public (water quantity, water quality, irrigation and recreation) than any of the other alternatives. And finally, the major advantage provided by the Improved Efficiencies Alternative is the ability to use water saved through efficiency improvements to address future resource needs – an option unavailable under any of the other alternatives.

ENVIRONMENTAL COMMITMENTS AND MONITORING

The following measures will be implemented as integral parts of the decision made herein to provide for desirable environmental benefits.

Irrigation District’s Commitments:

1. The District will participate in a public process established to develop recommendations for the use of saved water once the quantity saved is determined.

2. The District will participate in the State of South Dakota’s permit review process for changes in use or place of use of saved water, if the District is deemed a necessary party.

Figure 9.1.—Example of a ROD (continued).
Reclamation’s Commitments:

1. Reclamation will assess delivery system and on-farm efficiency prior to and subsequent to efficiency improvements. Based on this information along with other applicable data and considerations, Reclamation will use established hydrologic methodologies to determine the quantity of water saved. The general goal is to increase the District’s delivery system efficiency by an average of 5% and on-farm efficiencies by an average of 10%. Achievement of these goals will, in part, depend on the amount of funding available to accomplish efficiency improvements.

2. Reclamation will lead and facilitate a public process to develop recommendations for the use of saved water once the quantity saved is determined.

3. If a State of South Dakota permit is necessary for changes in use or place of use of saved water, Reclamation will obtain or work with other entities to obtain appropriate permits.

4. Reclamation will be responsible for implementing system efficiency improvements, subject to availability of funds. Reclamation will seek willing partners to develop on-farm efficiency improvements.

5. Reclamation will work to secure funding sources, as appropriate, to fund implementation of delivery system and on-farm efficiency improvements.

6. Reclamation will develop a plan to monitor water quality and fish health in the Cheyenne River from the dam downstream to Red Shirt, SD.
Chapter 9 Useful Links

ESA

NHPA
http://www.achp.gov/docs/nhpa%202008-final.pdf

Section 404 of the Clean Water Act
http://epw.senate.gov/water.pdf
Chapter 10

Other Agency NEPA Documents

10.1 Review of Other NEPA Documents
(40 CFR 1503.2 and 516 DM 4)

Reclamation has a responsibility to comment on environmental impacts discussed in another agency’s NEPA documents when those impacts are within Reclamation’s jurisdiction, expertise, or authority. Areas of Reclamation’s expertise and/or jurisdiction include pollution control, energy, land use, and natural resources management (FR, December 21, 1984).

EISs and other environmental documents sent to Interior for environmental review (ER) are posted on an OEPC Web site that is updated daily and also displays the previous 3 months of ERs. This database is located at: http://www.doi.gov/oepc/nrm.html. Most ERs are distributed by this system, except those that are still published on paper or CD-ROM. OEPC distributes ERs to all potentially affected bureaus, with the Policy and Administration office serving as the designated point of contact for Reclamation. Policy and Administration is responsible for distributing ERs within Reclamation for review and comment, and coordinating any response, as appropriate. As part of this process, Policy and Administration will notify the appropriate regional and area office ER points of contact when ERs are posted on the Web site and forward any electronic or paper documents/CD ROMS for review. Deadlines for comment are specified by OEPC or the Federal agency requesting comments in the OEPC memo that distributes the ER for review. Timeframes for response within Reclamation and designation of signatory level for Reclamation will be established by Policy and Administration, depending on the scope of any Reclamation comments and how many regions may be affected.

Policy and Administration will take the lead at consolidating Reclamation comments that impact Reclamation-wide policies or programs or in cases where several regions have comments. Either the Director of Policy and Administration or the Commissioner would sign any Reclamation-wide comments, as appropriate. In some cases, Reclamation comments are relevant to only one or a few regions; therefore, Policy and Administration would ask one of the affected regions to serve as the coordinator of Reclamation comments. In these cases, the appropriate Regional Director would submit Reclamation comments and send a copy to Policy and Administration.

Bureaus and offices in Interior may send their NEPA documents to the Commissioner for review. These should be redirected to Policy and Administration and should be treated the same way as documents from other
Federal agencies. Policy and Administration will determine no review is necessary by Reclamation, review them, or send them to the proper regional, area, or other office as appropriate.

If a Reclamation regional office receives a request for review of a NEPA document directly from another Federal agency, bureau, or departmental office, the regional or area office should inform Policy and Administration of the request and should determine the manner of the response.

10.2 Comments on Other NEPA Documents

Comments should be limited to significant matters affecting Reclamation policy, projects, and facilities, or falling within Reclamation’s expertise. The following are suggested for official comments:

- Does the proposed action relate to a Reclamation activity (water or power development) or affect Reclamation lands? If it does not, that should be stated. Does it relate to the expertise of Reclamation? If it does neither, a “no comment” letter or response should be considered.

- The focus should be on substantive, rather than editorial, comments.

- Trivia should be avoided. The focus should be on serious errors or omissions which lead to misunderstanding of impacts.

- The critique should not just point out deficiencies—suggestions for alternative language and sources for data should be offered.

- The critique should concentrate on better analysis of impacts.

CEQ has published appendix II to its NEPA regulations, which identifies the jurisdiction by law and/or special expertise of the various Federal agencies.

10.3 Procedure for Referrals of Other NEPA Documents

(40 CFR 1504.1-.3 and 516 DM 4.7 C)

EPA is required to review and comment publicly on all EISs and must refer the situation to CEQ for resolution if it determines an action is environmentally unsatisfactory.
Reclamation may also make a recommendation to refer another agency’s EIS to CEQ for resolution of unresolved issues through the Commissioner and Interior. The referral process to CEQ should be considered a last resort, to be used only after concerted and timely attempts to resolve the issue at the local level have failed.

The following procedures shall be followed if referral to CEQ is necessary:

- Advise the agency, at the earliest possible time, that the issue will be referred to CEQ unless a satisfactory agreement is reached.
- Include such advisement in Reclamation’s comments on the other agency’s DEIS.
- Identify any essential information that is lacking and provide a suggested timeframe for its submittal.
- Transmit a documentation package, including the above information, to the Commissioner, who forwards the notification of a referral to the Department.
- Interior will send the documentation package to CEQ to demonstrate that the agency has been advised of a planned referral.

If the matter is not resolved during the DEIS stage, Reclamation shall deliver its referral to CEQ no later than 25 days after the FEIS has been made available to the public. CEQ will not accept a referral after the 25-day period unless an extension has been granted by the agency producing the document. The referral shall consist of:

- A copy of the letter signed by the Commissioner and sent to the agency, informing it of the referral and the reasons for the referral, and requesting that no action be taken to implement the matter until CEQ acts upon the referral.
- A statement supported by data leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or environmental quality. The statement shall:
  - Identify the issues or facts in the controversy
  - Identify any existing environmental requirements or policies that would be violated by the matter
  - Present the reasons Reclamation believes the matter is environmentally unsatisfactory
o Contain a finding by Reclamation regarding whether or not the issue is of national importance or a threat to national environmental resources or policies

o Review the steps taken by Reclamation to bring its concern to the attention of the lead agency at the earliest possible time

o Provide Reclamation’s recommendations concerning a mitigation alternative, further study, or other course of action (including abandonment) necessary to remedy the situation
Chapter 10 Useful Links

Federal Register, December 21, 1984
http://ceq.hss.doe.gov/nepa/regs/ceq/iii-7app2.pdf
Chapter 11

Recurring NEPA Issues

Over a period of time, and as a result of Reclamation training, workshops, and similar activities, certain issues seem to resurface on a regular basis within the various regions and across a broad spectrum of Reclamation activities in the West. A number of these issues are identified in the following sections, along with a short discussion and guidance, where applicable. There are no clear answers to some of these issues, which is why they recur. When these difficult questions arise, the issues may be discussed with NEPA staff in Policy and Administration, other Reclamation NEPA practitioners, and the Solicitor’s Office to develop a solution that is in compliance with applicable regulations or procedures. This approach ensures that the decision is not arbitrary or capricious and documents the rationale as a matter of record.

11.1 Identifying Purpose and Need Early in the Process

The need for an accurate (and adequate) purpose and need statement early in the NEPA process cannot be overstated. This statement gives direction to the entire process and ensures alternatives are designed to address project goals. Simply stated, the purpose and need statement identifies what is to be accomplished. Before proceeding with a NEPA process, goals should be established and articulated. Purpose and need statements have often been inadequate in describing the necessity for the proposed action and in defining the scope of the alternatives to be considered. An inadequate definition of the purpose of and need for a project can lead to an inordinate array of alternatives—many of which will be beyond the scope of the proposed action. A concise purpose and need statement, at the initiation of the NEPA process, tends to limit the range of alternatives (thereby reducing the level of effort) and serves as a guide for selecting alternatives. In the absence of a concise purpose and need statement, the selection process will appear arbitrary and will be subject to criticism. This discussion is in the context of the EIS process but is generally applicable to the development of the need statement in the EA process as well.

11.2 Public Involvement Challenges

The public involvement process often does not reach all elements of the interested public as well as desired. The typical process of one or more scoping meetings may reach only stakeholders who are familiar with the process and who have responded, to some degree, to this process. This process does not necessarily ensure the participation or eventual buy-in of persons unfamiliar with the process or holding diverse or uncompromising interests. It is vital that creative,
nontraditional means be considered and used, as appropriate, to notify and involve all segments of the public. Greater use of local newspapers, community newsletters, radio, television, and the Internet, in languages of cultures within the community, is helpful in getting better representation of community interests in the NEPA process. Personal visits with local community leaders can be vital to understanding local concerns and improving local involvement.

Because most of the public does not deal with NEPA, there is understandable confusion concerning what NEPA is and how best to participate. There are resources available to assist in this area. For instance, CEQ has published, A Citizen’s Guide to the NEPA, Having Your Voice Heard (http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf). Interior NEPA regulations (43 CFR 46.200) recommend that Interior agencies provide, as practicable, community-based training to promote efficiency in the NEPA process. The regulations also encourage (43 CFR 46.110) consensus-based management to improve community and interested parties’ effective participation in the NEPA process. These techniques—and others—should be applied as practicable to the NEPA process, especially when a high degree of public interest exists.

When working with Indian tribes, it should be kept in mind that Indian tribes are not just another stakeholder but are sovereign entities and should be consulted individually on a government-to-government basis. Reclamation has prepared guidance to assist in this effort: Protocol Guidelines: Consulting with Indian Tribal Governments (http://www.usbr.gov/native/naao/policies/protguide.pdf).

The issues identified by the public involvement process often drive the entire NEPA process. The widest reasonable involvement of various interested parties significantly improves the integrity of the entire process.

11.3 Establishing Realistic Timeframes for NEPA Processes

Federal agencies at times have failed to allow sufficient time to complete the NEPA process. Most often this occurs due to a need to move forward with an action because of regulatory or other deadlines and an agency’s failure to adequately gauge how much time is needed to complete all the necessary consultations and analyses.

It is important to use NEPA as a tool to assist those responsible for making the best decisions possible, not just as a procedural “hoop” that must be jumped through. Agencies must plan in advance how much time and resources are necessary to complete the appropriate analysis and prepare the NEPA document.
Chapter 11: Recurring NEPA Issues

It is not unusual for a “typical” EIS to take 2 to 3 years. Areas in which schedules are often longer than expected include scoping, alternative development, analyses (especially if modeling is involved), integrating compliance with other environmental laws into the NEPA process, working with cooperating agencies, data collection, and responding to comments on the DEIS. When developing a schedule, resist the temptation to assume that only factual corrections on the DEIS will be needed and that the FEIS will be easy and quick to prepare. Experience has shown that this is often not the case. It is often helpful to consider the length of time it took to prepare EISs on similar actions when developing schedules and overall timeframes for completing the NEPA document.

Interior regulations (43 CFR 46.240) now require Reclamation to explicitly set time limits for the entire NEPA process. These time limits shall be developed in consultation with cooperating agencies and reflect both the requirements of 40 CFR 1501.8 and the proposal specific issues, interests, and controversies.

11.4 Need for After-Project Followup

As part of any environmental compliance activity, some environmental commitments are invariably made. These may be requirements resulting from ESA and NHPA consultations, agreement to implement recommendations of an FWCA report, or simply the environmental commitments of a NEPA document, which are written statements of intent, made by Reclamation, to mitigate or lessen environmental consequences associated with project activities. Environmental commitments can also address activities that restore or enhance environmental quality. These commitments are made in most environmental compliance documents (e.g., EAs, biological assessments, and EISs). The Reclamation office responsible for implementing the proposed action needs to follow up on environmental commitments made as part of the Reclamation decision on an action to ensure that these commitments are being fulfilled. This includes monitoring the effectiveness of commitments that are actually implemented to ensure that they meet stated goals of mitigation and/or enhancement. The findings should be documented and made part of the project files.

Environmental commitments should be viewed as a part of the action for which the agency may be held accountable. The terms of a ROD are enforceable by agencies and private parties. (See CEQ’s Forty Most Asked Questions, No. 34d.) Additionally, as new projects/activities are proposed, review and regulatory agencies may view past performance as an indication of future performance. Legitimate proposals for new activities can be jeopardized by past failures to honor commitments. NEPA documents, besides just listing environmental commitments, should include a process/program to identify specifically how the commitments will be met. Postdecisional monitoring is required by 40 CFR 1505.2(c), which states (in part): “A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.”
11.5 Doing NEPA on Decisions Already Made

NEPA compliance is required before any discretionary Federal action with potentially significant environmental impacts is initiated. Decisions should not be made without full compliance with NEPA. To do this is illegal and a violation of NEPA. The one exception to this requirement is in emergency situations. Reclamation may take urgent actions necessary to control immediate impacts of an emergency situation to life, property, or important resources (43 CFR 46.150).

Complying with NEPA after a decision has been made may cause the proposed Reclamation action to be halted, regardless of the merits of the proposed activity, because of legal challenges. Additionally, lack of a NEPA analysis may result in selecting an action that is not the best available alternative. The identification and analysis of alternatives contribute valuable information to the decisionmaking process. Other elements of the NEPA process also provide value, such as identifying measures that would avoid or mitigate significant impacts and an opportunity for the public to provide input into the decisionmaking process. Failure to carry out the NEPA process before a decision is made may result in decisions that are not beneficial to Reclamation and the environment.

11.6 How Much Is Enough?

NEPA sets forth a process to assist Federal agencies in making more informed decisions on actions that they undertake; however, before determining how or whether to proceed with a proposed action, there are many decisions that need to be made. These process decisions and the depth of analysis and/or scope of effort needed to make them have led to considerable discussion among NEPA practitioners, often culminating in the question, “How much is enough?” This question frequently arises during scoping—in the identification of the depth and extent of analysis regarding specific issues and when identifying the number/range of alternatives that need to be considered. Also, it frequently occurs during consultations with other agencies regarding the amount of information needed to make a determination of effect on resources. Unfortunately, with the sole exception of page limits, there is no specific guidance provided, in either NEPA or its implementing regulations, on this question.

There are, however, a number of references that suggest NEPA documents should be succinct statements, written in plain language, and detailed only to the point that it helps the reader understand the project, alternatives, and impacts. The sections of the CEQ NEPA regulations which address these topics are located at: 1500.1(b), 1500.4, 1501.2(b), 1501.7(a)(2) and (3), and Section 1502.22. A CEQ Guidance Memorandum, dated July 1983, also provides further discussion on this topic. The principal points coming out of the CEQ regulations and guidance are that Federal agencies should: (1) focus only on significant effects,
thus allowing a cutoff point to be defined by a lack of significance in the analysis; and (2) provide an adequate range of reasonable alternatives that allows decisionmakers to make informed decisions about the proposed actions.

The CEQ regulations do not put any consistent or explicit limit on the geographic or temporal scope to be examined (the “How far do you follow the impact?” issue). Wherever potentially significant impacts can be identified that are the result of any of the alternatives under consideration, those impacts should be presented, regardless of geographic location or how removed in time they may be. Where the impacts of an alternative are so attenuated as to be insignificant, or impossible to determine, the analysis can stop. The scope of an analysis can be an area of significant controversy, and the reasons an analysis is limited should be documented.

In responding to a question about how many alternatives must be considered, CEQ states that, “What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case” (CEQ’s Forty Most Asked Questions, No. 1b). This answer can be applied to any aspect of the NEPA process. The determination of a reasonable range must initially rest with the interdisciplinary preparers of the NEPA document. This can change during scoping, public meetings, and review of draft documents, and, of course, it is heavily influenced by the particular environmental issues involved.

There are several additional tests, all somewhat related and overlapping, which can be applied to appropriately limit the scope (i.e., identify when to determine enough is enough). The first is the “but for” argument. This consists of determining what would happen in the environment “but for” the proposed action. Those changes that would occur in the environment regardless of whether the proposed action is implemented are not analyzed as impacts of the proposed action. This is typically determined when the no action is developed because the no action should include those actions which would occur if the proposed action is not implemented. A typical example of this limit to NEPA analysis is a housing development which is going to occur regardless of whether Reclamation agrees to supply water or not. In this example, the no action alternative should reflect a reasonable alternative water supply and include the housing development. The alternatives would also include the housing development. Therefore, since the housing development would be a feature of the environment in all alternatives, the comparison of the no action alternative to the action alternatives would not display any effects of the housing development.

A second test revolves around the extent of agency discretion. Those actions for which Reclamation has no discretion to act differently (i.e., where there are no alternatives) are not subject to NEPA (43 CFR 46.100). An example would be where Congress has directed Reclamation to provide water to a specific community. While it may be appropriate to analyze the ways to provide that water, the provision of water to another community may not be a reasonable
alternative. These situations require careful reading of the authorizing statute and involvement of the Solicitor’s Office to ensure it is appropriate to limit the analysis.

The Supreme Court recently articulated (in *Department of Transportation v. Public Citizen*, 124 S. Ct. 2204 (2004)) an additional test, that of reasonable causation. The Supreme Court discusses this in terms of the “familiar doctrine of proximate cause from tort law” and indicates that, in addition to the “but for” test, discussed above, a “reasonably close causal relationship” must exist between the proposed action and the environmental effect. Where it is believed that such reasonable causation does not exist, it may be appropriate to exclude such analysis from a NEPA document; however, this depends on legal definitions and interpretations that should be discussed with the Solicitor’s Office before being applied to the scope of a NEPA analysis.

Finally, there is a brief discussion in section 3.5.3 describing how a Federal agency may limit the scope of analysis to a small part of a larger project when the larger project is non-Federal. There is a minimal level of Federal involvement that is necessary to trigger a requirement for analysis of the entire action as an indirect effect of the Federal action. This minimal level is not explicitly defined, but CEQ has recognized that such a limit of scope can be appropriate (see 52 FR 22517 (June 12, 1987)). As with agency discretion and reasonable causation, applying this concept to a particular project should be discussed with the Solicitor’s Office.

**11.7 Climate Change**

The subject of climate change has become a commonly raised issue in the NEPA process. As a result, it is recommended that climate change should be considered, to the extent it applies, in every NEPA analysis. There are two possible interpretations of climate change with respect to a Reclamation proposed action. The first interpretation is whether Reclamation’s action is a potentially significant contributor to climate change. The second is what effects climate change may have upon a Reclamation proposed action. For either case, it is recommended that a discussion of climate change be included in the EA or EIS, even if it is determined that climate change is not a factor for a particular action.

Reclamation’s proposed actions—typically involving moving and/or managing water in different ways—generally are not considered to be potentially significant contributors to climate change. If an action involves a substantial release of greenhouse gases (e.g., carbon dioxide [CO₂], methane [CH₄], nitrous oxide [N₂O], hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride [SF₆], and other fluorinated gases including nitrogen trifluoride [NF₃] and hydrofluorinated ethers), it may be reasonable to develop an analysis of the quantity of such greenhouse gases produced and relate that to other regional, national, or global sources to establish context and intensity.
Climate changes may have significant effects on how Reclamation projects operate and even whether the projects are viable, depending upon the local climate changes that may occur. The potential for climate change will likely affect all the alternatives (including no action) and triggers a potentially broad range of appropriate analysis for the NEPA document. A series of considerations are suggested to determine the appropriate analysis for any particular proposal. These considerations are:

- Is climate relevant to the proposed action?
- Is the timeframe for analysis long enough for climate change to be relevant?
- What relevant regional/local projections of climate change are available?
- If relevant regional/local projections are available, do they suggest significant change in a way that would affect the proposed action?
- If the proposal has an official partner, does that partner have State or local climate change analysis requirements that are appropriate for the NEPA analysis as well?
- Does the information available indicate that climate change would have a potentially significant effect upon Reclamation’s proposal?

As these considerations are examined, different options for addressing climate change in the NEPA process become more appropriate. If climate is not relevant, or if the project timeframe is too short for climate change to have an effect, a brief statement that climate change is not relevant is appropriate.

When the proposal may be affected by climate change, but no relevant regional/local climate projections are available, a generic discussion of climate change theory and current literature may be all that is reasonable. If the effect is potentially significant to the decision, be aware of 40 CFR 1502.22 and 43 CFR 46.125, addressing incomplete or unavailable information.

Where a cooperating agency or partner agency has climate change analysis requirements, based upon law or regulation, it may be appropriate to use the partner’s required analysis as long as that analysis is acceptable to Reclamation in a technical sense and appropriate for a NEPA analysis.

When the available information indicates a potentially significant effect upon Reclamation’s proposal, a more detailed discussion can be appropriate. This analysis can take the form of a literature review and qualitative analysis, or a quantitative sensitivity/effects analysis. This level of analysis is complex and can
be time consuming, and the question of exorbitant costs may become a factor. However, where climate change has a clear potential to significantly affect the proposal, all reasonable efforts should be made to obtain the appropriate information and analysis.
Chapter 11 Useful Links

A Citizen’s Guide to NEPA, Having Your Voice Heard

CEQ’s 40 Most Asked Questions

CEQ’s Memorandum of July 22, 1983

ESA

Fish and Wildlife Coordination Act
http://www.fws.gov/laws/lawsdigest/FWCOORD.HTML

National Historic Preservation Act
http://www.achp.gov/docs/nhpa%202008-final.pdf

Protocol Guidelines: Consulting with Indian Tribal Governments

40 CFR 1500-1508
http://ceq.hss.doe.gov/ceq_regulations/regulations.html

43 CFR 46
12.1 Who to Ask About NEPA in Reclamation

There will be many times when NEPA compliance requirements and procedures are not clear. When questions arise, this NEPA Handbook, and the policies, regulations, and laws it references, should be consulted first. If a course of action is still not clear, regional and Policy and Administration environmental staff, as well as the Solicitor and OEPC, are available for further assistance. Also, Reclamation has established a team of individuals representing NEPA expertise in each region and in Denver. This team is available to provide assistance when difficult NEPA issues occur.
NEPA Handbook Attachments

Attachment 1 – National Environmental Policy Act Regulations
National Environmental Policy Act of 1969
Council on Environmental Quality Regulations, 40 CFR 1500-1508
Department of Interior Implementation of NEPA, 43 CFR Part 46
Department of the Interior NEPA Procedures, 516 DM Chapters 1-4 and 14
Reclamation Manual, National Environmental Policy Act, ENV P03

Attachment 2 – Guidance
Council on Environmental Quality Guidance
Forty Most Asked Questions
Scoping Guidance
Guidance Regarding NEPA Regulations
Pollution Prevention and NEPA
Transboundary Effects
Cooperating Agencies
Cumulative Effects
Recommendations on Proposed Amendments to USACE
Prime and Unique Agricultural Lands and NEPA
Categorical Exclusions
Environmental Justice
Mitigation and Monitoring

Department of the Interior Environmental Statement Memoranda
State and Local Agency Review of Environmental Statements, ESM 10-14
Publication and Distribution of DOI NEPA Compliance, ESM 10-15
Tiered and Transferrence of Analysis, ESM 10-17
Public Participation and Community-Based Training, ESM 10-18
Integrated Analysis, ESM 10-19
Adaptive Management Practices, ESM 10-20
Consensus-Based Management, ESM 10-21
Approving and Filing of EISs, ESM 11-2
Procedures for Intra-Departmental Review of NEPA Compliance Documents via Electronic Methods, ESM 11-3

Bureau of Reclamation Guidance Memoranda
Consensus-Based Management
2025 Guidance
Title Transfer Cost Sharing
Guidance on Appropriate NEPA Compliance for Water-Related Contracting Activities
NEPA Compliance for Emergency Road Closures

Attachment 3 – Reclamation Manual
Reclamation Consultation Under the Endangered Species Act of 1973, as Amended

Attachment 4 – Summary of Related Environmental Laws
NEPA Handbook Attachments - continued

Attachment 5 – Executive Orders
Floodplains, EO 11988
Wetlands, EO 11990
Environmental Effects Abroad of Major Federal Actions, EO 12114
Intergovernmental Review of Federal Programs, EO 12372 and EO 12416,
   including Final Rule
Environmental Justice, EO 12898
Indian Sacred Sites, EO 13007
Invasive Species, EO 13112
Consultation and Coordination with Indian Tribal Governments, EO 13175
Migratory Birds, EO 13186
Cooperative Conservation, EO 13352
Federal Leadership in Environmental Energy, and Economic Performance, EO 13514

Attachment 6 – Environmental Justice
NEPA Responsibilities Under Departmental Environmental Justice Policy, ECM 95-3

Attachment 7 – American Indian Tribal Rights, Federal-Tribal Trust Responsibilities,
   and ESA, SO 3206

Attachment 8 – Tribal Trust Responsibilities
   Reclamation Compliance with Indian Sacred Sites

Attachment 9 – Indian Trust Asset Policy and Guidance
   Indian Trust Policy Memo from Commissioner Beard, July 1993
   Indian Trust Asset Policy Memo from Bill McDonald, December 1993, with enclosures
   Indian Trust Asset Memo from Dan Beard, October 21, 1994, with enclosures
   Departmental Responsibilities for Indian Trust Resources and Indian Sacred Sites on
   Federal Lands, ECM 97-2
   Responsibilities for Indian Trust Resources, Departmental Manual, 512 DM 2
   Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites,
   Departmental Manual, 512 DM 3

Attachment 10 – EPA Filing Procedures

Attachment 11 – EPA Wetland Banking Policies
The National Environmental Policy Act of 1969, as amended


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, consist 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 irrevocable 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.


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
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.
PART 1500--PURPOSE, POLICY, AND MANDATE

Sec. 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.

Sec. 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; 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.

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**Sec. 1500.3 Mandate.**

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, 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.

**Sec. 1500.4 Reducing paperwork.**

Agencies shall reduce excessive paperwork by:

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

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

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

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

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

 (f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (Secs. 1502.14 and 1502.15) and reducing emphasis on background material (Sec. 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 (Sec. 1501.7).

 (h) Summarizing the environmental impact statement (Sec. 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (Sec. 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 (Secs. 1502.4 and 1502.20).

 (j) Incorporating by reference (Sec. 1502.21).

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

 (l) Requiring comments to be as specific as possible (Sec. 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 (Sec. 1503.4(c)).

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

 (o) Combining environmental documents with other documents (Sec. 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 (Sec. 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 (Sec. 1508.13).


**Sec. 1500.5 Reducing delay.**

Agencies shall reduce delay by:

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

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

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

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

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

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

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

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

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

(j) Using accelerated procedures for proposals for legislation (Sec. 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 (Sec. 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 (Sec. 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

**Sec. 1500.6 Agency authority.**

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

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Sec. 1501.1 Purpose.

(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.

Sec. 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 Sec. 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.

Sec. 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (Sec. 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in Sec. 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.

Sec. 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 Sec. 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 (Sec. 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by Sec. 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 (Sec. 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (Sec. 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 Sec. 1506.6.

2. In certain limited circumstances, which the agency may cover in its procedures under Sec. 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 Sec. 1507.3, or

   (ii) The nature of the proposed action is one without precedent.

Sec. 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 (Sec. 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
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]

Sec. 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 Sec. 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.
Sec. 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 (Sec. 1508.22) in the Federal Register except as provided in Sec. 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 Sec. 1507.3(c). An agency may give notice in accordance with Sec. 1506.6.
2. Determine the scope (Sec. 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 (Sec. 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 Sec. 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 (Sec. 1502.7).
2. Set time limits (Sec. 1501.8).
3. Adopt procedures under Sec. 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.

Sec. 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 Sec. 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. 1502.1 Purpose.

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

Sec. 1502.2 Implementation.


Source: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.
To achieve the purposes set forth in Sec. 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 (Sec. 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.

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Sec. 1502.3 Statutory requirements for statements.

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

On proposals (Sec. 1508.23).
For legislation and (Sec. 1508.17).
Other major Federal actions (Sec. 1508.18).
Significantly (Sec. 1508.27).
Affecting (Secs. 1508.3, 1508.8).
The quality of the human environment (Sec. 1508.14).

Sec. 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 (Sec. 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 (Sec. 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 (Sec. 1501.7), tiering (Sec. 1502.20), and other methods listed in Secs. 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

**Sec. 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 (Sec. 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 (Secs. 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.

**Sec. 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 (Sec. 1501.7).

**Sec. 1502.7 Page limits.**

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

**Sec. 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.

**Sec. 1502.9 Draft, final, and supplemental statements.**

Except for proposals for legislation as provided in Sec. 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.

Sec. 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 Secs. 1502.11 through 1502.18, in any appropriate format.

Sec. 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 Sec. 1506.10).

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

**Sec. 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.

**Sec. 1502.13 Purpose and need.**

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

**Sec. 1502.14 Alternatives including the proposed action.**

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (Sec. 1502.15) and the Environmental Consequences (Sec. 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
Sec. 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 descriptions 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.

Sec. 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under Sec. 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 Sec. 1502.14. It shall include discussions of:

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

(b) Indirect effects and their significance (Sec. 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 Sec. 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under Sec. 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 Sec. 1502.14(f)).

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

**Sec. 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 (Secs. 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.

**Sec. 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 (Sec. 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.

**Sec. 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 Sec. 1502.18(d) and unchanged statements as provided in Sec. 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.

Sec. 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 (Sec. 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).

Sec. 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.

Sec. 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant
adverse effects on the human environment in an environmental
impact statement and there is incomplete or unavailable information,
the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably
foreseeable significant adverse impacts is essential to a
reasoned choice among alternatives and the overall costs of
obtaining it are not exorbitant, the agency shall include the
information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable
significant adverse impacts cannot be obtained because the
overall costs of obtaining it are exorbitant or the means to
obtain it are not known, the agency shall include within the
environmental impact statement:

1. A statement that such information is incomplete or
   unavailable;

2. A statement of the relevance of the incomplete or
   unavailable information to evaluating reasonably
   foreseeable significant adverse impacts on the human
   environment;

3. A summary of existing credible scientific evidence which
   is relevant to evaluating the reasonably foreseeable
   significant adverse impacts on the human environment,
   and

4. The agency's evaluation of such impacts based upon
   theoretical approaches or research methods generally
   accepted in the scientific community. For the purposes
   of this section, "reasonably foreseeable" includes impacts
   which have catastrophic consequences, even if their
   probability of occurrence is low, provided that the
   analysis of the impacts is supported by credible scientific
   evidence, is not based on pure conjecture, and is within
   the rule of reason.

(c) The amended regulation will be applicable to all
environmental impact statements for which a Notice of Intent
(40 CFR 1508.22) is published in the Federal Register on or
after May 27, 1986. For environmental impact statements in
progress, agencies may choose to comply with the
requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

Sec. 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.

Sec. 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.

Sec. 1502.25 Environmental review and consultation requirements.


(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. 1503.1 Inviting comments.
- 1503.2 Duty to comment.
- 1503.3 Specificity of comments.
- 1503.4 Response to comments.


Source: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

**Sec. 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 Sec. 1506.10.

**Sec. 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 environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in Sec. 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.

**Sec. 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.

**Sec. 1503.4 Response to comments.**

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:
1. Modify alternatives including the proposed action.

2. Develop and evaluate alternatives not previously given serious consideration by the agency.

3. Supplement, improve, or modify its analyses.


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 (Sec. 1502.19). The entire document with a new cover sheet shall be filed as the final statement (Sec. 1506.9).
PART 1504--PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec. 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.

Sec. 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.
Sec. 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).

PART 1505--NEPA AND AGENCY DECISIONMAKING

Sec. 1505.1 Agency decisionmaking procedures. Agencies shall adopt procedures (Sec. 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.

Sec. 1505.2 Record of decision in cases requiring environmental impact statements. At the time of its decision (Sec. 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.

Sec. 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 (Sec. 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.

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PART 1506--OTHER REQUIREMENTS OF NEPA

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Source: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

Sec. 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in Sec. 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....
Sec. 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.

Sec. 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.

Sec. 1506.4 Combining documents.

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

Sec. 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 (Sec. 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 Secs. 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 Sec. 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.

Sec. 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.

Sec. 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.

Sec. 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (Sec. 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 Secs. 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.

Sec. 1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the U.S. Environmental Protection Agency, Attention: Office of Federal Activities EIS Filing Section, Ariel Rios Building (South Oval Lobby) Mail Code 2252-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.

Sec. 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 Sec. 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 Sec.
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.


Sec. 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.

Sec. 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.

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 Sec. 1507.3 to the requirements of other applicable laws.

Sec. 1507.2 Agency capability to comply.

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

(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.
Sec. 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the Federal Register, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. 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 Secs. 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 (Sec. 1508.4)).

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

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

(d) Agency procedures may provide for periods of time other than those presented in Sec. 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 Sec. 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.
PART 1508--TERMINOLOGY AND INDEX

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Source: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

Sec. 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

Sec. 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."

Sec. 1508.3 Affecting.

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

Sec. 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 (Sec. 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 Sec. 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.

Sec. 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 Sec. 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.

Sec. 1508.6 Council.

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

Sec. 1508.7 Cumulative impact.

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

Sec. 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by 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.

Sec. 1508.9 Environmental assessment.
"Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

1. Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

2. Aid an agency's compliance with the Act when no environmental impact statement is necessary.

3. Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

Sec. 1508.10 Environmental document.

"Environmental document" includes the documents specified in Sec. 1508.9 (environmental assessment), Sec. 1508.11 (environmental impact statement), Sec. 1508.13 (finding of no significant impact), and Sec. 1508.22 (notice of intent).

Sec. 1508.11 Environmental impact statement.

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

Sec. 1508.12 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.

Sec. 1508.13 Finding of no significant impact.

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

Sec. 1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (Sec. 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.

**Sec. 1508.15 Jurisdiction by law.**

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

**Sec. 1508.16 Lead agency.**

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

**Sec. 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.

**Sec. 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 (Sec.
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 (Secs. 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.

Sec. 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.

Sec. 1508.20 Mitigation.

"Mitigation" includes:

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

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

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

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

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

Sec. 1508.21 NEPA process.

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

Sec. 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.

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

Sec. 1508.24 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.

Sec. 1508.25 Scope.

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

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

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

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

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

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

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

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

(b) Alternatives, which include:

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

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.
Sec. 1508.26 Special expertise.

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

Sec. 1508.27 Significantly.

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

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

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

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

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

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

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

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]

**Sec. 1508.28 Tiering.**

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

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

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

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Wednesday,
October 15, 2008

Part IV

Department of the Interior

Office of the Secretary

43 CFR Part 46
Implementation of the National Environmental Policy Act (NEPA) of 1969; Final Rule
DEPARTMENT OF THE INTERIOR
Office of the Secretary

43 CFR Part 46
RIN 1090–AA95

Implementation of the National Environmental Policy Act (NEPA) of 1969

AGENCY: Office of the Secretary, Interior.
ACTION: Final rule.

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

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

EFFECTIVE DATE: November 14, 2008.

FOR FURTHER INFORMATION CONTACT: Dr. Vijai N. Rai, Team Leader, Natural Resources Management, Office of Environmental Policy and Compliance, 1849 C Street, NW., Washington, DC 20240. Telephone: 202–206–6661. E-mail: vijai_rai@ios.doi.gov.

SUPPLEMENTARY INFORMATION: As a part of the conversion of the Department’s NEPA procedures from 516 DM to regulations, a number of key changes have been made. This rule:
- Clarifies which actions are subject to NEPA section 102(2) by locating all relevant CEQ guidance in one place, along with supplementary Department procedures.
- Establishes the Department’s documentation requirements for urgently needed emergency responses. The Responsible Official (RO) must assess and minimize potential environmental damage to the extent consistent with protecting life, property, and important natural, cultural and historic resources and, after the emergency, document that an emergency existed and describe the responsive actions taken.
- Incorporates CEQ guidance that the effects of a past action relevant to a cumulative impacts analysis of a proposed action may in some cases be documented by describing the current state of the resource the RO expects will be affected.
- Clarifies that the Department has discretion to determine, on a case-by-case basis, how to involve the public in the preparation of EAs.
- Highlights that adaptive management strategies may be incorporated into alternatives, including the proposed action.
- Incorporates language from the statute and CEQ guidance that EAs need only analyze the proposed action and may proceed without consideration of additional alternatives when there are no unresolved conflicts concerning alternative uses of available resources.

This rule is organized under subparts A through F including the material currently in 516 DM Chapters 1 through 6. The Department is replacing these chapters with new 516 DM Chapters 1–3, which will include explanatory guidance on these regulations. These revised chapters will be available to the public before the effective date of this rule and will be found at http://www.doi.gov/oepc. The Department did not include 516 DM Chapter 7 in this rule because it provides internal administrative guidance specific to Department review of environmental documents and project proposals prepared by other Federal agencies. Chapters 8–15 of 516 DM continue to contain bureau-specific NEPA implementing procedures. In addition, other guidance pertaining to the Department’s NEPA regulations and the bureaus’ NEPA procedures will be contained in explanatory and informational directives. These explanatory and informational directives will be contained either in the DM or ESM (for Departmental guidance), bureau NEPA handbooks (for bureau-specific guidance), or both.

The CEQ was consulted on the proposed and final rule. CEQ issued a letter stating that CEQ has reviewed this rule and found it to be in conformity with NEPA and CEQ regulations (per 40 CFR 1507.3 and NEPA section 102(2)(B)).

Comments on the Proposal

This rule was published as a proposed rule in the Federal Register (73 FR 126) on January 2, 2008, and there was a 60-day comment period that closed on March 3, 2008. The Department received 100 comments. These comments were in the form of letters, e-mails, and faxes. Of the 100 comments received 50 were substantive; the remaining comments were all variations of a single form letter addressing one or more of three issues, which have been addressed below. The Department very much appreciates the response of the public, which has assisted the Department in improving the clarity of this final rule.

In addition to changes made to the final rule in response to specific comments received, which are noted below, the Department has made minor revisions throughout in order to improve the clarity of the rule. In general, these latter revisions do not change the substance or meaning of any of the provisions proposed on January 2, 2008, except in one or two instances as noted. As contemplated in the preamble to the proposed rule, the Department has added a provision specifying the circumstances in which an Environmental Assessment (EA) may tier to an Environmental Impact Statement (EIS) and in which a bureau may reach a Finding of No Significant Impact (FONSI) or Finding of No New Significant Impact (FONNSI). Please see paragraph 46.140(c).

General Comments on the Proposed Rule

Comment: Several commenters questioned the rationale for moving the Department’s NEPA procedures from the DM to regulations and requested further clarification of this rationale.

Response: The Department believes that codifying the procedures in regulation will provide greater visibility to that which was previously contained in the DM and highlight opportunities for public engagement and input in the NEPA process. The Department believes that this greater accessibility of the regulations, when published in the Code of Federal Regulations (CFR), will allow
the public to more easily participate in the NEPA process.

Comment: Some commenters stated that the Department should include the issue of global climate change in all environmental analysis documents. They stated that the Department has a legal obligation under NEPA to analyze the effects of global climate change as shaping the context within which proposed actions take place, as well as the impacts of proposed projects on climate change. Another group recommended that the Department include a mandate that an environmental analysis of climate change impacts be included in the NEPA analysis prepared for Resource Management Plans (RMPs). Several groups suggested that the Department should require planning documents for fossil fuel developments to consider various energy alternatives, including conservation and energy efficiency. They also recommended that the Department analyze greenhouse gas emissions in all decision documents related to energy development on public lands. Another commenter suggested that the Department compile information about landscape changes in response to climate change to use for programmatic NEPA documents.

Response: Climate change issues can arise in relation to the consideration of whether there are direct or indirect effects of the greenhouse gas emissions from a proposed action, the cumulative effect of greenhouse gas emissions, and the effect of climate change on the proposed action or alternatives. The extent to which agencies address the effects of climate change on the aspects of the environment affected by the proposed action depends on the specific effects of the proposed action, nexus with climate change effects on the same aspects of the environment, and their implications for adaptation to the effects of climate change. Whether and to what extent greenhouse gas emissions and/or climate change effects warrant analysis is the type of determination that Responsible Officials make when determining the appropriate scope of the NEPA analysis. Extensive discussion regarding the role of the Department, as well as the Federal government as a whole, with respect to the effects of greenhouse gas emissions and/or global climate change is beyond the scope of this rule concerning environmental analysis generally. Consequently, the final rule does not contain explicit provisions addressing global climate change.

Comment: One commenter stated that the Department should include a provision that agencies must seek input through the NEPA process from local, regional, State, and tribal health agencies when making decisions that may impact human health. Several groups recommend requiring a Health Impact Assessment (which is a tool used by the World Health Organization) when a project may impact human health.

Response: The Department appreciates this suggestion but does not believe inclusion of a specific requirement in this regard is appropriate in this rule. Individual bureaus of the Department have addressed and will continue to address possible impacts to human health in certain circumstances, such as with respect to subsistence issues in Alaska. Whether or not a Health Impact Assessment is the appropriate means to assess potential impacts on human health with regard to a particular proposal is the type of determination that Responsible Officials make for all manner of possible impacts when determining the appropriate scope of the NEPA analysis.

Responses to Comments on Individual Provisions, Including Analysis of Changes Made

The following paragraphs contain responses to comments made on individual provisions of the proposed rule and incorporate discussion of changes made to the rule as proposed in January 2008.

Subpart A: General Information

Section 46.10 Purpose of this Part. A new paragraph (c) has been added to clarify that, in accordance with CEQ regulations at 40 CFR 1500.3, trivial violations of these regulations are not intended to give rise to any independent cause of action.

Section 46.30 Definitions. This section supplements the terms found in the CEQ regulations and adds several new definitions. The terms affected are the following: Adaptive management; Bureau; Community-based training; Controversial; Environmental Statement Memoranda; Environmentally preferable alternative; No action alternative; Proposed action; Reasonably foreseeable future actions; and Responsible Official. A definition of consensus-based management has been placed in section 46.110. The definitions of no action alternative and proposed action have been moved to this section for the final rule from proposed section 46.420, as these terms may apply to both EAs and EISs. Comments and responses addressing these terms may be found below, in the discussion of section 46.420.

Comment: Several commenters expressed concern that the definition of “community” may be “misinterpreted in a variety of ways to mean local and county governments affected by a proposed action, or communities of individuals with a common interest in the project who do not necessarily live in the area directly affected by the project.” Several groups recommended that the Department include and review the definition(s) in Environmental Statement Memorandum No. ESM03–7.

Response: Because of the possibility of confusion noted by the commenter, the Department has included a provision at section 46.110 focusing on “consensus-based management” as incorporating the ideas reflected in the emphasis on community involvement in the NEPA process. In developing the provision addressing consensus-based management, the Department relied upon the existing ESM03–7.

Comment: Many commenters expressed concerns with the proposed definition of “controversial.” Some stated that the size or nature of a proposed action should not render the action controversial under NEPA.

Several individuals are concerned that the proposed definition of “controversial” would render all proposed projects on public lands as being controversial and will protract NEPA analyses. One group applauded the Department for defining “controversial” in terms of disputes over the bio-physical effects of a project rather than merely opposition to a project.

Response: The language in the proposed rule reflects current case precedent on the meaning of “controversial” under NEPA and has been retained, but with clarification to address the confusion regarding the reference to “size” and “nature” in the final rule. Courts have consistently specified that disagreement must be with respect to the character of the effects on the quality of the human environment in order to be considered to be “controversial” within the meaning of NEPA, rather than a mere matter of the unpopularity of a proposal. See Como-Falcon Coalition, Inc. v. U.S. Dept. of Labor, 609 F.2d 342 (8th Cir. 1978), cert. denied, 446 U.S. 936 (“Mere opposition to federal project does not make project controversial so as to require environmental impact statement.”)

Comment: Some commenters suggested that the definition of “environmentally preferable alternatives” does not make clear whether the requirement applies to Records of Decision (RODs) on projects
analyzed in an EIS or EA or only to those analyzed in an EIS. They recommended adding a sentence at the end of the definition clarifying that the requirement applies to EAs and EISs.

Response: CEQ regulations require the identification of at least one environmentally preferable alternative in a ROD, which is the decision document issued after completion of an EIS. (40 CFR 1505.2(b); see also Question 6b of CEQ’s “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended (hereinafter CEQ’s “Forty Most Asked Questions”).) The CEQ regulations do not identify the decision document issued after completion of an EA/atoon, and bureaus do not issue RODs in this situation. Therefore, the Department has not changed the definition in response to this comment.

Comment: Several commenters expressed reservations about the definition of Preliminary Environmental Impact Statement (PEIS). They suggested that the role of the PEIS be clarified. One commenter wanted the Department to include provisions on how the scoping process and the PEIS will interact. Others wanted to know what level of detail should be included in a PEIS and whether use of a PEIS would introduce an additional requirement for public comment. One commenter strongly disagreed with the use of a PEIS, stating that the use of a PEIS could delay a DEIS or FEIS and could add additional expenses to private proponents that are funding NEPA projects. They recommended that the Department add a provision to the rule that would enforce time restrictions on the PEIS process.

Response: Because of the confusion and concern surrounding the PEIS, and upon further reflection, the Department has decided not to include this provision in the final rule. The definition in the proposed rule found at section 46.30 and description in sections 46.415 and 46.420 have been removed in the final rule. The Department continues to encourage collaboration with the public in an approach to alternative development and decision-making. The implementation of any such approach is determined by the RO. The PEIS was simply an optional tool and its removal from the final rule will not diminish this continuing Departmental emphasis on collaboration. The RO will still be free to involve and inform the public regarding each particular NEPA analysis in a manner that best meets the public and government needs.

Comment: One commenter stated that the Department should add “agency” to the definition of “Reasonably Foreseeable Future Actions” to ensure the agency covers all reasonably foreseeable actions that flow from proposed actions. Several commenters stated that the proposed definition of “Reasonably Foreseeable Future Actions” conflicts with the definition of “Reasonably Foreseeable Development Scenario” contained in the Instruction Memorandum 2004–089 issued by the BLM. Another commenter stated that the proposed definition of “Reasonably Foreseeable Future Actions” does not follow CEQ guidelines.

Response: The final rule defines “reasonably foreseeable future actions” to explain a term used in CEQ’s definition for “cumulative impact” at 40 CFR 1508.7. The Department has attempted to strike a balance by eliminating speculation about activities that are not yet planned, but including those that are reasonably foreseeable and are expected to occur (for example, based on other development in the area when there has been some decision, funding, or development of a proposal (see 40 CFR 1508.23)). The Department does not believe that the definition of “reasonably foreseeable future actions” conflicts with the description of the Bureau of Land Management’s analytical tool, the “reasonably foreseeable development scenario” or RFD. The RFD is a projection (scenario) of oil and gas exploration, development, production, and reclamation activity that may occur in a specific resource area during a specific period of time; as such, the analysis in the RFD can provide basic information about oil and gas activities that may inform the analysis of reasonably foreseeable future actions.

In order to clarify that reasonably foreseeable future actions include both “federal and non-federal” activities, we have added these terms in the definition in section 46.30. This is consistent with 40 CFR 1508.7. The Department has added language to clarify that the existing decisions, funding, or proposals are those that have been brought to the attention of the RO.

In its mention of the “Responsible Official of ordinary prudence” the definition also incorporates the “Reasonably Foreseeable” standard emphasized by the Supreme Court as “inherent in NEPA and its implementing regulations.” In Department of Transportation v. Public Citizen, 541 U.S. 752, 770 (2004), the Court reaffirmed that this “rule of reason” is what ensures that agencies include in the analyses that they prepare information useful in the decision-making process. In that case, the Court noted that the agency in question, the Federal Motor Carrier Safety Administration in the Department of Transportation, properly considered the incremental effects of its own safety rules in the context of the effects of the reasonably foreseeable possibility that the President might lift the moratorium on cross-border operations of Mexican motor carriers. Id. In those circumstances, the possibility that the President might act in one of several ways was neither an existing decision, matter of funding, or proposal, but was nevertheless a possibility that a person of ordinary prudence would consider when reaching a decision regarding the proposed action of promulgating the rule at issue in that case. Similarly, in some circumstances an RO of ordinary prudence would attempt to strike a balance by analyzing actions that, while not yet proposed, funded, or the subject of a decision, nevertheless are likely or foreseeable enough to provide important information and context within which any significant incremental effects of the proposed action would be revealed.

Subpart B: Protection and Enhancement of Environmental Quality

The proposed rule did not include portions of 516 DM Chapter 1 that are merely explanatory in that they address internal Departmental processes. This information will be retained in the DM or will be issued as additional explanatory information by the Department’s Office of Environmental Policy and Compliance in Environmental Statement Memoranda.

In this final rule, this subpart includes the following sections:

Section 46.100 Federal action subject to the procedural requirements of NEPA. This section provides clarification on when a proposed action is subject to the procedural requirements of NEPA. Paragraph 46.100(b)(4). “The proposed action is not exempt from the requirements of section 102(2) of NEPA,” refers to those situations where, either a statute specifically provides that compliance with section 102(2) of NEPA is not required, or where, for instance, a bureau is required by law to take a specific action such that NEPA is not triggered. For example, Public Law 105–167 mandates the Bureau of Land Management (BLM) to exchange certain mineral interests. In this situation, section 102(2) of NEPA would not apply because the law removes BLM’s decision making discretion. Also, this provision refers to situations where there is a clear and unavoidable conflict
between NEPA compliance and another statutory authority such that NEPA compliance is not required. For example, if the timing requirements of a more recent statutory authority makes NEPA compliance impossible, NEPA must give way to the more recent statutory authority such that NEPA compliance impossible, NEPA must give way to the more recent statutory authority.

Similarly, the final rule clarifies that the proposed action is subject to the procedural requirements of NEPA and the CEQ regulations depending on “the extent to which bureaus exercise control and responsibility over the proposed action and whether Federal funding or approval will be provided to implement it” paragraph 46.100(a). The criteria for making this determination include, inter alia, “when the bureau has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal” paragraph 46.100(b)(1), and “the effects can be meaningfully evaluated” and “the proposed action would cause effects on the human environment” paragraph 46.100(b)(3).

The clarifications provided in this section have been made, in part, in order to ensure that the rule is consistent with the Supreme Court’s decision in Department of Transportation v. Public Citizen, 541 U.S. 752, 770 (2004). In Public Citizen, the Court explained that a “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations, but that there must be “a reasonably close causal relationship” between the environmental effect and the alleged cause and that this requirement was analogous to the “familiar doctrine of proximate cause from tort law.” 541 U.S. at 767. The Court reaffirmed that “courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not” and that inherent in NEPA and its implementing regulations is a “rule of reason.” Id.

Comment: Some commenters expressed concern regarding the procedural requirements of NEPA. One group stated that the Department’s procedural actions should be subject to NEPA requirements regardless of whether or not sufficient funds are available. This group stated that if a proposed action is even being considered by a RO, the procedural requirements of NEPA must apply. Another group suggested the Department add an additional subsection that offers guidance whether an “action” is subject to NEPA compliance.

Response: The Department agrees that the procedural requirements of NEPA apply when a proposal consistent with 40 CFR 1508.23 has been developed. Mere consideration of a possible project, however, does not constitute a proposed action that can be analyzed under NEPA. Rather, under 40 CFR 1508.23, a proposal is ripe for analysis when an agency is “actively preparing to make a decision.”

When the proposed action involves funding, Federal control over the expenditure of the funds by the recipient is essential to determining what constitutes a “Federal” action that requires NEPA compliance. This is consistent with 40 CFR 1508.18(a). The issue of funding does not turn on the sufficiency, or lack thereof, of the funding, but on the degree of Federal control or influence over the use of the funds. The language in the final rule regarding whether a proposal is subject to NEPA compliance has been clarified by addressing the question of whether NEPA applies in paragraph 46.100(a), and when the NEPA analysis should be conducted in paragraph 46.100(b).

Comment: One individual urged the Department to not add additional obligations that are not currently required under NEPA, particularly with respect to the emphasis on public participation.

Response: This final rule adds no additional obligations not currently required under NEPA and the CEQ regulations. Section 46.100 is an effort to consolidate existing requirements in 40 CFR 1508.18, 40 CFR 1508.23, and 40 CFR 1508.25 among others. For instance, paragraph 40 CFR 1502.2(c) CEQ regulations require the use of “best available data;” rather, CEQ regulations demand information of “high quality” and professional integrity. 40 CFR 1500.1, 1502.24. However, the Department’s obligations under other authorities, such as the Information Quality Act Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554), do require bureaus to use the best available data. While discussion of the Department’s obligations under the Information Quality Act is outside the scope of this rule, the Department concurs that meaningful evaluation must be carried out on the basis of whatever data is available. The Department does not believe that this is inconsistent with CEQ’s provision regarding those situations where information is incomplete or unavailable (40 CFR 1502.22). In fact, rather than stating that meaningful evaluation cannot take place when there are “unknowns” as the commenter appears to suggest, the CEQ regulations provide steps to take in order that meaningful evaluation can continue when information is lacking; therefore, the Department does not believe
revision of this rule is necessary to address this point.

Comment: Several individuals responded to our request for input regarding the use of FONSIIs based on tiered EAs where a FONSI would be, in effect, a finding of no significant impacts rather than those already disclosed and analyzed in the EIS to which the EA is tiered. These individuals supported the concept.

Response: The Department appreciates the comment. The Department has added the provision as contemplated. See section 46.140, which provides for the use of tiered documents. See also the detailed response to comments on section 46.140, below. Under this final rule a FONSI or FONNSI (Finding of No New Significant Impact) can be prepared based on an EA that is tiered to an EIS. This approach is consistent with CEQ regulations at 40 CFR 1508.28.

Comment: One group recommended the Department clarify that the National Park Service (NPS) should prepare an EA or EIS as part of its submission to the National Capital Planning Commission.

Response: This comment was specifically referring to situations where a particular type of proposed action may be subject to categorical exclusion (CX or CE) under the Department’s NEPA procedures but not under the NEPA procedures of another Federal agency such as, in this case, the NPS. While, as a general rule, each Federal agency is responsible for compliance with NEPA consistent with both CEQ’s regulations and its own procedures for implementing NEPA, the particular issue raised concerns a very specific situation involving two Federal agencies acting under very specific and distinct authorities. Therefore, the Department declines to address this comment more specifically and does not believe a specific provision is necessary in general Departmental procedures.

Section 46.105 Using a contractor to prepare environmental documents. This section explains how bureaus may use a contractor to prepare any environmental document in accordance with the standards of 40 CFR 1506.5(c).

Comment: Some commenters wanted the Department to clarify requirements for working with a contractor. Some stated that strict requirements should be put into place for selection of a contractor to ensure the adequacy of documents, independent evaluation, and sound management practices. One individual stated that the Department should adopt existing CEQ guidance on the use and selection of contractors.

Response: The Department complies with CEQ regulations and follows existing CEQ guidance on the selection and use of contractors. Each bureau is responsible for determining how its officials will work with contractors, subject to the CEQ regulations and guidance. In any event, the RO is responsible for, or is the approving official for, the adequacy of the environmental document. The Department does not believe any further clarification of the rule is necessary.

Comment: Another commenter applauded the Department for a “clear articulation of the use of contractors for NEPA document preparation.”

Response: The Department appreciates the comment.

Section 46.110 Incorporating consensus-based management. This section provides a definition of consensus-based management and incorporates this approach as part of the Department’s NEPA processes. Paragraph 46.110(e), requiring bureaus to develop directive to implement section 46.110 has been removed from the final rule as not appropriate for regulatory treatment.

Comment: Most commenters supported the Department’s proposed rule on consensus-based management. However, many individuals expressed concerns regarding the breadth of the definition of consensus-based management. Because of the lack of concrete provisions within this section, many individuals suggested the NEPA process could become “unnecessarily time consuming and costly.” Several individuals stated that the word “consensus” should be taken out of the proposed rule because “consensus” suggests interested parties will determine the preferred alternative. Other individuals suggested that the term “consensus” has the potential to create “unreasonable expectations in the public.” One group suggested replacing “consensus” with “open and transparent community involvement and input.” Another suggestion for the replacement of the word “consensus” was “collaboration.” Several individuals stated that the proposal for consensus-based management should be withdrawn and that the Department should continue following the current CEQ regulations on collaboration. Individuals suggested that the Department clearly define what constitutes community.

Response: The Department has revised section 46.110, and added a definition for “consensus-based management” to this section. The definition comes from the existing ESM03–7, and expresses existing Department policy. The definition of “consensus-based management” has been modified in order to render it in regulatory language. Many of the commenters seem to assume that in the absence of consensus the Department will not take action. This is not the case. While the RO is required to consider the consensus-based management alternative whenever practicable, at all times discretion remains with the RO regarding decisions, if any, to be made with respect to the proposed action. While the Department requires the use of consensus-based management, whenever practicable, we have added a provision that if the RO determines that the consensus-based alternative should not be the preferred alternative, an explanation of the rationale behind this decision is to be incorporated in the environmental document.

Comment: Some commenters stated that the technique of consensus-based management may be impossible to implement. One group was particularly concerned with the definition of “interested party.” They believe it may be impossible for the Department to determine who the interested parties are and that the process of managing interested parties may be cumbersome and add expense and time onto NEPA projects. This group suggested that the Department develop a clear and concise definition of “interested parties.”

Response: The Department acknowledges that consensus may not always be achievable or consistent with the Department’s legal obligations or policy decisions. However, the Department requires the use of consensus-based management whenever practicable. CEQ regulations direct agencies to encourage and facilitate public involvement in the NEPA process. 40 CFR 1500.2(d), 40 CFR 1506.6. The Department agrees that use of the term “interested parties” may cause confusion. The Department has replaced the term “interested parties” with “those persons or organizations who may be interested or affected” which is used in the CEQ regulations. See for example 40 CFR 1503.1.

Comment: Several individuals stated that it is vital that the interests of the “regional community” be taken into account during the NEPA process. One commenter applauded the Department for including consensus-based management in the proposed rule and for taking additional steps to support the “cooperative conservation policy.”

One group believed this proposal would “provide an avenue for impacted local governments and citizens to become
management alternative (if there are any presented) may only be selected if it is fully consistent with the purpose of and need for the proposed action, as well as with NEPA generally, the CEQ regulations, and all applicable statutory and regulatory provisions, as well as Departmental and bureau written policies and guidance could be selected. It also provides that bureaus must be able to show that participants’ or community’s input is reflected in the evaluation of the proposed action and the final decision. Therefore, the Department believes that the final rule adequately addresses these comments.

Comment: Some individuals indicated that NEPA does not require consensus and stated the proposed rule goes against the direction of the CEQ regulations. Some commenters directed the Department to review CEQ’s “Collaborative decision-making in NEPA” handbook. Several groups recommended that the Department include and review the Environmental Statement Memorandum No. ESM03–7.

Response: The Department agrees neither NEPA nor the CEQ regulations require consensus. This new regulation requires the use of consensus-based management whenever practicable. Consensus-based management is not inconsistent with the intent of NEPA and the CEQ regulations. The Department has reviewed CEQ’s publication “Collaborative decision-making in NEPA—A Handbook for NEPA Practitioners” available at http://ceq.eh.doe.gov/nepa/nepapubs/Collaboration_in_NEPA_Oct2007.pdf. While consensus-based management, like collaboration, can be a useful tool, the Department recognizes that consensus-based management may not be appropriate in every case. The final rule does not set consensus-based management requirements, including timelines or documentation of when parties become involved in the process. Similar to collaborative processes, consensus-based management processes, like public involvement and scoping, will vary depending on the circumstances surrounding a particular proposed action. Some situations will require a lot of time and others will not. Regardless of the level or kind of public involvement that takes place, at all times the RO remains the decision maker.

Comment: One group suggested that the Department remove paragraph (b) because it is “duplicative, ambiguous, and unnecessary.” They believed this section simply restates the requirement in section 1502.14 of the CEQ regulations that requires agencies evaluate “all reasonable alternatives.” They also expressed concern that community-based alternatives may be given preferential weight over the project proponent’s alternative.

Response: The Department does not agree that the section is unnecessary and duplicative or that it simply restates the requirement in section 1502.14 of the CEQ regulations. Although there are some common elements to 40 CFR 1502.14 and paragraph 46.110(b), this paragraph requires the use of consensus-based management in NEPA processes and decision-making whenever practicable. The RO is responsible for an analysis of the reasonable alternatives, and the NEPA process allows for the selection of an alternative based on the consideration of environmental effects, as well as the discretionary evaluation of the RO. The intent of this provision is that alternatives presented by those persons or organizations that may be interested or affected, including applicants, be given consideration.

Comment: One group wanted to see a mandate added to the proposed rule that requires the Department to work with tribal governments. One individual suggested that the word “considered” should be changed to “adopted,” “accepted,” or “implemented” to ensure consideration is given to an alternative proposed by a tribe.

Response: The Department has a government-to-government relationship with federally-recognized tribes and as such specifically provides for consultation, coordination and cooperation. We consider all alternatives, including those proposed by the tribes, as part of the NEPA process, but cannot adopt, accept, or implement any alternative before full evaluation of all reasonable alternatives. Therefore, the Department declines to adopt the group’s recommendation.

Section 46.113 Scope of the analysis. This section, as proposed, addressed the relationships between connected, cumulative, and similar actions and direct, indirect and cumulative impacts. This section has been removed from the final rule.

Comment: Some commenters stated that the proposed rule is not clear with respect to the issue of what projects need to be included in the scope of analysis. One individual suggested that the Department should include language in the proposed rule clarifying that the effects of connected, cumulative and similar actions must be included in the effects analysis as indirect or cumulative effects. These actions do not become part of the proposed action, and alternatives for these actions need not be considered in the analysis.
One individual suggests that the Department change the language to provide guidance that allows bureaus to determine which projects need to be included in a cumulative effects analysis. They recommend clearly defining “connected,” “cumulative,” “direct,” and “indirect.” If these changes are made, some believe this rule will provide uniformity, consistency, and predictability to the NEPA process.

Another individual suggested “should” be removed from this section. They expressed concern that the current wording implies that connected and cumulative action analysis is optional.

One commenter recommended that this section should be deleted in its entirety because it is inconsistent with CEQ regulations. They recommended that the Department revise the section to reflect the difference between the treatment of connected, cumulative, and similar actions and the treatment of the effects of such actions.

Response: In light of the confusion reflected in several of the comments, as well as upon further consideration, the Department has eliminated this provision from the final rule. Bureaus will continue to follow CEQ regulations regarding scope of analysis at 40 CFR 1508.25, as well as bureau specific directives.

Section 46.115 Consideration of past actions in the analysis of cumulative effects. This section incorporates CEQ guidance issued on June 24, 2005 that clarifies how past actions should be considered in a cumulative effects analysis. The Department has elected not to repeat the specific provisions of the CEQ guidance in the final rule. Responsible Officials are directed to refer to the applicable CEQ regulations and the June 24, 2005 CEQ guidance.

Comment: Several groups commended the Department for its efforts to bring clarity to the NEPA cumulative effects analysis.

Response: The Department appreciates the comments.

Comment: Several groups stated that CEQ regulations do not contain a “significant cause-and-effect” filter excluding projects from cumulative impact analysis because the project’s effects are minor. One group was concerned that a proposed rule contains measures that would “constrain the usefulness of agencies’ analyses of cumulative impacts,” and would violate CEQ regulations. This group suggested that the proposed rule would constrain the scope of actions whose effects should be considered in a cumulative impacts analysis.

Some individuals stated that the Department is proposing to curtail the consideration and evaluation of past actions when proposing future activities. They stated that the agencies and public should be informed of potential environmental consequences before decisions are made. Others suggested this section does not provide guidance to the RO on what past actions and proposed future actions should be included in the analysis. Groups stated that a Department field office has no inherent expertise in determining which actions are relevant to a cumulative impacts analysis and should therefore not be vested with such discretion.

Several groups suggested that the entire section should be removed from the proposed rule, and that the Department should conduct environmental analyses pursuant to CEQ regulations. One individual stated “NEPA is intended to ensure that decisions informed by the “cumulative and incremental environmental impacts” of the proposed projects and how those impacts will actually affect the environment.” Several groups stated that vague language for past actions to be included in cumulative impact analysis will result in more confusion and litigation.

Response: At section 46.115, this final rule incorporates guidance on the analysis of past actions from the June 24, 2005 CEQ Guidance on the Consideration of Past Actions in Cumulative Effects Analysis, which may be found at http://ceq.eh.doe.gov/nea/regs/Guidance_on_CE.pdf. This section is consistent with existing CEQ regulations, which use the terms “effects” and “impacts” synonymously and define cumulative impact as “the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions” (40 CFR 1508.7).

The focus of the CEQ guidance incorporated in this final rule is on the consideration of useful and relevant information related to past actions when determining the cumulative effects of proposals and alternatives. Bureaus will conduct cumulative effects analyses necessary to inform decision-making and disclose environmental effects in compliance with NEPA. A “significant cause-and-effect” filter is specifically provided for in the CEQ guidance.

To clarify the Department’s commitment to follow CEQ guidance concerning consideration of past actions, the final rule at section 46.115 is revised to state, “When considering the effects of past actions as part of a cumulative effects analysis, the Responsible Official must analyze the effects in accordance with 40 CFR 1508.7 and in accordance with relevant guidance issued by the Council on Environmental Quality, such as ‘The Council on Environmental Quality Guidance Memorandum on Consideration of Past Actions in Cumulative Effects Analysis’ dated June 24, 2005, or any superseding Council on Environmental Quality guidance.” The Department believes that by incorporating CEQ’s guidance we have included sufficient specificity in the rule; any other “how to” information may be provided through the Departmental chapters in the DM, environmental statement memos,and series, or bureau-specific explanatory and informational directives.

Comment: Groups expressed concern over the definition of “reasonably foreseeable future actions” and suggested this definition should be removed from the final proposal. They understood that the Department cannot conduct a “crystal ball” analysis but that actions should be considered in the analysis even if decisions and funding for specific future proposals does not exist.

Response: The Department agrees. In response, the Department has added specificity and provided guidance on what should be considered a reasonably foreseeable future action in order to ensure that speculative actions or actions are not incorporated into the analysis while actions that may inform the RO’s analysis of cumulative impacts for the proposed action are included, even if they are not yet funded, proposed, or the subject of a decision identified by the bureau. This approach is consistent with CEQ regulations.

Section 46.120 Using existing environmental analyses prepared pursuant to NEPA and the Council on Environmental Quality regulations. This section explains how to incorporate existing environmental analysis previously prepared pursuant to NEPA and the CEQ regulations into the analysis being prepared.

Comment: Several individuals agreed that using existing documentation will reduce lengthy analysis and duplication of work and applaud the Department for including this section in the proposed rule. However, commenters would like a provision added to the analysis to ensure the supporting documentation is provided to the public online and in the bureau’s office.

Response: The Department agrees that any information relied upon in a NEPA analysis should be publicly available, either independently or in connection with the specific proposed action at
issue, and has so stated in section 46.135.

Section 46.125 Incomplete or unavailable information. CEQ regulations at 40 CFR 1502.22 provide “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” and sets out steps that agencies must follow in these circumstances. This section clarifies that the overall costs of obtaining information referred to in 40 CFR 1502.22 are not limited to the estimated monetary cost of obtaining information unavailable at the time of the EIS, but can include other costs such as social costs that are more difficult to monetize. Specifically, the Department requested comments on whether to provide guidance on how to incorporate non-monetized social costs into its determination of whether the costs of incomplete or unavailable information are exorbitant. The Department also requested comments on what non-monetized social costs might be appropriate to include in this determination; e.g., social-economic and environmental (including biological) costs of delay in fire risk assessments for high risk fire-prone areas.

Comment: Many commenters expressed concern with the incomplete or unavailable information section. They stated that the rule does not provide guidance to bureaus on how to address “non-monetized social costs.” Some individuals stated that critical information is missing from this section, such as an exclusive list of non-monetized costs. Several groups suggested the Department expand on CEQ regulation section 1502.22 which addresses agency procedure in the face of incomplete or unavailable information. Groups stated that the Department should “direct its bureaus to specifically evaluate the risks of proceeding without relevant information, including risks to sensitive resources.” Some suggested the Department provide their findings to the public so the public can provide meaningful comment and scrutiny. They stated that this approach would be more consistent with case law and with CEQ regulations. Groups stated that if the section remains “as is,” the Department has provided “the bureaus with an incentive to cease collecting information and providing it to the public.” One group stated that the proposed rule encourages agencies to find reasons not to obtain information that they have already acknowledged is relevant to reasonably foreseeable significant impacts and that this message is contrary to NEPA and CEQ regulations. Several other commenters noted that the proposed rule provides clarity in assessing the monetary costs of gathering information and is consistent with CEQ regulations.

Response: The Department believes that section 46.125 provides guidance sufficient to implement 40 CFR 1502.22 in so far as CEQ’s regulation addresses this issue of costs. The Department has added some language in response to comments regarding what the considerations constitute “non-monetized social costs.” However, the Department believes that other factors that may need to be weighed include the risk of undesirable outcomes in circumstances where information is insufficient or incomplete. Paragraph 1502.22(b) specifically provides for the steps the Department will take if the overall cost of obtaining the data is exorbitant or the means to obtain the data are not known.

Comment: One commenter suggested that the Department must “utilize public comment articles that are the best available scientific information” and recommended including a provision to this effect in the final rule.

Response: There is no question that public involvement is an integral part of the NEPA process and can take a variety of forms, depending on the nature of the proposed action and the environmental document being prepared; therefore the final rule includes several provisions addressing public involvement. There is, however, some level of confusion regarding the data standard applicable to the type of information NEPA requires. The rule is frequently made in court cases, as the commenter suggests here, that NEPA analyses must use the “best available science” to support their conclusions. In fact, the “best available science” standard comes from section 7 of the Endangered Species Act, specifically 16 U.S.C. 1536(a)(2), which requires that “each agency shall use the best scientific and commercial data available” when evaluating a proposed action’s impact on an endangered species. In addition, the “best available science” standard is used by the United States Department of Agriculture Forest Service’s regulations implementing the National Forest Management Act of 1976, 16 U.S.C. 1600 et seq. (see Final Rule and Record of Decision, National Forest System Land Management Planning Part III, 73 Fed. Reg. 21468 (Apr. 21, 2008) (to be codified at 36 CFR Part 219)). NEPA imposes a different standard: rather than insisting on the best scientific information available, CEQ regulations demand information of “high quality” and professional integrity. 40 CFR 1500.1, 1502.24. Therefore, the Department declines to accept the commenter’s recommendation.

Section 46.130 Mitigation measures in analyses. This section has been clarified from the proposed rule. The revision clarifies how mitigation measures and environmental best management practices are to be incorporated into and analyzed as part of the proposed action and its alternatives.

Comment: Most individuals stated that the Department should address mitigation measures in the proposed rule. These individuals explained that, in order to provide interested parties an accurate portrayal of potential effects, it is necessary to include all mitigation measures in the impacts analysis. Several individuals indicate the language in the proposed rule is broad and unclear. Several groups opposed the proposed rule in its current form and suggested that the Department should revise and narrow the rule to “clarify that proposed mitigation measures are discussed in NEPA documents in order to help inform an agency’s decision, but reflect the well-settled legal principle that the agency need not guarantee that particular mitigation measures be implemented or that such mitigation measures be successful.” One group suggested that the Department revise the proposed rule to clarify that NEPA does not require agencies to adopt particular mitigation measures or to guarantee the success of the mitigation plans. One group stated that avoiding significant environmental effects should be the primary goal in the development of any proposed action and mitigation should be a final course of action when all other attempts to avoid impacts have been exhausted.

Response: The Department agrees with the comments about the importance of mitigation; the provision addressing mitigation is carried forward into this final rule. The Department has, however, refined the language of the provision for clarity. The Department agrees that NEPA does not require bureaus to adopt particular mitigation measures and that it is not possible to guarantee the success of mitigation plans, but does not believe revision to the final rule reflecting this understanding is necessary.

Comment: One group argued that including mitigation measures in the effects analysis is crucial to demonstrate that potential effects can be mitigated through the use of stipulations,
conditions of approval, and best management practices. They did not believe it necessary to “strip” mitigation measures or best management practices from an applicant’s proposal just for the sake of analyzing the stripped down version.

Response: It was not the Department’s intent that applicants’ proposals be stripped of all best management practices or mitigation measures. The Department has included language to clarify this point. Independent of NEPA, any application must provide a proposal that includes any ameliorative design elements (for example, stipulations, conditions, or best management practices) required to make that proposal conform to legal requirements. In addition, the applicant’s proposal presented to the bureau for decision-making will include any voluntary ameliorative design elements that are part of the applicant’s proposal. Therefore, the analysis of the applicant’s proposal, as an alternative, includes, and does not strip out, these elements. Should the bureau wish to consider and/or require any additional mitigation measures other than the design elements included in the applicant’s proposal, the effects of such mitigation measures must also be analyzed. This analysis can be structured as a matter of consideration of alternatives to approving the applicant’s proposal or as separate mitigation measures to be imposed on any alternative selected for implementation.

Section 46.135 Incorporation of referenced documents into NEPA analysis. This section establishes procedures for incorporating referenced documents as provided for in the CEQ regulations at 40 CFR 1502.21.

No comments were received on this section, but clarifying changes have been made in this final rule.

Section 46.140 Using tiered documents. This section clarifies the use of tiering. As contemplated in the preamble to the rule, and in response to favorable comments, the Department has added a new subsection clarifying that an environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects. Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. The finding of no significant impact, in such circumstances, would be, in effect, a finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered. The finding of no significant impact in these circumstances may also be called a “finding of no new significant impact.” In addition, the provision requiring bureaus to review existing directives addressing tiering, and listing topics that must be included in such directives has been removed from the final rule as not appropriate for regulatory treatment. The numbering of the subsections has been adjusted accordingly.

Comment: One group supported using existing analyses to avoid duplication of effort and to minimize costs. However, they stated that the Department should clearly indicate that existing data does not need to be supplemented with new data if there is no evidence that the current conditions differ from the conditions in which the existing data was developed.

Response: The Department concurs with the comment, but believes that it has been addressed in paragraph 46.140(a). As contemplated in the preamble to the rule, and in response to favorable comments, the Department has added a new paragraph 46.140(c).

Section 46.145 Using adaptive management. This section incorporates adaptive management as part of the NEPA planning process.

Comment: Most commenters supported the concept of adaptive management. However, they stated that the Department has not clearly explained how adaptive management will be incorporated into the NEPA process. One individual believed adaptive management could be a useful tool in allowing “mid-course corrections” without requiring new or supplemental NEPA review. Several groups suggest that the Department clarify that adaptive management is only appropriate where risk of failure will not cause harm to sensitive resources. Also, they stated that a requirement for a sufficient inventory of current conditions of affected resources should be included in the adaptive management plan. A detailed monitoring plan should be developed with specific indicators that will serve to define the limits of acceptable change. They also requested a “fallback” plan, which would be implemented if adaptive management, monitoring, or funding is not available. Several commenters suggested the Department include sufficient detail and commitments as to how impacts will be measured, avoided, and mitigated. They urged the Department to make this plan available for public comment. Another group suggested that the Department clearly delineate the scope, duration, and availability of funding for any planned monitoring programs before they are implemented. One individual suggested that the Department include additional detail that will clarify how and when it is appropriate to evaluate the effects of adaptive management in subsequent NEPA analysis. Another commenter suggests the Development develop a manual to demonstrate to managers circumstances where adaptive management has worked on-the-ground.

Many groups were concerned that adaptive management is a costly practice and will result in accruing additional costs for project proponents. One group was concerned that lack of information may be used to excuse and allow actions to proceed without sufficient protective measures in place. Some commenters expressed concern that it would be impossible to adequately analyze impacts of adaptive management “since those actions rely on future conditions that could be complicated and cumulative.” Modifications to requirements and conclusions in decision documents must be allowed to ensure appropriate adjustments to management actions, according to one group. One commenter was concerned that the Department may misuse adaptive management with regard to on-the-ground monitoring due to lack of funding. Another group suggested the project proponent should play a role in defining the adaptive management strategy and ensuring funding will be available to implement those actions. Another group suggested the Department clarify that public involvement is welcome but adaptive management strategies and implementation are the full responsibility of the agency.

Groups questioned adaptive management’s consistency with current case law, NEPA, and CEQ regulations. Several commenters suggested that this section should be eliminated due to its inconsistencies with NEPA and CEQ. Due to lack of CEQ framework and no guidance for implementation, one group suggested that the Department should remove this section from the proposed rule.

Response: The Department has made minor wording changes to this section. Adaptive Management (AM) is an approach to management; however, it can be integrated with the NEPA process. The establishment of specific provisions with respect to the use of AM
is beyond the scope of this rule. The intent of this provision is only to clarify that the use of an AM approach is not inconsistent with NEPA. That is, proposed actions must be analyzed under NEPA. Each proposed action, including possible changes in management resulting from an AM approach, may be analyzed at the outset of the process, or these changes in management may be analyzed when actually implemented.

Section 46.150 Emergency responses. This section clarifies that ROs, in response to the immediate effects of emergencies, can take immediate actions necessary to mitigate harm to life, property, or important resources without complying with the procedural requirements of NEPA, the CEQ regulations, or this rule. Furthermore, ROs can take urgent actions to respond to the immediate effects of an emergency when there is not sufficient time to comply with the procedural requirements of NEPA, the CEQ regulations, or this rule by consulting with the Department (and CEQ in cases where the response action is expected to have significant environmental impacts) about alternative arrangements.

Comment: Some commenters expressed concern regarding the broad definitions provided in the emergency response section. They stated the section is “written too broadly and could lead to misuse of the provision that would allow a bureau to bypass the preparation of an environmental document.” One group objected to the lack of specificity in terms provided in this section, such as “emergency,” “emergency actions,” “immediate impact,” and “important resources” leaves uncertainty as to how this provision may be implemented by the Department.

Response: There is no special meaning intended for the term “emergency” beyond its common usage as “an unforeseen combination of circumstances or the resulting state that calls for immediate action” (Webster’s Third New International Dictionary Of The English Language 1961 and Merriam-Webster’s Collegiate Dictionary (11th ed. 2004)); “a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action” (Random House Dictionary Of The English Language (2ed. 1987)); “a state of things unexpectedly arising, and urgently demanding immediate action” (The Oxford English Dictionary 2ed. 1991) and “[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures * * *” (Black’s Law Dictionary 260, 562 (8th ed. 2004)). The proposed regulation, as revised in this final rule, recognizes that responsible officials can take immediate actions to control the immediate impacts of an emergency to mitigate harm to life, property, or important natural or cultural resources.

The final rule, at section 46.150, replaces “other important resources” with “important natural, cultural, or historic resources” to more clearly identify the type of resources impacted by the emergency. The Department has not defined an emergency because it is impossible to list all circumstances that constitute an emergency; it is up to the RO to decide what constitutes an emergency.

Only such actions required to address the “immediate impacts of the emergency that are urgently required to mitigate harm to life, property, important natural, cultural, or historic resources” may be taken without regard to the procedural requirements of NEPA or the CEQ regulations. Thus, there are no NEPA documentation requirements for these types of situations and the final rule requires NEPA to apply to any and all subsequent proposed actions that address the underlying emergency (paragraphs 46.150 (c) and (d)). The provisions of section 46.150 codify the existing Department practice and CEQ guidance for emergency actions.

Comment: Another group suggested that the Department add a sentence that “the RO shall document in writing the action taken, any mitigation, and how the action meets the requirements of this paragraph.” Several commenters stated that this section does not comply with Congress’ mandate to comply with NEPA and CEQ regulations. Several groups believed the proposed rule would allow a bureau to implement any action at any time and avoid the NEPA planning process. Others stated that the “important resources” clause should be removed from this section. Several commenters were concerned that the Department is implementing emergency response in order to preclude analysis of fire suppression activities.

Response: The Department agrees that the RO should document the determination of an emergency and have modified the final rule to require this. The Department will continue to act to protect lives, property, and important natural, cultural, or historic resources through means including the use of fire suppression. The Department notes that fire suppression alternatives are addressed in plans that are subject to NEPA analysis.

Section 46.155 Consultation, coordination, and cooperation with other agencies. This section describes the use of procedures to consult, coordinate, and cooperate with relevant State, local, and tribal governments, other bureaus, and Federal agencies concerning the environmental effects of Department plans, programs, and activities. The Department deleted the reference to organizations since this section will deal only with Federal, State, and tribal governmental entities.

Material related to consensus-based management has been moved to section 46.110 in order to consolidate all provisions related to consensus-based management. Paragraph 46.155(b), directing bureaus to develop procedures to implement this section, has been deleted as not appropriate for regulatory treatment.

Comment: Many commenters supported this section and stated collaboration would benefit all interested parties.

Response: The Department appreciates the comments.

Comment: Some individuals pointed out that consensus is often unachievable and unnecessary. One group stated that the Department should put federal project reviews into a consensus building process to ensure that opinions and experience are captured in the NEPA process.

Response: Please see our response above to comments on section 46.110.

Comment: Many groups suggested the Department require bureaus to work with cooperating agencies, such as the U.S. Fish and Wildlife Service. One commenter indicated that the Department should ensure that enhanced involvement does not add unnecessary cost or burden to project proponents. They also stated that “memorializing cooperative conservation in regulations, rather than policy guidance, will result in unnecessary burdens and litigation.”

Response: The Department requires that the RO of the lead bureau consider any request by an eligible government entity to participate in a particular EIS as a cooperating agency. The Department recognizes that an emphasis on the use of cooperating agencies may result in additional steps in the NEPA process, but is likely to lead to improved cooperative conservation and enhanced decision making, Executive Order 13352 on Facilitation of Cooperative Conservation requires all federal agencies to implement cooperative conservation in their programs and activities. Cooperative conservation is consistent with the CEQ requirement that agencies should
encourage and facilitate public involvement in the NEPA process. See 40 CFR 1500.2(d), 1506.6. Comment: Several tribes expressed concern that the proposed rule will negate the government-to-government consultation with tribes. The tribes believed that the Department should include a provision to ensure Indian tribes are given the opportunity to fully participate in the NEPA process and address concerns that are unique to each action. Response: See our response above with respect to government-to-government consultation under section 46.110.

Section 46.160 Limitations on actions during the NEPA analysis process. This section incorporates guidance to aid in fulfilling the requirements of 40 CFR 1506.1.

Comment: Several individuals agreed with the proposed rule and believe there is legal authority to support this section. One individual suggested that the Department should address actions that can be taken while a “project” is underway, specifically “actions taken by a private project applicant that are outside the jurisdiction of the bureau are not an irreversible or irretrievable commitment of agency resources.” They suggested the Department add a provision to this section to clarify the Department’s commitment to projects. Although the direction is clear in the provision, one group stated bureau field offices are not adhering to this policy and that an additional provision should be added to this section regarding the use of existing NEPA documents for major federal actions. Another group wanted the Department to add an additional provision clarifying that a particular action must be justified independently of the program and will not prejudice the ultimate decision of the proposed program.

Response: The Department appreciates the support expressed for this provision. The Department believes that this provision is clear and consistent with 40 CFR 1506.1 and does not believe any additional statement to this effect need be added to the final rule. The requested addition is not required because the provision here at section 46.160 only addresses situations where the major Federal action is within the scope of and analyzed in an existing NEPA document supporting the current plan or program. With respect to current practice within the Department, as explained in the preamble to the proposed rule, see 73 FR 126 (Jan. 2, 2008), the Department believes that one of the benefits of establishing this final rule is greater transparency in the NEPA process. Such transparency is likely to improve consistency of implementation across the Department, as well.

Section 46.165 Ensuring public involvement. This section has been removed from the final rule. CEQ regulations include requirements for public involvement in the preparation of an EIS. Section 46.305 of this final rule addresses public involvement in the EA process. The requirement in paragraph 46.305(a), that the bureau must, to the extent practicable, provide for public notification and public involvement when an EA is being prepared, includes an element of timeliness. The RO has the discretion to choose method(s) of public notification and public involvement that ensure that, if practicable, the public receives timely information on the proposed action.

Comment: One commenter stated that this provision does not provide clarity in the role of public participation. They suggested the Department add additional language to explain the timing, processes and opportunities this provision will provide.

Response: CEQ regulations implementing NEPA direct agencies to encourage and facilitate public involvement in the NEPA process “to the fullest extent possible.” 40 CFR 1500.2(d); see also 40 CFR 1506.6. Bureaus conduct a wide variety of actions under various conditions and circumstances. Therefore, the Department has determined that the best approach is for individual bureaus to provide direction as to how ROs should exercise their discretion in ensuring that this involvement takes place in a manner practicable in the particular circumstances of each proposed action, but that it is not appropriate to provide specifics as to how this should occur in this final rule. The Department has provided some information regarding public involvement in ESM 03–4 and may address this topic in future ESMs.

Section 46.170 Environmental effects abroad of major Federal actions. This section describes procedures the bureaus must follow in implementing EO 12114, which “represents the United States government’s exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.”

No comments were received on this provision.

Subpart C: Initiating the NEPA Process

In the conversion from 516 DM 2 to 43 CFR Part 46, Subpart C, we have restructured the Department’s requirements for initiating the NEPA process. We have put into regulations the essential parts of the NEPA process that are unique to the Department and which require further clarification of the CEQ regulations. This rule clarifies the requirements for applying NEPA early, using categorical exclusions (CEs), designating lead agencies, determining eligible cooperating agencies, implementing the Department’s scoping process, and adhering to time limits for the NEPA process.

Section 46.200 Applying NEPA early. This section emphasizes early consultation and coordination with Federal, State, local, and tribal entities and with those persons or organizations who may be interested or affected whenever practical and feasible. A new paragraph 46.200(e) has been added to clarify that bureaus must inform applicants as soon as practicable of any responsibility they will bear for funding environmental analyses associated with their proposals. Any cost estimates provided to applicants are not binding upon the bureau. This provision had already been included with respect to the preparation of EISs, but should also have been included with respect to EAs. Therefore, the provision has been moved from 46.400 (EISs) to 46.200.

Comment: Some commenters supported this section of the proposed rule as it is currently written.

Response: The Department appreciates the comments.

Comment: Some commenters stated that the proposed rule is not clear with respect to how community-based training will be conducted and what the content of the training will include. These commenters suggested the proposed rule should provide a detailed discussion of the purpose of such training, as well as when it is warranted.

Response: The Department has determined that this topic is most appropriately addressed in the environmental statement memoranda. Community-based training, including the content of the training, is included in ESM03–7 and, if appropriate, will be expanded in future ESMs or bureau-specific explanatory and informational directives. No change to the proposed rule has been made.

Comment: Some commenters also recommended that the proposed rule should clarify that it does not expand the amount of information required for applications under the relevant substantive statute.
Response: The final rule does not expand the amount of information required beyond what is required by NEPA and CEQ regulations, which may be more than the information required for applications under the relevant substantive statute. This provision simply provides that the bureaus be forthcoming with descriptions of information that the applicant may need.

Comment: A few commenters stated that public involvement should not be limited to submitting comments on the scoping notice, attending public meetings, and submitting comments on the final version of draft NEPA documents. Various commenters suggest that the proposed rule require early consultation with applicants. Others proposed additional changes to the proposed rule to further facilitate early coordination between the Department and applicants. These commenters recommended that the proposed rule distinguish between public involvement in the EA process and the EIS process.

Response: As noted above, CEQ regulations implementing NEPA directly agencies to encourage and facilitate public involvement in the NEPA process “to the fullest extent possible.” 40 CFR 1500.2(d); see also 40 CFR 1506.6. The Department is encouraging enhanced public involvement and broad-based environmental coordination early in the NEPA process. The purpose is to facilitate better outcomes by encouraging dialogue among the affected parties. Public involvement is encouraged during the EA and EIS process. CEQ regulations prescribe the manner in which the minimum level of public involvement must be carried out under the EIS process; the manner of conducting public involvement in the EA process is left to the discretion of RO.

Section 46.205 Actions categorically excluded from further NEPA review. This section provides Department-specific guidance on the use of categorical exclusions.

Comment: Many commenters supported this section of the proposed rule as it is currently written. These commenters supported the position that NEPA does not “apply to statutorily created categorical exclusions,” such as those created by Congress in 2005.

Response: The Department concurs that legislation governs the application of statutory categorical exclusions. For example, the Energy Policy Act of 2005 (EPAct) establishes how NEPA applies with respect to these categorical exclusions.

Comment: Several groups suggested that the Department “ensure that its bureaus involve the public in the development and application of CEs and clearly state that extraordinary circumstances need to be provided for unless Congress specifically exempts an agency from doing so.” These groups maintained that CE disagreements could be reduced through greater transparency in their application. Some of these comments recommended the deletion of paragraph 46.205(d) from the proposed rule. Overall, commenters generally believed it is important to articulate the extraordinary circumstances under which a CE will not apply.

Response: As noted above, CEQ regulations include specific requirements for the establishment of procedures, including CEs, for implementing NEPA. When established as part of the DM, the categories listed in the final rule and the extraordinary circumstances language were approved by CEQ and subject to public review and comment, in accordance with 40 CFR 1507.3, by publication in the Federal Register, March 8, 2004 (69 FR 10866). The final CEs, as originally published in the DM, and as presented in this final rule, were developed based on a consideration of those comments. The Department has provided for extraordinary circumstances in the application of its CEs. Each bureau has a process whereby proposed actions are evaluated for whether particular CEs are applicable including whether extraordinary circumstances exist. As noted above, part of the Department’s intent in publishing its NEPA procedures as regulations is to increase transparency in their implementation. By moving NEPA procedures, including CEs and the listing of extraordinary circumstances from the DM to regulations, the Department does not intend to alter the substance of these CEs or extraordinary circumstances. In paragraph 46.205(d) the Department is merely acknowledging the fact that Congress may establish CEs by legislation, in which case the terms of the legislation determine how to apply those CEs.

Section 46.210 Listing of Departmental Categorical Exclusions. This section includes a listing of the Department’s CEs (currently 516 DM Chapter 2, Appendix B–1). The CEs are in paragraphs (a) through (l). These CEs were all published for public comment prior to inclusion in the DM. This section includes the same number of CEs as were in the DM and the wording in the CEs is unchanged, with five exceptions. Four of those changes are made between the rule as proposed and final because of minor editorial changes from how the categorical exclusions appeared in the DM.

First, § 46.210(b) has been revised from “Internal organizational changes and facility and office reductions and closings” as it appeared in the DM to “Internal organizational changes and facility and office reductions and closings” to conform to the definition of “bureau” in the final rule, at § 46.30, which includes “office.” The DM had not provided a definition of “bureau” and so used both “bureau” and “office.” Second, the word “development” was inadvertently added, so that the parenthetical in the proposed rule at § 46.210(c) read “(e.g., in accordance with applicable procedures and Executive Orders for sustainable development or green procurement).” This change has been deleted from this final rule.

Third, the numbering system has been changed in the CE § 46.210(k) from the DM, originally published as final on June 5, 2003 (68 FR 33814), in order to more clearly set out the requirements for use of the CE for hazardous fuels reduction activities. The meaning of the CE has not changed. And fourth, in paragraphs 46.210(k) and (l), the citations to the ESM series, which appeared in parentheticals in the DM, but as footnotes in the Notice published on March 8, 2004 (69 FR 10866), have been placed in the text itself for ease of reference.

Finally, paragraph 46.210(i), which replaces 516 DM Chapter 2, Appendix B–1, Number 1.10, has been changed to correct an error during the finalization of the revision to these DM chapters in 2004. Prior to 1984, and up until 2004, this CE, as established and employed by the Department, covered “Policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature; or the environmental effects of which are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” 49 FR 21437 [May 21, 1984]; 516 DM 2, Appendix 1 (June 30, 2003) (Archived versions of 516 DM chapters, including the 1984, 2003, and 2004 versions of 516 DM 2, may be accessed at http://elips.doi.gov/app_dm/index.elf?Fuseaction=ShowArchive). No problems with the use of the CE were brought to the attention of the Department during this period. It is the version of the CE that was in place prior to 2004 that was proposed in the Department’s January 2, 2008 Notice of Proposed Rulemaking (73 FR 126, 130), and is announced as final in the rule published today.
From 2004, however, a slightly different version of the CE appeared in the DM chapters. In 2000, the Department proposed revisions to 516 DM, including 516 DM 2. 65 FR 52212, 52215 (Aug. 28, 2000). No change was proposed to this CE at that time, and no comments were received regarding this CE. No further action was taken on the 2000 proposal until 2003, when the Department again published the proposed revision to the 516 DM chapters at issue; however, as proposed this revision included an erroneous change to this CE. 68 FR 52595 (Sept. 4, 2003). No comments were received regarding this CE in response to the 2003 Notice. As a result, although no change had been intended, the following version was published as final in 2004 (69 FR 10866, 10877–78 (Mar. 8, 2004)), and incorporated into 516 DM 2, Appendix 1.10: “Policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.”

As noted in the preamble to the proposed rule, published January 2, 2008 (73 FR 126, 130), the Department is correcting an unintended drafting error in the 2004 Rule. The text which previously described two categories of policies, directives, regulations and guidelines (“* * * that are of an administrative, financial, legal, technical, or procedural nature; or the environmental effects of which are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process * * *”), was replaced with a more restrictive category of policies, directives, regulations and guidelines (“* * * that are of an administrative, financial, legal, technical, or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process * * *”). During the Departmental review beginning in 2006, in preparation for this rulemaking, the Department discovered the drafting error that existed both in the 2003 proposal and the 2004 final revision to the DM. This error has made it difficult to use the CE as originally intended, and has engendered confusion in the Department. It is now clear that the erroneous version that became final in 2004, though inadvertent, had resulted in a substantive difference in meaning.

For example, the use of the word “and” made it difficult to apply the CE to an agency action, such as a procedural rule, that has no individual or cumulative significant environmental effects. With the correction effectuated by this 2008 rulemaking (no comments were received with respect to this proposed correction), this CE has now been replaced with its original version. As such, actions such as procedural rules with no individual or cumulative significant environmental effects are covered by the categorical exclusion, as well as circumstances where the action will later be subject to NEPA compliance.

Comment: One commenter stated that the bureau-specific CEs should be included in the proposed rule. Comments also suggest the addition of a new category in the proposed rule which allows the bureaus the discretion to establish other Departmental CEs which are consistent with 43 CFR 46.205. One group suggests revising the proposed rule to cross-reference bureau-specific CEs. This group maintained that this cross-reference will provide better information for the public, as well as promote greater transparency in the NEPA process.

Response: Bureau specific CEs are listed separately in the 516 DM Chapters 8–15 to reflect bureau specific mission and activities. Those DM Chapters remain in effect. Bureaus have specific environmental conservation responsibilities and their CEs are tailored to these unique missions and mandates. The Departmental CEs are general and are applicable throughout the Department and across all bureaus. Bureaus have the discretion to propose additional CEs that are unique to a bureau specific context and which are included in the bureau specific chapters of the DM. If appropriate, bureaus can also propose to the Department additional CEs to augment those already in this rule for future consideration. Such additional proposed CEs would have to be consistent with the broad nature of the already existing Departmental CEs. Cross referencing is unnecessary because bureau specific CEs are unique to that particular bureau and do not apply to other bureaus.

Comment: Several groups cited 40 CFR 1508.27(b), and stated that the Department “must also perform a cumulative effects analysis prior to promulgation of the CE.” These groups stated that impacts analysis at the project level does not relieve the Department from the obligation to ensure that the CE has no cumulative impacts. These groups were concerned that the proposed rule on CEs does not comply with NEPA requirements and would violate recent court rulings.

Response: The requirements for establishing agency procedures for implementing NEPA—such as the procedures set forth in this rule, and including CEs—are set forth in CEQ’s regulations at 40 CFR 1505.1 and 1507.3. These provisions require agencies to consult with CEQ while developing procedures and to publish the procedures in the Federal Register for public comment prior to adoption. The CEQ regulations do not direct agencies to prepare a NEPA analysis or document before establishing agency NEPA procedures. This means that agencies are not required to prepare a NEPA analysis to establish their NEPA procedures; however, agencies must have a basis for determining that actions covered by proposed CEs do not have individual or cumulative impacts.

Agency NEPA procedures assist agencies in fulfilling agency responsibilities under NEPA and are not, themselves, actions or programs that may have effects on the human environment. Moreover, agency NEPA procedures do not dictate what level of NEPA analysis is required for a particular proposed action or program. Thus, such procedures are not federal actions subject to the requirements of NEPA. The determination of establishing agency NEPA procedures does not itself require NEPA analysis and documentation has been upheld in Heartwood, Inc. v. U.S. Forest Service, 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), aff’d 230 F.3d 947, 954–55 (7th Cir. 2000).

By including the Department’s CEs in this rule, the Department is merely moving established categories and language addressing extraordinary circumstances from their current location in the DM to the new 43 CFR Part 46. When established as part of the DM, these categories and extraordinary circumstances language were approved by CEQ and subject to public review and comment, in accordance with 40 CFR 1507.3. The substantiation for those actions included the bases for determining that the actions covered by the CE do not “individually or cumulatively have a significant effect on the human environment.” (40 CFR 1508.4). This final rule does not add any new categories or—apart from one clarifying addition (explained below)—alter existing language regarding extraordinary circumstances. Therefore, the Department does not believe that this final rule fails to comply with NEPA or the CEQ regulations and believes that the existing procedural
framework established by the statute, CEQ regulations, and existing Department procedures is maintained. CEQ regulations, and existing framework established by the statute, Register CFR 1507.3 (for example, see 68 Federal and comment, in accordance with 40 circumstances language were approved categories and extraordinary circumstances. When from their current location in the DM to addressing extraordinary circumstances including the Department's CEs in this new 43 CFR Part 46. When Department determines changes must be made to sections 210 and 215 of part 46, these changes will similarly undergo CEQ review as well as public review and comment. Further, in such event, the Department will comply with all applicable requirements for rulemaking.

Comment: Some groups also suggested that this section of the proposed rule is "extremely vague and broad." These commenters recommended removal of, or expanded limits on, the portions of the CE that authorize mechanical treatment to reduce fuels, as well as those portions which authorize post-fire rehabilitation. Commenters maintain that the allowance of these authorizations would be "environmentally disastrous." Furthermore, these groups recommended implementation of strict measures to ensure that "temporary roads" remain temporary.

Response: As explained above, by including the Department's CEs in this rule, the change is merely moving established categories and language addressing extraordinary circumstances from their current location in the DM to the new 43 CFR Part 46. When established as part of the DM, these categories and extraordinary circumstances language were approved by CEQ and subject to public review and comment, in accordance with 40 CFR 1507.3 (for example, see 68 Federal Register 33813 published on June 5, 2003). This final rule does not add any new categories or alter existing language regarding extraordinary circumstances, with the exceptions noted above with respect to the language of the CEs, including the correction of the typographical error in paragraph 46.210(i) and the clarification in section 46.215 noted below.

Comment: Some commenters suggested modification of the proposed rule in such a way that the collection of small samples for mineral assessments be included within educational CEs. Other commenters recommended the proposed rule be modified to incorporate CEs for the Fish and Wildlife Service. Another commenter recommended that the Department adopt its CE relating to the installation, maintenance, or restoration of artificial water developments used in the conservation of wildlife. In addition, this commenter suggests clearly defining small water control structures in the proposed rule.

Response: See responses above.

Section 46.215 Categorical Exclusions: Extraordinary circumstances. This section contains a listing of the Department's CEs: Extraordinary Circumstances (currently 516 DM Chapter 2, Appendix B–2). This section includes the same number of CEs: Extraordinary Circumstances as were in the DM, and the wording in the CEs: Extraordinary Circumstances is essentially unchanged. Similar to the listing of CEs, each of the Extraordinary Circumstances was published for public comment prior to inclusion in the DM. The CEs: Extraordinary Circumstances are in paragraphs (a) through (l). In the proposed rule, and in this final rule, the only change from the way the Extraordinary Circumstances appeared in the DM is the addition of the following sentence to section 46.215: "Applicability of extraordinary circumstances to categorical exclusions is determined by the Responsible Official." This is not a substantive change to the extraordinary circumstances themselves, but reflects the authority and the responsibility of the RO. Similarly, the phrase "as determined by the bureau" (which appears in most of the CE) was inadvertently left out of the proposed rule at paragraph 46.215(g): the final rule therefore reads: "Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by the bureau." While the DM provision (see 69 FR 19866, Mar. 8, 2004) that is being replaced by this rule read "as determined by either the bureau or office," only "bureau" is used here, to be consistent with the definition of "bureau" in the final rule, at section 46.30.

Comment: Another commenter believed that the Executive Order on Facilitation of Hunting Heritage and Wildlife Conservation should form the basis of extraordinary circumstances and should be added to the proposed rule.

Response: As noted above, no new CEs or extraordinary circumstances are being added at this time. That being said, the Department is aware of the referenced Executive Order and will incorporate in Departmental directives, as appropriate, any plan developed under the Executive Order for the management of resources under the Department’s jurisdiction.

Comment: Some commenters stated that lands found to have "wilderness characteristics," such as citizen proposed wilderness areas, do not constitute extraordinary circumstances. Many commenters suggested that the Department revise this section of the proposed rule to clarify that the term "highly controversial environmental effects" does not include instances where there is merely a public controversy.

Response: The Departmental list of extraordinary circumstances specifically includes "wilderness areas or wilderness study areas but not wilderness characteristics or citizen proposed wilderness areas. As noted above, no new extraordinary circumstances are being added as part of this initiative. That being said, just as with any other resource value, there may be circumstances where the issue of effects on area with "wilderness characteristics" may be captured under the existing extraordinary circumstances.

Comment: One commenter requested, "where an Interior agency proposes to categorically exclude a decision from review under NEPA, that the agency include the proposed decision on NEPA registers available on the agency’s Web site.” This commenter also requested eliminating the adoption of regulations and policies from the list of Departmental CEs, as found in paragraph (i).

Response: The Department declines to adopt the commenter's recommendation regarding making the proposed decisions supported by CEs available on bureau Web site(s). From a practical standpoint, many thousands of proposed actions annually are categorically excluded. To list each use of a CE on a NEPA register or bureaus’ Web sites would prove overly burdensome. The Department declines to adopt the commenter’s recommendation regarding eliminating the adoption of regulations and policies from the list of Departmental CEs, as found in paragraph (i). As explained above, the Department is not changing the language of the CEs or the extraordinary circumstances in the final rule, but is merely moving them from the DM to regulations.

Comment: Some groups stated that the proposed rule severely narrows the definition of extraordinary...
circumstances. These groups also believed the proposed rule allows the Department to illegitimately manipulate NEPA’s threshold question.

Response: This final rule simply moves established categories and language on extraordinary circumstances from the Department’s NEPA procedures previously located in 516 DM 2, Appendix 1 and 2; no change was proposed or is made to the extraordinary circumstances themselves in the final rule. As noted above, these categories and requirements were established following public review and comment, in consultation with CEQ and with CEQ’s concurrence, pursuant to 40 CFR 1507.3. The final rule does not add any new categories, nor does it substantively alter existing requirements regarding review for extraordinary circumstances. The Department notes that the commenter’s assertion that the threshold question with respect to the extraordinary circumstances review is altered, the prefatal statement to the list of extraordinary circumstances was, and remains “Extraordinary circumstances (see §4.6205(c)) exist for individual actions within CXs that may meet any of the criteria listed in paragraphs (a) through (l) of this section.” (Emphasis added.)

Section 46.220 How to designate lead agencies. This section provides specific detail regarding the selection of lead agencies.

Comment: Some commenters stated that the proposed rule needs to address how a lead agency will be designated when more than one federal agency is involved. These commenters recommended that the Department consider requiring the consent of an agency before it can be named the lead agency. In addition, commenters suggested that the Department may want to recognize in the proposed rule that the RO would need to comply with any applicable statutory or regulatory requirements in the designation of the lead agency.

Response: CEQ regulations at 40 CFR 1501.5 establish guidelines on the designation of a lead agency, including resolution of the question of designation, in the event of dispute. The RO complies with this rule in the designation of a lead agency.

Section 46.225 How to select cooperating agencies. This section establishes procedures for selecting cooperating agencies and determining the roles of non-Federal agencies, such as tribal governments, and the further identification of eligible governmental entities for cooperating agency relationships. Criteria for identifying, and procedures for defining, the roles of cooperating agencies and the specific requirements to be carried out by cooperators in the NEPA process are set forth in this section.

Comment: Several commenters supported consensus-based management for resolving competing government interests.

Response: The Department appreciates the comments.

Comment: Some commenters suggested that lead NEPA agencies must collect the “best available information,” with the decision-making process based on this information. These commenters also proposed modification of the proposed rule to “encourage” the use of this section in preparing an EA.

Response: The Department collects the high quality information, and that information supports the NEPA analysis which contributes to the decision-making process. This is consistent with CEQ requirements. The Department declines to make the recommended change to paragraph 46.225(e); ROs are given the latitude to exercise discretion in this regard.

Comment: Many commenters supported the use of memoranda of understanding (MOU) and recommended revision of the proposed rule to include clarification on cooperating agency status and limitations, as well as a schedule for the environmental document.

Response: Paragraph 46.225(d) provides for the use of memoranda of understanding (MOU) between the lead and cooperating agencies. The MOU provides a framework for cooperating agencies to agree to their respective roles, responsibilities and limitations, including, as appropriate, target schedules. The requirement with respect to memoranda of understanding in paragraph 46.225(e) may apply to EAs also.

Section 46.230 Role of cooperating agencies in the NEPA process. This section provides specific detail regarding the responsibilities of cooperating agencies.

No comments were received for this section.

Section 46.235 NEPA scoping process. This section discusses the use of NEPA’s scoping requirements to engage the public in collaboration and consultation for the purpose of identifying concerns, potential impacts, relevant effects of past actions, possible alternatives, and interdisciplinary considerations. The regulatory language encourages the use of communication methods (such as using the Internet for the publications of status of NEPA documents on bulletin boards) for a more efficient and proactive approach to scoping.

Comment: Some organizations stated that the Department has offered no explanation for the lack of required scoping when preparing an EA or applying a CE, as compared with applying for an EIS. These organizations maintained that this lack of scoping contradicts the proposed guidance found in paragraph 46.200(b). These commenters stated that federal agencies are required to ensure proper public involvement when implementing NEPA and suggested public scoping assists in making an informed decision.

Response: Although scoping is not required for the preparation of an EA (CEQ regulations at 40 CFR 1501.7 specifically reference the preparation of an EIS), the Department encourages the use of scoping where appropriate as it does represent a form of public involvement, which is a requirement of EAs. The Department has added language to clarify the relationship between this section and section 46.305. In addition, in contrast to the rule as proposed, the Department has also clarified that while public notification and public involvement are required to the extent practicable in the preparation of an EA, the RO has the discretion to determine the manner of this public notification and public involvement. See paragraph 46.305(a). Scoping is not a step necessary to document a CE. The Department recognizes and acknowledges the importance of scoping as a form of public involvement and participation in the NEPA process, wherever it is appropriate, in that it can serve the purpose of informed decision making.

Comment: One commenter recommended clarification of “interdisciplinary considerations” in the proposed rule.

Response: This rule ensures that the use of the natural, social, and the environmental sciences as required under section 102(2)(A) of NEPA. As recommended by the commenter, we have clarified this provision by replacing the phrase “interdisciplinary considerations” in paragraph 46.235(a) with the phrase “interdisciplinary approach” as provided in 40 CFR 1502.6.

Section 46.240 Establishing time limits for the NEPA process. The section requires bureaus to establish time limits to make the NEPA process more efficient.

Comment: One commenter pointed out that the proposed rule does not explain why time limits should be established. This commenter recommended the addition of specific
Subpart D: Environmental Assessments

In the conversion from 516 DM Chapter 3 to 43 Part 46 Subpart D, we have written this rule to incorporate procedural changes, expand upon existing procedures, give greater discretion and responsibilities to bureaus, and provide clarity in the EA process.

Section 46.300 Purpose of an EA and when it must be prepared. This section clarifies that the action being analyzed is a “proposed” action. It expands upon the purpose and clarifies when to prepare an EA.

Comment: One group recommended that the Department add a provision to assure that all decisions made by the RO after preparing an EA or an EA and FONSI are in writing and include the Official’s reasoning behind that decision.

Response: This rule addresses the Department’s NEPA procedures and not the Department’s decision-making authorities. The Department has decided that documentation requirements for decisions on proposed actions made on the basis of preparation of EAs and FONSIs are outside the scope of this rule. That is, bureau decision making itself is governed by Department and bureau-specific authorities. Section 46.325 describes the culmination of the EA process rather than documentation of a final decision on the proposed action and has been edited to ensure this point is clearly made.

Comment: Another group stated that wording in paragraph (a), in the context of the Bureau of Indian Affairs, may be misleading since many EAs are prepared by a tribal government agency. Those commenters suggested that paragraph (a) be revised as follows: “A bureau must ensure that an EA is prepared for all proposed Federal actions * * *.”

Response: The Department concurs and has revised the language at paragraph 46.300(b) to reflect the suggested change. This section has also been expanded to give bureaus the discretion to provide cooperating agency status for EAs. It specifies that the publication of a draft EA for public comment is one method available for public involvement, but it is not required.

Comment: Some commenters supported this section of the proposed rule as it is currently written. These commenters believed that the proposed rule is consistent with CEQ regulations, which only require public involvement in EAs to the extent practicable.

Response: The Department appreciates the comment and has clarified that because notification is a means of public involvement, it too is subject to the qualifier “practicable” and has revised the final rule as described above.

Comment: This section of the proposed rule directs bureaus to consider comments that are “timely” received. One commenter maintained that the proposed rule did not adequately define “timely.” This commenter also recommended stating in the rule “that if no comments are received during this 30-day comment period, the decision is made using the content of the draft document.”

Response: Publication of a “draft” EA is not required. The RO has the discretion whether to invite comments on an EA. If an RO requests comments, there will be a stated time limit to the comment period. Comments not received within this stated time limit may be deemed untimely by the RO. It

guidance and direction to the proposed rule so bureau staff can process NEPA documents with minimal delay.

Response: CEQ regulations at 40 CFR 1501.8 encourage federal agencies to set time limits appropriate to individual actions. This rule requires individual bureaus to establish time limits, as appropriate, to expedite the NEPA process and to ensure efficiency, especially when project completion may be time sensitive or when statutory or regulatory timeframes may be applicable. The Department believes individual bureaus are best situated to establish timeframes on a case-by-case basis, and does not deem it necessary to implement specific additional guidance to ensure that delays are not encountered in the NEPA process.

Comment: Another commenter stated that the proposed rule appears to be focused solely on internal administrative factors and fails to acknowledge that complex projects and potential impacts could seriously affect timelines. Commenters also suggested that the availability of the public to participate in the process needs to be considered and accounted for when setting time limits. Multiple commenters supported establishing time limits for the NEPA process on a case-by-case basis, as long as the time limits do not impose a schedule that cannot facilitate the project proponent’s goals and objectives for the proposed action.

Response: The Department does not have a prescribed time limit for each proposed step in the NEPA process. In each case, time limits are set based on a consideration of factors such as funding, staff availability, public needs, and the complexity of the proposed action. The Department realizes that the proponent’s goals and objectives are a consideration in scheduling the time considerations, as well as the factors mentioned above.

Comment: Several commenters requested an addition to the proposed rule “that cooperating agencies represent that they have sufficient qualified staff and necessary resources to participate as a cooperating agency on the project and meet project deadlines.” Several commenters also recommended several additions to the proposed rule to strengthen time limit requirements.

Response: The MOU as required under paragraph 46.225(d) is a mechanism for establishing that such cooperating agencies represent that they have sufficient qualified staff to participate on the project and meet project deadlines. The Department does not believe any change to the final rule is necessary.

Another group stated that the Department should provide more consistency with CEQ regulations, which do not require bureaus to provide such notice in each and every instance, but only require that Federal agencies “shall to the fullest extent possible encourage and facilitate public involvement in decisions which affect the quality of the human environment.” 40 CFR 1500.2(d). With respect to EAs, CEQ regulations require that agencies provide notice of the availability of such environmental documents, but are otherwise quite general in approach to public involvement in EAs. See 40 CFR 1501(b) and 1506.6. As the Department’s bureaus prepare thousands of EAs each year—many times for routine matters for which there are not categorical exclusions, but for which there is no interest on the part of the public—a categorical public notification requirement would prove a fairly substantial burden. Therefore, discretion is left to the RO in each case to determine how best to involve the public in a decision that affects the quality of the human environment.

This section has also been expanded to give bureaus the discretion to provide cooperating agency status for EAs. It specifies that the publication of a draft EA for public comment is one method available for public involvement, but it is not required.

Comment: Some commenters supported this section of the proposed rule as it is currently written. These commenters believed that the proposed rule is consistent with CEQ regulations, which only require public involvement in EAs to the extent practicable.

Response: The Department appreciates the comment and has clarified that because notification is a means of public involvement, it too is subject to the qualifier “practicable” and has revised the final rule as described above.

Comment: This section of the proposed rule directs bureaus to consider comments that are “timely” received. One commenter maintained that the proposed rule did not adequately define “timely.” This commenter also recommended stating in the rule “that if no comments are received during this 30-day comment period, the decision is made using the content of the draft document.”

Response: Publication of a “draft” EA is not required. The RO has the discretion whether to invite comments on an EA. If an RO requests comments, there will be a stated time limit to the comment period. Comments not received within this stated time limit may be deemed untimely by the RO. It
is left to the discretion of the RO to take action when comments have been received after the end of the comment period.

Comment: Several commenters also supported the proposed provision which would allow cooperating agencies to participate in the development of EAs. They recommended rewording of the proposed rule to “encourage” cooperating agency participation, not merely “permit” this participation.

Response: The rule has used “may allow” rather than the term “encourage,” because cooperating agency involvement in an EA is a matter of discretion for the RO; no change is made to the final rule.

Comment: Many commenters supported publication of draft EAs and recommended modification of the proposed rule to support publication of draft EAs. These commenters believed that this section of the proposed rule is in violation of CEQ direction and that public review of environmental documents has the potential to identify information about impacts or resource uses that would be otherwise unknown.

Response: The manner of public involvement, including the publication of a draft EA, is a matter of discretion for the RO; this provision is consistent with 40 CFR 1501.3.

Comment: Several commenters expressed disappointment that “the language in the Department’s NEPA proposed rule focuses on how not to provide public involvement opportunities in section 46.305.” This group maintained that it is essential that the public effectively be involved in the NEPA process, that public participation is a component of NEPA, and that public involvement extends to all “environmental documents,” including EAs. These commenters urged the Department to include positive language in the proposed rule to involve the public in the preparation of an EA, including requiring publishing of draft EAs for public comment, and establishing clear and specific guidelines for public involvement in the EA process.

Response: The Department strongly encourages public involvement and participation in the NEPA process at all stages. However, consistent with CEQ regulations, the Department’s final rule distinguishes between “public involvement” and “public comment.” With respect to EISs, CEQ’s regulations specify that the public must have the opportunity to comment on a draft EIS. By contrast, the CEQ regulations do not specify that public involvement should take any particular form for EAs, as recognized by every court that has decided the issue. Therefore, the Department’s final rule clarifies that the RO has the discretion to determine how public involvement in the preparation of an EA is to occur, depending on the particular circumstances surrounding the proposed action. Bureaus engage in a wide variety of routine actions, for which EAs are prepared (e.g., approval of replacement of culverts, erection of fences, etc.). Therefore, it is neither necessary nor practical for public comment to be required for each of these EAs. Public involvement can take a variety of forms, ranging from notification on bureau or field office Web sites to the holding of public meetings. Some of the bureaus provide more specific direction on facilitating public involvement (see 516 DM Chapters 8–15 and bureau handbooks).

Comment: Another commenter recommends that the proposed rule should ensure that communities and tribes potentially impacted by the proposed action have adequate opportunities to participate in the development of an EA.

Response: Another response regarding the CEQ requirement respecting public involvement. The circumstances surrounding each proposed action may interest a variety of members of the public, including, but not limited to, communities and tribes potentially affected by the proposed action. The RO has discretion to implement public notification and public involvement measures appropriate to the proposed action, and affected communities. In addition, as noted above, and independent of its responsibilities under NEPA, the United States has a government-to-government relationship with federally-recognized tribes. In accordance with this responsibility, the Department specifically provides for consultation, coordination and cooperation within the framework of government-to-government consultation.

Section 46.310 Contents of an EA.

This section establishes new language outlining what information must be included in an EA. It describes the requirements for alternatives, if any, and provides for incorporating adaptive management strategies in alternatives. Sections on tiered analysis, from 516 DM Chapter 3, are found in subpart B of this rule, since this information pertains to both EISs and EAs.

Comment: Several commenters supported this section of the proposed rule as it is currently drafted. These commenters maintained that CEQ regulations only require that an EA contain a brief discussion of the environmental impacts of the proposed action and alternatives.

Response: The Department appreciates the comments.

Comment: Other commenters stated that this section of the proposed rule should be removed because it conflicts with NEPA, CEQ regulations, and existing case law.

Response: The Department disagrees. This section fully complies with NEPA and CEQ regulations, as well as CEQ guidance. On September 8, 2005, the CEQ issued EA guidance to Federal agencies entitled “Emergency Actions and NEPA” that explained language at section 102(2)(E) of NEPA “unresolved conflicts concerning alternative uses of available resources” (42 U.S.C. 4332(2)(E)). The CEQ guidance states: “When there is consensus about the proposed action based on input from interested parties, you can consider the proposed action and proceed without consideration of additional alternatives. Otherwise, you need to develop reasonable alternatives to meet project needs.” (Attachment 2 “Preparing Focused, Concise and Timely Environmental Assessments”. http://ceq.eh.doe.gov/nepa/regs/Preparing Focused Concise and Timely EAs.pdf).

Comment: Several commenters stated that the proposed rule calls for a superficial analysis of impacts, which creates the potential for inadequate analysis, and will result in poor decision-making and possible litigation.

Response: The Department disagrees. CEQ regulations describe EAs as “concise” documents that “briefly” provide information sufficient to determine whether preparation of an EIS is required. CEQ has issued guidance consistent with this idea (see September 8, 2005 CEQ guidance referenced above). The Department does not believe that conciseness necessarily leads to a superficial analysis.

Comment: These commenters therefore suggested that “conciseness” be changed to “unanimity” to assure that there is no confusion about the limited circumstances in which paragraph 46.310(b) applies.

Response: “Unanimity” is not required; therefore, the Department declines to make the suggested alteration to the final rule.

Comment: One commenter suggested that the cumulative effects of the proposed action and other previous actions should be included in the list of things that must be discussed in an EA.
Section 46.315 How to format an EA. This section provides clarification on the EA format. No comments were received on this provision.

Section 46.320 Adopting EAs prepared by another agency, entity, or person. In this section, the term “and other program requirements” has been added to the compliance stipulations. It also expands the requirements of the RO in adopting another agency’s EA.

Comment: One commenter suggested that a new section be added to the proposed rule which includes the requirement that the RO “consults with other agencies that have regulatory authority over the project” when adopting an EA prepared by another agency. This commenter maintained this will help ensure that other affected agencies agree with the adoption. Another organization suggested that this section of the proposed rule should state that an Indian tribe may be the applicant.

Response: The determination to adopt another agency’s EA is left solely to the discretion of the RO. However, the Department expects that the RO will consult with any other agency that has regulatory authority over the project that is the subject of a bureau’s proposed action and environmental analysis. In fact, this final rule provides at section 46.155: “The Responsible Official must whenever possible consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of bureau plans, programs, and activities within the jurisdictions or related to the interests of these agencies.” This provision applies to proposed actions supported by both EAs and EISs. As such, no change has been made to section 46.320.

The Department recognizes generally that an Indian tribe may be an applicant, as well as a State or other unit of government; paragraph 46.300(a) has been modified to read: “A bureau must ensure that an EA is prepared for all proposed Federal actions” in order to reflect that it may be the applicant who is preparing the EA, especially when a tribe is the applicant. No other change in this respect has been made to the final rule.

Section 46.325 Conclusion of the EA process. Documentation requirements for decisions made on the basis of EAs and FONSI s are beyond the scope of this rule. After a bureau has completed an EA for a proposed action, the bureau will make a finding of no significant impact, or will determine that it is necessary to prepare an EIS, in which case, the bureau will publish a Notice of Intent in the Federal Register or will take no further action on the proposal.

Comment: Several commenters “suggested that the requirement that a decision be documented also include a requirement that the document be made public.”

Response: Bureau decision documents are public documents. While some bureaus routinely publish these documents (for instance on bureau or field office Web sites), the Department is not including a requirement that all decision documents be published. Decision documents are available from bureaus upon request.

Subpart E: Environmental Impact Statements

This subpart takes the place of 516 DM Chapter 4, with following exceptions.

The language from 516 DM Chapter 4 that simply reiterates the CEQ regulations is not included in subpart E of this rule. Those DM sections are: statutory requirements, cover sheet, summary, purpose and need, appendix, methodology and scientific accuracy, proposals for legislation, and time periods.

Sections on tiering, incorporation of referenced documents into NEPA analysis, incomplete or unavailable information, adaptive management, and contractor prepared environmental documents, from 516 DM Chapter 4 are found in subpart B of this rule since that information pertains to EISs and EAs.

The phrase “environmentally preferable alternative” is found in the definitions, subpart A. This phrase expands on the definition that currently exists in 516 DM 4.10(l)(A)(5).

This rule also incorporates procedural changes, clarifies the extent of discretion and responsibility that may be exercised by bureaus and provides clarity in the EIS process.

Section 46.400 Timing of EIS development. This section describes when an EIS must be prepared.

Comment: One commenter recommended revising the definition of “environment” within the proposed rule to avoid disputes.

Response: Neither the Department’s proposed nor final rule includes a definition of “environment.” Neither NEPA nor the CEQ regulations define this term; however, the CEQ regulations do define “human environment,” and the definitions in the CEQ regulations apply (see sections 46.20 and 46.30).

The Department does not believe that a definition is required.

Comment: One commenter stated that it is important to note that the RO should not have the authority to mandate whether an applicant must pay for environmental analyses. The commenter recommended that the applicant should be given the opportunity to voluntarily fund the NEPA analysis. Others recommended that any reference to who pays for the analysis be deleted from the proposed rule.

Response: The provision in the Department’s final rule specifies only that the RO “must inform applicants as soon as practicable of any responsibility they will bear for funding environmental analyses associated with their proposal.” This provision refers specifically to the responsibility of the RO to inform the applicant of any such requirements in each instance. (As noted above in the introduction to section 46.200, this provision has been moved from section 46.400 to section 46.200 because it applies to EAs as well, and the application to EAs was inadvertently left out of the proposed rule.) The question of whether an RO may require an applicant to pay for NEPA analysis is outside the scope of this rule because programs and bureaus have different payment requirements, for example, under their cost recovery authority, if applicable.

Section 46.405 Remaining within page limits. This section encourages bureaus to keep EISs within the page limits described in the CEQ regulations using incorporation of referenced documents into NEPA analysis and tiering.

No comments were received on this provision.

Section 46.415 EIS Content, Alternatives, Circulation and Filing Requirements. This section provides direction for the development of alternatives, establishes language on the documentation of environmental effects with a focus on NEPA statutory requirements, and provides direction for circulating and filing the draft and final EIS or any supplement(s) thereto. The Department changed the title of this section and added a sentence to address
Federal Advisory Committee Act (FACA) implications.

Comment: Some commenters supported this portion of the proposed rule as it is written.

Response: The Department appreciates the comments.

Comment: One group stated that the term “interested parties” is too broadly defined, resulting in significant delays in agency decision-making. Consequently, standing would be given to parties that otherwise would lack standing to pursue future legal action.

Response: The Department agrees that the meaning of “interested parties” is potentially ambiguous and has revised this term to match the language used in the CEQ regulations. Please see the final rule at section 46.110, as well as the responses to comments on that section.

Comment: Some commenters believed that the cumulative effects of the proposed action and other previous actions must also be disclosed in an EIS. Consequently, these commenters recommended adding cumulative effects to the list of terms that must be disclosed in the contents of an EIS.

Response: Paragraph 46.415(a)(3) of the Department’s final rule requires that an EIS disclose “the environmental impact of the proposed action.” Environmental impact includes direct, indirect and cumulative impacts (40 CFR 1508.7 and 1508.8). The Department does not believe that a disclosure should not be required. Other commenters recommended that the RO will be required to disclose preliminary draft and final EISs available to those interested and affected persons and agencies for comment. The main concern discussed by commenters is that the word “shall” implies that the RO will be required to circulate preliminary drafts of EISs. These commenters recommended that the proposed rule should allow public circulation of preliminary EISs when the RO determines that such circulation would be beneficial, but public disclosure should not be required. Other commenters stated it is inappropriate for agencies to share preliminary EISs that represent preliminary agency thoughts. They were concerned that public release of a preliminary document would hinder internal discussion regarding innovative management options available for consideration and analysis.

Response: The Department has elected not to include a “preliminary environmental impact statement” in the final rule. Please see the response above to comments on section 46.30.

Comment: One group recommended clarification of the proposed rule by stating that the human environment changes over time, regardless of the action being assessed under NEPA. They recommended this clarification should “explicitly exclude the idea that nothing changes over time, so the no action alternative means no change.”

Response: The Department acknowledges that some clarification was needed and added language to the final rule. Natural systems evolve over time. The “no action” alternative is not the alternative that results in “no change” to the environment; rather it represents the state of the environment without the proposed action or any of the alternatives. When the proposed action involves a proposed change in management then, under the no action alternative, what does not change is management direction or level of intensity.

Comment: Another commenter stated, “it is not clear from the proposed rule how or why ‘incremental changes’ will be considered as alternatives” and asked for additional detail regarding the “incremental process” and how it interacts with the alternative discussion.

Response: The Department appreciates this comment. The intent of this provision is that modifications to alternatives developed through a collaborative process, may, themselves, be considered alternatives to a proposed action. To avoid confusion, the final rule no longer uses the term “incremental” when dealing with alternatives.

Comment: Many commenters fully support and encouraged analysis of the no action alternative. Several recommended clarification in the proposed rule on how the tenets of adaptive management will work with the requirements for clearly articulating and pre-specifying the adjustments and the respective environmental effects that might later occur. Another commenter encouraged the Department to specify in the proposed rule that alternatives considered throughout the NEPA process must be capable of achieving the project goals.

Response: The Department believes that no further clarification is necessary. The intent of the provision respecting adaptive management is to clarify that the use of an adaptive management approach does not preclude the necessity of complying with NEPA. Each proposed action, including possible changes in management made as a result of an adaptive management approach may be analyzed at the outset of the process or the changes in management made may be analyzed when implemented.

Comment: Several commenters strongly opposed the idea that the RO, with or without input from any interested parties, would be permitted to make modifications to a proponent’s proposed action. These commenters recommend eliminating this language in its entirety from the proposed rule.

Response: Bureaus would analyze reasonable alternatives that would meet the purpose and need for action. In determining the range of reasonable alternatives, the range may in some cases be limited by the proponent’s proposed action, but the RO must still evaluate reasonable alternatives within that range. As such the RO may include additional alternatives for analysis, including those which represent different modifications of the proposed action. No change to the provision has been made.

Comment: Some commenters requested clarification on the public comment opportunity that follows the publication of a final EIS. They maintained the rule should explain that the public can submit comments on a final EIS prior to an agency’s final decision.

Response: CEQ regulations at 40 CFR 1506.10(b)(2) require a 30-day waiting period between publication of the final EIS and signing of a ROD. CEQ guidance states: “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. CEQ’s “Forty Most Asked Questions.” Therefore, while this period is not a formal comment period, the public may comment after the publication of the final EIS.

Section 46.420 Terms used in an EIS. This section describes terms that are commonly used to describe concepts or activities in an EIS, including: (a) Statement of purpose and need, (b) Reasonable alternatives, (c) Range of alternatives, (d) Proposed action, (e) Preferred alternative, and (f) No action alternative. Definitions for proposed action and no action alternative have been moved to the definitions in section 46.30 as they may both be applicable to EAs as well as EISs. Comments and responses on these terms, however, are below. In order to clarify that it is the bureau’s exercise of discretion that constitutes a proposed action that is subject to NEPA requirements, not just that the bureau might have a statutory role over a non-Federal entity’s planned activity, the final rule has been changed to read “discretion” rather than...
“authority” in proposed paragraph 46.420(d), which is now in section 46.30. Section 46.30 explains that a “proposed action” includes “the bureau’s exercise of discretion over a non-Federal entity’s planned activity that falls under a Federal agency’s authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments.”

**Response:** The Department agrees that the bureau should consider the needs and goals of the parties involved, including the applicant. However, the public interest is also a key consideration under NEPA. As such the Department has not changed the language of this provision in the final rule.

**Comment:** One group recommended using the definition in paragraph 46.420(b) for the feasibility requirement throughout the proposed rule because it is the most complete definition.

**Response:** The Department concurs with the intent of this recommendation and has implemented this recommendation by changing 46.415(b) to read “range of alternatives” rather than “reasonable alternatives,” as “range of alternatives” as defined in paragraph 46.420(c) incorporates the definition of “reasonable alternatives” at paragraph 46.420(b).

**Comment:** One commenter stated that the definition of “range of alternatives” is circular and should be revised.

**Response:** The Department agrees and has clarified the phrase “rigorously explored and objectively evaluated” in the CEQ regulations applies only to reasonable alternatives.

**Comment:** One commenter recommended that the Department distinguish the proposed federal action from the proposed project or activity for which the federal action is necessary.

**Response:** The Department agrees and has clarified the language of section 46.30 (formerly proposed as paragraph 46.420(d)). Paragraph 46.420(d) explains that a “proposed action” includes “the bureau’s exercise of discretion over a non-Federal entity’s planned activity that falls under a Federal agency’s authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments.”

**Comment:** A commenter agreed with the statement that no action can mean either no action or no change and that the proposed rule should acknowledge that the effect of the no action alternative is not always maintenance of the status quo.

**Response:** As specified in proposed paragraph 46.420(f) and now at section 46.30, the Department agrees that the no action alternative has two interpretations—“no change from a current management direction or level of management intensity” or “no project.” Natural systems evolve over time. The “no action” alternative is not the alternative that results in “no change” to the environment; rather it represents the state of the environment without the proposed action or any of the alternatives. The Department has made minor edits to this section to clarify this point.

**Comment:** One individual recommended inserting “national policies” after “giving consideration to” in paragraph (e).

**Response:** The Department does not believe it is necessary to specifically include “national policies” as one of the factors that the bureau considers in identifying the preferred alternative. Proposed paragraph (e), now (d), refers to “other factors,” which is broad enough to include a variety of considerations, including, if appropriate, national policies.

**Comment:** One commenter stated that it is unclear whether the terms “practical” and “feasible” are intended to be synonymous within the proposed rule.

**Response:** These terms are not intended to be synonymous. CEQ’s “Forty Most Asked Questions” explains “reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense.” Any given reasonable alternative could be practical, feasible, or both.

**Comment:** One commenter encouraged the Department to revise the proposed rule to clarify and reflect established NEPA precedent that agencies need not conduct a separate analysis of alternatives that have substantially similar consequences.

**Response:** The Department agrees that bureaus need not separately analyze alternatives that have been shown to have substantially similar environmental consequences. This is a well-established principle; no change to the final rule is necessary.

**Section 46.425 Identification of the preferred alternative in an EIS.** This section clarifies when the preferred alternative must be identified.

**Comment:** Several groups questioned why more than one preferred alternative would be necessary and recommend that only one preferred alternative be allowed to avoid confusion.

**Response:** The Department’s final rule is consistent with CEQ regulations, which expressly contemplate situations in which more than one preferred alternative may exist. 40 CFR 1502.14(e). Rather than confusing the public, the Department believes that in certain circumstances presentation of more than one preferred alternatives may encourage public involvement in the process.

**Section 46.430 Environmental review and consultation requirements.** This section establishes procedures for an EIS that also addresses other.
environmental review requirements and approvals. It should be noted that this section allows for the completion of the NEPA analysis prior to obtaining all permits. However, if the terms of the permit are outside of the scope of analysis, additional NEPA analysis may be required.

Comment: One commenter commented that CEQ is currently undertaking a project to integrate review under NEPA and the National Historic Preservation Act (NHPA). This commenter recommended that the Department assure effective integration of that project’s results with the proposed rule. In order to protect statutory rights of Indian tribes, another group recommended integration of regulations from the Advisory Council on Historic Preservation in this section of the proposed rule.

Response: Regulations implementing the National Historic Preservation Act (NHPA) at 36 CFR Part 800 encourage Federal agencies to coordinate compliance with section 106 of the NHPA with steps taken to meet the requirements of NEPA (36 CFR 800.8) and will work with CEQ to integrate any such guidance in the Department’s directives as appropriate. Please see response to comments addressing section 46.110 above regarding the Department’s fulfillment of its responsibilities toward Indian tribes.

Comment: One group strongly supported consolidation of processes whenever possible to reduce delays and eliminate duplication of effort. This group proposed revision of the proposed rule to promote the consolidation of processes “to the extent possible and otherwise not prohibited by law.” This group also recommended the establishment of an exemption for mining operations based on the “functional equivalence doctrine.” They maintained that other laws and regulations applicable to the mining operations provide a rigorous framework for providing a “harder look” at environmental consequences than NEPA.

Response: The Department appreciates the support for its efforts to encourage consolidation of processes whenever possible. However, the Department does not believe the revision proposed by the commenter to paragraph 46.430(b) is necessary. The Department does not believe such an exemption for mining operations as advocated by the commenter is warranted, as it addresses matters beyond the scope of this rulemaking.

Comment: One commenter recommended revision of “Paragraph (a) to clarify that an EIS need only identify and discuss studies relied upon for other consultation and review processes if the EIS is intended to serve as the NEPA compliance for those review processes.”

Response: The Department believes no revision to the final rule is necessary. When paragraph 46.430(a) states “An EIS that also addresses other environmental review and consultation requirements. * * * *” this means that it is precisely when the EIS in question is to serve as the NEPA compliance (in whole or in part) for the other environmental review and consultation requirements that the EIS needs to identify and discuss studies relied upon for these other review and consultation processes.

Section 46.435 Inviting comments. This section requires bureaus to request comments from Federal, State, and local agencies, or tribal governments, and the public at large. This section also clarifies that bureaus do not have to delay a final EIS because they have not received comments.

Comment: One group proposed revisions to the proposed rule, which include: (1) Requesting comments from any potentially affected tribal government, (2) recognizing the federal government’s continuing obligation to consult with tribal governments prior to making decisions which may impact tribal rights, (3) revising paragraph (c) to include all lands and waters within the boundaries of tribal lands, (4) inserting language to explicitly include Alaska Native tribes, and (5) including additional clauses covering various situations in which the Department must invite comments from a tribe. This group proposed these revisions because it believes the current language could be interpreted too narrowly by the Department bureaus, resulting in bureaus deciding not to request comments from tribal governments, even though a proposed action may affect tribal rights or interests.

Response: CEQ regulations at 40 CFR 1503.1(a)(4) require that agencies shall request the comments on a draft EIS from “the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.” This would necessarily include “any potentially affected tribal government” regardless of whether the proposed action may affect the environment of Indian trust or restricted land or other Indian trust resources, trust assets, or tribal health and safety, as specified in 46.435(c). In view of the CEQ regulations, the Department does not believe it is necessary to include the commenter’s proposed language in this final rule. For instance, under 40 CFR 1503.1(a)(4), the bureaus would need to request comments from those persons or organizations affected by impacts to the resources noted by the commenters, including “one or more historic properties to which the tribe attaches religious and cultural significance” or “wildlife or plant species that are important to the tribe for cultural purposes.” Likewise, if any member of the public specifically requests information regarding the analysis of effects of a proposed action on a specific identified area, the bureau would provide that information.

This being said, the requirement to engage in government-to-government consultation with Indian tribes is a requirement apart from NEPA, and, in effect, broadens any consultation that needs to take place as a function of compliance with NEPA. The Department has other, more specific directives addressing government-to-government consultation, as well as how the Department is to fulfill its trust responsibilities. See, e.g., 512 DM 2: “Departmental Responsibilities for Indian Trust Resources”; ECM97–2 “Departmental Responsibilities for Indian Trust Resources and Indian Sacred Sites on Federal Lands”.

Comment: One commenter encouraged the Department to provide for better coordination with permit applicants when the federal action being examined involves the issuance of a federal permit or authorization.

Response: Please see discussion, above, regarding paragraph 46.430(a).

Section 46.440 Eliminating duplication with State and local procedures. This section allows a State agency to jointly prepare an EIS, if applicable.

No comments were received addressing this provision.

Section 46.445 Preparing a legislative EIS. This section ensures that, when appropriate, a legislative EIS will be included as a part of the formal transmittal of a legislative proposal to the Congress.

No comments were received addressing this provision.

Section 46.450 Identifying the environmentally preferable alternative. This section provides for identifying the environmentally preferable alternative in the ROD.

Comment: One commenter supported this part of the proposed rule as it is written. Multiple commenters oppose...
this section of the proposed rule and urge the Department to delete this section from the proposed rule. They believed “that this provision is not necessary in light of the existing CEQ regulation found at 40 CFR 1505.2.” In the event that Department does not remove this section from the proposed rule, the commenters recommended that the Department revise this section to include clarification that this rule in no way obligates agencies to identify and select an “environmentally preferable alternative” during its NEPA analysis.

Response: The Department appreciates these comments, but believes this provision is necessary to distinguish between “identifying” and “selecting” an environmentally preferable alternative, both for Departmental personnel and members of the public. Although the environmentally preferable alternative must be identified in the ROD, the RO is not required to select the environmentally preferable alternative as the alternative that will be implemented. No change is made in the final rule.

Procedural Requirements

Regulatory Planning and Review (E.O. 12866)

This is a significant rule and has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. This rule:

(1) Is not an economically significant action because it will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor state or local governments.

(2) Will not interfere with an action taken or planned by another agency.

(3) Will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs.

(4) Raises novel policy and legal issues. It is a significant rulemaking action subject to OMB review because of the extensive interest in Department planning and decision making relating to NEPA.

In accordance with the Office of Management and Budget (OMB) Circular A-4, “Regulatory Analysis,” the Department has conducted a cost/benefit analysis. The analysis compared the costs and benefits associated with the current condition of having Departmental implementing procedures combined with Departmental explanatory guidance in the DM and the condition of having implementing direction in regulations and explanatory guidance in the DM.

Many benefits and costs associated with the rule are not quantitative. Some of the benefits of this rule include collaborative and participatory public involvement to more fully address public concerns, timely and focused environmental analysis, and flexibility in preparation of environmental documents. These will be positive effects of the new rule.

Moving NEPA procedures from the DM to regulations is expected to provide a variety of potential beneficial effects. This rule would meet the requirements of 40 CFR 1507.3 by placing the Department’s implementing procedures in their proper regulatory position. The Department will maintain Department- and bureau-specific directives in the DM and bureau handbooks to assist field offices. This will facilitate timely bureau responses to procedural interpretations, training needs, and editorial changes to addresses and Internet links to assist bureaus when implementing the NEPA process.

Finally, the changes to the Department NEPA procedures are intended to provide the Department specific options to meet the intent of NEPA through increased emphasis on collaboration and the use of a consensus-based approach when practicable.

Thus, while no single effect of this rule creates a significant quantifiable improvement, the benefits outlined above taken together create the potential for visible improvements in the Department’s NEPA program. Further discussion of the costs and benefits associated with the rule is contained in the economic analysis which is incorporated in the administrative record for this rulemaking and may be accessed on the Department’s Office of Environmental Policy and Compliance Web site located at: http://www.doio.gov/oepc.

Regulatory Flexibility Act

The Department certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This document provides the Department with policy and procedures under NEPA and does not compel any other party to conduct any action.

Consultation With Indian Tribes (E.O. 13175)

Under Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Department has assessed the effects of this rule on State, local, and tribal governments and the private sector. This rule does not compel the expenditure of $100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Takings (E.O. 12630)

This rule has been analyzed in accordance with the principles and criteria contained in E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and it has been determined that the rule does not pose the risk of a taking of Constitutionally protected private property.

Federalism (E.O. 13132)

The Department has considered this rule under the requirements of E.O. 13132, Federalism. The Department has concluded that the rule conforms to the federalism principles set out in this E.O.: will not impose any compliance costs on the States; and will not have substantial direct effects on the States or the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Department has determined that no further assessment of federalism implications is necessary.

Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Does not unduly burden the judicial system; and

(b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity, and be written to minimize litigation; and

(c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (E.O. 13175)

In accordance with E.O. 13175 of November 6, 2000, and 512 DM 2, we have assessed this document’s impact on tribal trust resources and have determined that it does not directly affect tribal resources since it describes the Department’s procedures for its compliance with NEPA.
Paperwork Reduction Act

This rule does not contain information collections subject to OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501, et seq.).

National Environmental Policy Act

The CEQ does not direct agencies to prepare a NEPA analysis or document before establishing agency procedures that supplement the CEQ regulations for implementing NEPA. Agency NEPA procedures are procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency’s final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing agency NEPA procedures does not require NEPA analysis and documentation has been upheld in Heartwood, Inc. v. U.S. Forest Service, 73 F. Supp. 2d 962, 972–73 (S.D. III. 1999), aff’d 230 F.3d 947, 954–55 (7th Cir. 2000).

Data Quality Act

In developing this rule we did not conduct or use a study requiring peer review under the Data Quality Act (Pub. L. 106–554).

Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

Clarity of This Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:
—Be logically organized;
—Use the active voice to address readers directly;
—Use clear language rather than jargon;
—Be divided into short sections and sentences; and
—Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments as instructed in the ADDRESSES section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you think lists or tables would be useful, etc.

List of Subjects in 43 CFR part 46

Environmental protection, EISs.


James E. Cason,
Associate Deputy Secretary.

For the reasons given in the preamble, the Office of the Secretary is adding a new part 46 to Subtitle A of title 43 of the Code of Federal Regulations to read as follows:

PART 46—IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Sec.

Subpart A—General Information

46.10 Purpose of this part.
46.20 How to use this part.
46.30 Definitions.

Subpart B—Protection and Enhancement of Environmental Quality

46.100 Federal action subject to the procedural requirements of NEPA.
46.105 Using a contractor to prepare environmental documents.
46.110 Incorporating consensus-based management.
46.115 Consideration of past actions in analysis of cumulative effects.
46.120 Using existing environmental analyses prepared pursuant to NEPA and the Council on Environmental Quality regulations.
46.125 Incomplete or unavailable information.
46.130 Mitigation measures in analyses.
46.135 Incorporation of referenced documents into NEPA analysis.
46.140 Using tiered documents.
46.145 Using adaptive management.
46.150 Emergency responses.
46.155 Consultation, coordination, and cooperation with other agencies.
46.160 Limitations on actions during the NEPA analysis process.
46.170 Environmental effects abroad of major Federal actions.

Subpart C—Initiating the NEPA Process

46.200 Applying NEPA early.
46.205 Actions categorically excluded from further NEPA review.
46.210 Listing of Departmental Categorical Exclusions.
46.215 Categorical Exclusions: Extraordinary circumstances.
46.220 How to designate lead agencies.
46.225 How to select cooperating agencies.
46.230 Role of cooperating agencies in the NEPA process.
46.235 NEPA scoping process.
46.240 Establishing time limits for the NEPA process.

Subpart D—Environmental Assessments

46.300 Purpose of an environmental assessment and when it must be prepared.
46.305 Public involvement in the environmental assessment process.
46.310 Contents of an environmental assessment.
46.315 How to format an environmental assessment.
46.320 Adopting environmental assessments prepared by another agency, entity, or person.
46.325 Conclusion of the environmental assessment process.

Subpart E—Environmental Impact Statements

46.400 Timing of environmental impact statement development.
46.405 Remaining within page limits.
46.415 Environmental impact statement content, alternatives, circulation and filing requirements.
46.420 Terms used in an environmental impact statement.
46.425 Identification of the preferred alternative in an environmental impact statement.
46.430 Environmental review and consultation requirements.
46.435 Inviting comments.
46.440 Eliminating duplication with State and local procedures.
46.445 Preparing a legislative environmental impact statement.
46.450 Identifying the environmentally preferable alternative.


Subpart A—General Information

§ 46.10 Purpose of this part.
(a) This part establishes procedures for the Department, and its constituent bureaus, to use for compliance with:
(1) The National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 et seq.); and
(2) The Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508).
(b) Consistent with 40 CFR 1500.3, it is the Department’s intention that any trivial violation of these regulations will not give rise to any independent cause of action.

§ 46.20 How to use this part.
(a) This part supplements, and is to be used in conjunction with, the CEQ regulations except where it is inconsistent with other statutory requirements. The following table shows the corresponding CEQ regulations for the sections in subparts A–E of this part. Some sections in those subparts do not have a corresponding CEQ regulation.

Subpart A 40 CFR
46.10 Parts 1500–1508
46.20 No corresponding CEQ regulation
46.30 No corresponding CEQ regulation

Subpart B
46.100 1508.14, 1508.18, 1508.23
46.105 1506.5
46.110 No corresponding CEQ regulation
46.115 1508.7
46.120 1502.9, 1502.20, 1502.21, 1506.3
46.125 1502.22
46.130 1502.14
46.135 1502.21
46.140 1502.20
46.145 No corresponding CEQ regulation
46.150 1506.11
46.155 1502.25, 1506.2
46.160 1506.1
46.170 No corresponding CEQ regulation

Subpart C
46.200 1501.2
46.205 1508.4
46.210 1508.4
46.215 1508.4
46.220 1501.5
46.225 1501.6
46.230 1501.6
46.235 1501.7
46.240 1501.8

Subpart D
46.300 1501.3
46.305 1501.7, 1506.6
46.310 1508.9
46.315 No corresponding CEQ regulation
46.320 1506.3
46.325 1501.4

Subpart E
46.400 1502.5
46.405 1502.7
46.415 1502.10
46.420 1502.14
46.425 1502.14
46.430 1502.25
46.435 1503
46.440 1506.2
46.445 1506.8
46.450 1505.2

(b) The Responsible Official will ensure that the decision making process for proposals subject to this part includes appropriate NEPA review. During the decision making process for each proposal subject to this part, the Responsible Official shall consider the relevant NEPA documents, public and agency comments (if any) on those documents, and responses to those comments, as part of consideration of the proposal and, except as specified in paragraphs

46.210(a) through (j), shall include such documents, including supplements, comments, and responses as part of the administrative file.

(d) The Responsible Official’s decision on a proposed action shall be within the range of alternatives discussed in the relevant environmental document. The Responsible Official’s decision may combine elements of alternatives discussed in the relevant environmental document if the effects of such combined elements of alternatives are reasonably apparent from the analysis in the relevant environmental document.

(e) For situations involving an applicant, the Responsible Official should initiate the NEPA process upon acceptance of an application for a proposed Federal action. The Responsible Official must publish or otherwise provide policy information and make staff available to advise potential applicants of studies or other information, such as costs, foreseeably required for later Federal action.

§ 46.30 Definitions.

For purposes of this part, the following definitions supplement terms defined at 40 CFR parts 1500–1508.

Adaptive management is a system of management practices based on clearly identified outcomes and monitoring to determine whether management actions are meeting desired outcomes; and, if not, facilitating management changes that will best ensure that outcomes are met or re-evaluated. Adaptive management recognizes that knowledge about natural resource systems is sometimes uncertain. Bureau means bureau, office, service, or survey within the Department of the Interior.

Community-based training in the NEPA context is the training of local participants together with Federal participants in the workings of the environmental planning effort as it relates to the local community(ies).

Controversial refers to circumstances where a substantial dispute exists as to the environmental consequences of the proposed action and does not refer to the existence of opposition to a proposed action, the effect of which is relatively undisputed.

Environmental Statement Memoranda (ESM) are written instructions issued by the Department’s Office of Environmental Policy and Compliance to provide information and explanatory guidance in the preparation, completion, and circulation of NEPA documents.

Environmentally preferable alternative is the alternative required by 40 CFR 1505.2(b) to be identified in a record of decision (ROD), that causes the least damage to the biological and physical environment and best protects, preserves, and enhances historical, cultural, and natural resources. The environmentally preferable alternative is identified upon consideration and weighing by the Responsible Official of long-term environmental impacts against short-term impacts in evaluating what is the best protection of these resources. In some situations, such as when different alternatives impact different resources to different degrees, there may be more than one environmentally preferable alternative.

No action alternative.

(1) This term has two interpretations. First “no action” may mean “no change” from a current management direction or level of management intensity (e.g., if no ground-disturbance is currently underway, no action means no ground-disturbance). Second “no action” may mean “no project” in cases where a new project is proposed for implementation.

(2) The Responsible Official must determine the “no action” alternative consistent with one of the definitions in paragraph (1) of this definition and appropriate to the proposed action to be analyzed in an environmental impact statement. The no action alternative looks at effects of not approving the action under consideration.

Proposed action. This term refers to the bureau activity under consideration. It includes the bureau’s exercise of discretion over a non-Federal entity’s planned activity that falls under a Federal agency’s authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments. The proposed action:

(1) Is not necessarily, but may become, during the NEPA process, the bureau preferred alternative or (in a record of decision for an environmental impact statement, in accordance with 40 CFR 1505.2) an environmentally preferable alternative; and

(2) Must be clearly described in order to proceed with NEPA analysis.

Reasonably foreseeable future actions include those federal and non-federal activities not yet undertaken, but sufficiently likely to occur, that a Responsible Official of ordinary prudence would take such activities into account in reaching a decision. These federal and non-federal activities that must be taken into account in the analysis of cumulative impact include, but are not limited to, activities for which there are existing decisions, funding, or proposals identified by the

Subpart E
46.435 1503
46.440 1506.2
46.445 1506.8
46.450 1505.2

(b) The Responsible Official will ensure that the decision making process for proposals subject to this part includes appropriate NEPA review. During the decision making process for each proposal subject to this part, the Responsible Official shall consider the relevant NEPA documents, public and agency comments (if any) on those documents, and responses to those comments, as part of consideration of the proposal and, except as specified in paragraphs

46.210(a) through (j), shall include such documents, including supplements, comments, and responses as part of the administrative file.

(d) The Responsible Official’s decision on a proposed action shall be within the range of alternatives discussed in the relevant environmental document. The Responsible Official’s decision may combine elements of alternatives discussed in the relevant environmental document if the effects of such combined elements of alternatives are reasonably apparent from the analysis in the relevant environmental document.

(e) For situations involving an applicant, the Responsible Official should initiate the NEPA process upon acceptance of an application for a proposed Federal action. The Responsible Official must publish or otherwise provide policy information and make staff available to advise potential applicants of studies or other information, such as costs, foreseeably required for later Federal action.

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Community-based training in the NEPA context is the training of local participants together with Federal participants in the workings of the environmental planning effort as it relates to the local community(ies).

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No action alternative.

(1) This term has two interpretations. First “no action” may mean “no change” from a current management direction or level of management intensity (e.g., if no ground-disturbance is currently underway, no action means no ground-disturbance). Second “no action” may mean “no project” in cases where a new project is proposed for implementation.

(2) The Responsible Official must determine the “no action” alternative consistent with one of the definitions in paragraph (1) of this definition and appropriate to the proposed action to be analyzed in an environmental impact statement. The no action alternative looks at effects of not approving the action under consideration.

Proposed action. This term refers to the bureau activity under consideration. It includes the bureau’s exercise of discretion over a non-Federal entity’s planned activity that falls under a Federal agency’s authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments. The proposed action:

(1) Is not necessarily, but may become, during the NEPA process, the bureau preferred alternative or (in a record of decision for an environmental impact statement, in accordance with 40 CFR 1505.2) an environmentally preferable alternative; and

(2) Must be clearly described in order to proceed with NEPA analysis.

Reasonably foreseeable future actions include those federal and non-federal activities not yet undertaken, but sufficiently likely to occur, that a Responsible Official of ordinary prudence would take such activities into account in reaching a decision. These federal and non-federal activities that must be taken into account in the analysis of cumulative impact include, but are not limited to, activities for which there are existing decisions, funding, or proposals identified by the
bureau. Reasonably foreseeable future actions do not include those actions that are highly speculative or indefinite. Responsible Official is the bureau employee who is delegated the authority to make and implement a decision on a proposed action and is responsible for ensuring compliance with NEPA.

Subpart B—Protection and Enhancement of Environmental Quality

§ 46.100 Federal action subject to the procedural requirements of NEPA.
(a) A bureau proposed action is subject to the procedural requirements of NEPA if it would cause effects on the human environment (40 CFR 1508.14), and is subject to bureau control and responsibility (40 CFR 1508.18). The determination of whether a proposed action is subject to the procedural requirements of NEPA depends on the extent to which bureau exercise control and responsibility over the proposed action and whether Federal funding or approval are necessary to implement it. If Federal funding is provided with no Federal agency control as to the expenditure of such funds by the recipient, NEPA compliance is not necessary. The proposed action is not subject to the procedural requirements of NEPA if it is exempt from the requirements of section 102(2) of NEPA.
(b) A bureau shall apply the procedural requirements of NEPA when the proposal is developed to the point that:
(1) The bureau has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal; and
(2) The effects of the proposed action can be meaningfully evaluated (40 CFR 1508.23).

§ 46.105 Using a contractor to prepare environmental documents.
A Responsible Official may use a contractor to prepare any environmental document in accordance with the standards of 40 CFR 1506.5(b) and (c). If a Responsible Official uses a contractor, the Responsible Official remains responsible for:
(a) Preparation and adequacy of the environmental documents; and
(b) Independent evaluation of the environmental documents after their completion.

§ 46.110 Incorporating consensus-based management.
(a) Consensus-based management incorporates direct community involvement in consideration of bureau activities subject to NEPA analyses, from initial scoping to implementation of the bureau decision. It seeks to achieve agreement from diverse interests on the goals of, purposes of, and needs for bureau plans and activities, as well as the methods anticipated to carry out those plans and activities. For the purposes of this Part, consensus-based management involves outreach to persons, organizations or communities who may be interested in or affected by a proposed action with an assurance that their input will be given consideration by the Responsible Official in selecting a course of action.
(b) In incorporating consensus-based management in the NEPA process, bureaus should consider any consensus-based alternative(s) put forth by those participating persons, organizations or communities who may be interested in or affected by the proposed action.
While there is no guarantee that any particular consensus-based alternative will be considered to be a reasonable alternative or be identified as the bureau’s preferred alternative, bureaus must be able to show that the reasonable consensus-based alternative, if any, is reflected in the evaluation of the proposed action and discussed in the final decision. To be selected for implementation, a consensus-based alternative must be fully consistent with NEPA, the CEQ regulations, and all applicable statutory and regulatory provisions, as well as Departmental and bureau written policies and guidance.
(c) The Responsible Official must, whenever practicable, use a consensus-based management approach to the NEPA process.
(d) If the Responsible Official determines that the consensus-based alternative, if any, is not the preferred alternative, he or she must state the reasons for this determination in the environmental document.
(e) When practicing consensus-based management in the NEPA process, bureaus must comply with all applicable laws, including any applicable provisions of the Federal Advisory Committee Act (FACA).

§ 46.115 Consideration of past actions in the analysis of cumulative effects.
When considering the effects of past actions as part of a cumulative effects analysis, the Responsible Official must analyze the effects in accordance with 40 CFR 1508.7 and in accordance with relevant guidance issued by the Council on Environmental Quality, such as “The Council on Environmental Quality Guidance Memorandum on Consideration of Past Actions in Cumulative Effects Analysis” dated June 24, 2005, or any superseding Council on Environmental Quality guidance.

§ 46.120 Using existing environmental analyses prepared pursuant to NEPA and the Council on Environmental Quality regulations.
(a) When available, the Responsible Official should use existing NEPA analyses for assessing the impacts of a proposed action and any alternatives. Procedures for adoption or incorporation by reference of such analyses must be followed where applicable.
(b) If existing NEPA analyses include data and assumptions appropriate for the analysis at hand, the Responsible Official should use these existing NEPA analyses and/or their underlying data and assumptions where feasible.
(c) An existing environmental analysis prepared pursuant to NEPA and the Council on Environmental Quality regulations may be used in its entirety if the Responsible Official determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives. The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.
(d) Responsible Officials should make the best use of existing NEPA documents by supplementing, tiering to, incorporating by reference, or adopting previous NEPA environmental analyses to avoid redundancy and unnecessary paperwork.

§ 46.125 Incomplete or unavailable information.
In circumstances where the provisions of 40 CFR 1502.22 apply, bureaus must consider all costs to obtain information. These costs include monetary costs as well as other non-monetized costs when appropriate, such as social costs, delays, opportunity costs, and non-fulfillment or non-timely fulfillment of statutory mandates.

§ 46.130 Mitigation measures in analyses.
(a) Bureau proposed action. The analysis of the proposed action and any alternatives must include an analysis of the effects of the proposed action or alternative as well as analysis of the effects of any appropriate mitigation measures or best management practices that are considered. The mitigation measures can be analyzed either as elements of alternatives or in a separate discussion of mitigation.
(b) Applicant proposals (i.e., bureau decision-making on such proposals is the proposed action). An applicant’s...
proposals presented to the bureau for analysis must include any ameliorative design elements (including stipulations, conditions, or best management practices), required to make the proposal conform to applicable legal requirements, as well as any voluntary ameliorative design element(s). The effects of any mitigation measures other than the ameliorative design elements included in the applicant’s proposal must also be analyzed. The analysis of these mitigation measures can be structured as a matter of consideration of alternatives to approving the applicant’s proposal or as separate mitigation measures proposed on any alternative selected for implementation.

§ 46.135 Incorporation of referenced documents into NEPA analysis.
(a) The Responsible Official must determine that the analysis and assumptions used in the referenced document are appropriate for the analysis at hand.
(b) Citations of specific information or analysis from other source documents should include the pertinent page numbers or other relevant identifying information.
(c) Publications incorporated into NEPA analysis by reference must be listed in the bibliography. Such publications must be readily available for review and, when not readily available, they must be made available for review as part of the record supporting the proposed action.

§ 46.140 Using tiered documents.
A NEPA document that tiers to another broader NEPA document in accordance with 40 CFR 1508.28 must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions.
(a) Where the impacts of the narrower action are identified and analyzed in the broader NEPA document, no further analysis is necessary, and the previously prepared document can be used for purposes of the pending action.
(b) To the extent that any relevant analysis in the broader NEPA document is not sufficiently comprehensive or adequate to support further decisions, the tiered NEPA document must explain this and provide any necessary analysis.
(c) An environmental assessment prepared in support of an individual proposed action can be tiered to a programmatic or other broader-scope environmental impact statement. An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects. Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. A finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered may also be called a “finding of no significant impact.”

§ 46.145 Using adaptive management.
Bureaus should use adaptive management, as appropriate, particularly in circumstances where long-term impacts may be uncertain and future monitoring will be needed to make adjustments in subsequent implementation decisions. The NEPA analysis conducted in the context of an adaptive management approach should identify the range of management options that may be taken in response to the results of monitoring and should analyze the effects of such options. The environmental effects of any adaptive management strategy must be evaluated in this or subsequent NEPA analysis.

§ 46.150 Emergency responses.
This section applies only if the Responsible Official determines that an emergency exists that makes it necessary to take urgently needed actions before preparing a NEPA analysis and documentation in accordance with the provisions in subparts D and E of this part.
(a) The Responsible Official may take those actions necessary to control the immediate impacts of the emergency that are urgently needed to mitigate harm to life, property, or important natural, cultural, or historic resources. When taking such actions, the Responsible Official shall take into account the probable environmental consequences of these actions and mitigate foreseeable adverse environmental effects to the extent practical.
(b) The Responsible Official shall document in writing the determination that an emergency exists and describe the responsive action(s) taken at the time the emergency exists. The form of that documentation is within the discretion of the Responsible Official.
(c) If the Responsible Official determines that proposed actions taken in response to an emergency, beyond actions noted in paragraph (a) of this section, are not likely to have significant environmental impacts, the Responsible Official shall document that determination in an environmental assessment and a finding of no significant impact prepared in accordance with this part, unless categorically excluded (see subpart C of this part). If the Responsible Official finds that the nature and scope of the subsequent actions related to the emergency require taking such proposed actions prior to completing an environmental assessment and a finding of no significant impact, the Responsible Official shall consult with the Office of Environmental Policy and Compliance about alternative arrangements for NEPA compliance. The Assistant Secretary, Policy Management and Budget or his/her designee may grant an alternative arrangement. Any alternative arrangement must be documented. Consultation with the Department must be coordinated through the appropriate bureau headquarters.
(d) The Department shall consult with CEQ about alternative arrangements as soon as possible if the Responsible Official determines that proposed actions, taken in response to an emergency, beyond actions noted in paragraph (a) of this section, are likely to have significant environmental impacts. The Responsible Official shall consult with appropriate bureau headquarters and the Department, about alternative arrangements as soon as the Responsible Official determines that the proposed action is likely to have a significant environmental effect. Such alternative arrangements will apply only to the proposed actions necessary to control the immediate impacts of the emergency. Other proposed actions remain subject to NEPA analysis and documentation in accordance with this part.

§ 46.155 Consultation, coordination, and cooperation with other agencies.
The Responsible Official must whenever possible consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities.

§ 46.160 Limitations on actions during the NEPA analysis process.
During the preparation of a program or plan NEPA document, the Responsible Official may undertake any
major Federal action in accordance with 40 CFR 1506.1 when that action is within the scope of, and analyzed in, an existing NEPA document supporting the current plan or program, so long as there is adequate NEPA documentation to support the individual action.

§ 46.170 Environmental effects abroad of major Federal actions.

(a) In order to facilitate informed decision-making, the Responsible Official having ultimate responsibility for authorizing and approving proposed actions encompassed by the provisions of Executive Order (EO) 12114 shall follow the provisions and procedures of that EO. EO 12114 “represents the United States government’s exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purposes of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.”

(b) When implementing EO 12114, bureaus shall coordinate with the Department. The Department shall then consult with the Department of State, which shall coordinate all communications by the Department with foreign governments concerning environmental agreements and other arrangements in implementing EO 12114.

Subpart C—Initiating the NEPA Process

§ 46.200 Applying NEPA early.

(a) For any potentially major Federal action (40 CFR 1508.23 and 1508.18) that may have potentially significant environmental impacts, bureaus must coordinate, as early as feasible, with:

(1) Any other bureaus or Federal agencies, State, local, and tribal governments having jurisdiction by law or special expertise; and

(2) Appropriate Federal, State, local, and tribal governments authorized to develop and enforce environmental standards or to manage and protect natural resources or other aspects of the human environment.

(b) Bureaus must solicit the participation of all those persons or organizations that may be interested or affected as early as possible, such as at the time an application is received or when the bureau initiates the NEPA process for a proposed action.

(c) Bureaus should provide, where practicable, any appropriate community-based training to reduce costs, prevent delays, and facilitate and promote efficiency in the NEPA process.

(d) Bureaus should inform private or non-Federal applicants, to the extent feasible, of:

(1) Any appropriate environmental information that the applicants must include in their applications; and

(2) Any consultation with other Federal agencies, or State, local, or tribal governments that the applicant must accomplish before or during the application process.

(e) Bureaus must inform applicants as soon as practicable of any responsibility they will bear for funding environmental analyses associated with their proposals.

§ 46.205 Actions categorically excluded from further NEPA review.

Categorical Exclusion means a category or kind of action that has no significant individual or cumulative effect on the quality of the human environment. See 40 CFR 1508.4.

(a) Except as provided in paragraph (c) of this section, if an action is covered by a Departmental categorical exclusion, the bureau is not required to prepare an environmental assessment (see subpart D of this part) or an environmental impact statement (see subpart E of this part). If a proposed action does not meet the criteria for any of the listed Departmental categorical exclusions or any of the individual bureau categorical exclusions, then the proposed action must be analyzed in an environmental assessment or environmental impact statement.

(b) The actions listed in section 46.210 are categorically excluded, Department-wide, from preparation of environmental assessments or environmental impact statements.

(c) The CEQ Regulations at 40 CFR 1508.4 require agency procedures to provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect and require additional analysis and action. Section 46.215 lists the extraordinary circumstances under which actions otherwise covered by a categorical exclusion require analyses under NEPA.

(1) Any action that is normally categorically excluded must be evaluated to determine whether it meets any of the extraordinary circumstances in section 46.215; if it does, further analysis and environmental documents must be prepared for the action.

(2) Bureaus must work within existing administrative frameworks, including any existing programmatic agreements, when deciding how to apply any of the section 46.215 extraordinary circumstances.

(d) Congress may establish categorical exclusions by legislation, in which case the terms of the legislation determine how to apply those categorical exclusions.

§ 46.210 Listing of Departmental categorical exclusions.

The following actions are categorically excluded under paragraph 46.205(b), unless any of the extraordinary circumstances in section 46.215 apply:

(a) Personnel actions and investigations and personnel services contracts.

(b) Internal organizational changes and facility and bureau reductions and closings.

(c) Routine financial transactions including such things as salaries and expenses, procurement contracts (e.g., in accordance with applicable procedures and Executive Orders for sustainable or green procurement), guarantees, financial assistance, income transfers, audits, fees, bonds, and royalties.

(d) Departmental legal activities including, but not limited to, such things as arrests, investigations, patents, claims, and legal opinions. This does not include bringing judicial or administrative civil or criminal enforcement actions which are outside the scope of NEPA in accordance with 40 CFR 1508.18(a).

(e) Nondestructive data collection, inventory (including field, aerial, and satellite surveying and mapping), study, research, and monitoring activities.

(f) Routine and continuing government business, including such things as supervision, administration, operations, maintenance, renovations, and replacement activities having limited context and intensity (e.g., limited size and magnitude or short-term effects).

(g) Management, formulation, allocation, transfer, and reprogramming of the Department’s budget at all levels. (This does not exclude the preparation of environmental documents for proposals included in the budget when otherwise required.)

(h) Legislative proposals of an administrative or technical nature (including such things as changes in authorizations for appropriations and minor boundary changes and land title transactions) or having primarily economic, social, individual, or institutional effects; and comments and reports on referrals of legislative proposals.

(i) Policies, directives, regulations, and guidelines; that are of an administrative, financial, legal,
technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

(j) Activities which are educational, informational, advisory, or consultative to other agencies, public and private entities, visitors, individuals, or the general public.

(k) Hazardous fuels reduction activities using prescribed fire not to exceed 4,500 acres, and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres. Such activities:

(1) Shall be limited to areas—
   (i) In wildland-urban interface; and
   (ii) Condition Classes 2 or 3 in Fire Regime Groups I, II, or III, outside the wildland-urban interface;

(2) Shall be identified through a collaborative framework as described in “A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment 10-Year Comprehensive Strategy Implementation Plan’’;

(3) Shall be conducted consistent with bureau and Departmental procedures and applicable land and resource management plans;

(4) Shall not be conducted in wilderness areas or impair the suitability of wilderness study areas for preservation as wilderness; and

(5) Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and may include the sale of vegetative material if the primary purpose of the activity is hazardous fuels reduction. (Refer to the ESM Series for additional, required guidance.)

(l) Post-fire rehabilitation activities not to exceed 4,200 acres (such as tree planting, fence replacement, habitat restoration, heritage site restoration, repair of roads and trails, and repair of damage to minor facilities such as campgrounds) to repair or improve lands unlikely to recover to a management approved condition from wildland fire damage, or to repair or replace minor facilities damaged by fire. Such activities must comply with the following (Refer to the ESM Series for additional, required guidance:)

(1) Shall be conducted consistent with bureau and Departmental procedures and applicable land and resource management plans;

(2) Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and

(3) Shall be completed within three years following a wildland fire.

§ 46.215 Categorical Exclusions: Extraordinary circumstances.

Extraordinary circumstances (see paragraph 46.205(c)) exist for individual actions within categorical exclusions that may meet any of the criteria listed in paragraphs (a) through (l) of this section. Applicability of extraordinary circumstances to categorical exclusions is determined by the Responsible Official.

(a) Have significant impacts on public health or safety.

(b) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (EO 11990); floodplains (EO 11988); national monuments; migratory birds; and other ecologically significant or critical areas.

(c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)].

(d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.

(e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

(f) Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.

(g) Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by the bureau.

(h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.

(i) Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.

(j) Have a disproportionately high and adverse effect on low income or minority populations (EO 12898).

(k) Limit access to and ceremonial use by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (EO 13007).

(l) Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act and EO 13112).

§ 46.220 How to designate lead agencies.

(a) In most cases, the Responsible Official should designate one Federal agency as the lead with the remaining Federal, State, tribal governments, and local agencies assuming the role of cooperating agency. In this manner, the other Federal, State, and local agencies can work to ensure that the NEPA document will meet their needs for adoption and application to their related decision(s).

(b) In some cases, a non-Federal agency (including a tribal government) must comply with State or local requirements that are comparable to the NEPA requirements. In these cases, the Responsible Official may designate the non-Federal agency as a joint lead agency. (See 40 CFR 1501.5 and 1506.2 for a description of the selection of lead agencies, the settlement of lead agency disputes, and the use of joint lead agencies.)

(c) In some cases, the Responsible Official may establish a joint lead relationship among several Federal agencies. If there is a joint lead, then one Federal agency must be identified as the agency responsible for filing the environmental impact statement with EPA.

§ 46.225 How to select cooperating agencies.

(a) An “eligible governmental entity” is:

(1) Any Federal agency that is qualified to participate in the development of an environmental impact statement as provided for in 40 CFR 1501.6 and 1508.5 by virtue of its jurisdiction by law, as defined in 40 CFR 1508.15;

(2) Any Federal agency that is qualified to participate in the development of an environmental impact statement by virtue of its special expertise, as defined in 40 CFR 1508.26; or

(3) Any non-Federal agency (State, tribal, or local) with qualifications similar to those in paragraphs (a)(1) and (a)(2) of this section.

(b) Except as described in paragraph (c) of this section, the Responsible Official for the lead bureau must invite eligible governmental entities to participate as cooperating agencies.
when the bureau is developing an environmental impact statement.

(c) The Responsible Official for the lead bureau must consider any request by an eligible governmental entity to participate in a particular environmental impact statement as a cooperating agency. If the Responsible Official for the lead bureau denies a request, or determines it is inappropriate to extend an invitation, he or she must state the reasons in the environmental impact statement. Denial of a request or not extending an invitation for cooperating agency status is not subject to any internal administrative appeals process, nor is it a final agency action subject to review under the Administrative Procedure Act, 5 U.S.C. 701 et seq.

(d) Bureaus should work with cooperating agencies to develop and adopt a memorandum of understanding that includes their respective roles, agreements of issues, schedules, and staff commitments so that the NEPA process remains on track and within the time schedule. Memoranda of understanding must be used in the case of non-Federal agencies and must include a commitment to maintain the confidentiality of documents and deliberations during the period prior to the public release by the bureau of any NEPA document, including drafts.

(e) The procedures of this section may be used for an environmental assessment.

§ 46.230 Role of cooperating agencies in the NEPA process.

In accordance with 40 CFR 1501.6, throughout the development of an environmental document, the lead bureau will collaborate, to the fullest extent possible, with all cooperating agencies on those issues relating to their jurisdiction and special expertise. Cooperating agencies may, by agreement with the lead bureau, help to do the following:

(a) Identify issues to be addressed;
(b) Arrange for the collection and/or assembly of necessary resource, environmental, social, economic, and institutional data;
(c) Analyze data;
(d) Develop alternatives;
(e) Evaluate alternatives and estimate the effects of implementing each alternative; and
(f) Carry out any other task necessary for the development of the environmental analysis and documentation.

§ 46.235 NEPA scoping process.

(a) Scoping is a process that continues throughout the planning and early stages of preparation of an environmental impact statement. Scoping is required for an environmental impact statement; scoping may be helpful during preparation of an environmental assessment, but is not required (see paragraph 46.305(a)(1) Public involvement in the NEPA process). For an environmental impact statement, bureaus must use scoping to engage State, local and tribal governments and the public in the early identification of concerns, potential impacts, relevant effects of past actions and possible alternative actions. Scoping is an opportunity to introduce and explain the interdisciplinary approach and solicitation information as to additional disciplines that should be included. Scoping also provides an opportunity to bring agencies and applicants together to lay the groundwork for setting time limits, expediting reviews where possible, integrating other environmental reviews, and identifying any major obstacles that could delay the process. The Responsible Official shall determine whether, in some cases, the invitation requirement in 40 CFR 1501.7(a)(1) may be satisfied by including such an invitation in the notice of intent (NOI).

(b) In scoping meetings, newsletters, or by other communication methods appropriate to scoping, the lead agency must make it clear that the lead agency is ultimately responsible for determining the scope of an environmental impact statement and that suggestions obtained during scoping are only options for the bureau to consider.

§ 46.240 Establishing time limits for the NEPA process.

(a) For each proposed action, on a case-by-case basis, bureaus shall:
(1) Set time limits from the start to the finish of the NEPA analysis and documentation, consistent with the requirements of 40 CFR 1501.8 and other legal obligations, including statutory and regulatory timeframes;
(2) Consult with cooperating agencies in setting time limits; and
(3) Encourage cooperating agencies to meet established time frames.

(b) Time limits should reflect the availability of Department and bureau personnel and funds. Efficiency of the NEPA process is dependent on the management capabilities of the lead bureau, which must assemble an interdisciplinary team and/or qualified staff appropriate to the type of project to be analyzed to ensure timely completion of NEPA documents.

Subpart D—Environmental Assessments

§ 46.300 Purpose of an environmental assessment and when it must be prepared.

The purpose of an environmental assessment is to allow the Responsible Official to determine whether to prepare an environmental impact statement or a finding of no significant impact.

(a) A bureau must ensure that an environmental assessment is prepared for all proposed Federal actions, except those:
(1) That are covered by a categorical exclusion;
(2) That are covered sufficiently by an earlier environmental document as determined and documented by the Responsible Official; or
(3) For which the bureau has already decided to prepare an environmental impact statement.

(b) A bureau may prepare an environmental assessment for any proposed action at any time to:
(1) Assist in planning and decision-making;
(2) Further the purposes of NEPA when no environmental impact statement is necessary; or
(3) Facilitate environmental impact statement preparation.

§ 46.305 Public involvement in the environmental assessment process.

(a) The bureau must, to the extent practicable, provide for public notification and public involvement when an environmental assessment is being prepared. However, the methods for providing public notification and opportunities for public involvement are at the discretion of the Responsible Official.

(b) For which the bureau has already decided to prepare an environmental impact statement.

(c) The bureau must notify the public of the availability of an environmental assessment and any associated finding of no significant impact once they have been completed. Comments on a finding of no significant impact do not need to be solicited, except as required by 40 CFR 1501.4(e)(2).
(d) Bureaus may allow cooperating agencies (as defined in § 46.225) to participate in developing environmental assessments.

§ 46.310 Contents of an environmental assessment.
(a) At a minimum, an environmental assessment must include brief discussions of:
(1) The proposal;
(2) The need for the proposal;
(3) The environmental impacts of the proposed action;
(4) The environmental impacts of the alternatives considered; and
(5) A list of agencies and persons consulted.
(b) When the Responsible Official determines that there are no unresolved conflicts about the proposed action with respect to alternative uses of available resources, the environmental assessment need only consider the proposed action and does not need to consider additional alternatives, including the no action alternative. (See section 102(2)(E) of NEPA).
(c) In addition, an environmental assessment may describe a broader range of alternatives to facilitate planning and decision-making.
(d) A proposed action or alternative(s) may include adaptive management strategies allowing for adjustment of the action during implementation. If the adjustments to the action are clearly articulated and pre-specified in the description of the alternative and fully analyzed, then the action may be adjusted during implementation without the need for further analysis. Adaptive management includes a monitoring component, approved adaptive actions that may be taken, and environmental effects analysis for the adaptive actions approved.
(e) The level of detail and depth of impact analysis should normally be limited to the minimum needed to determine whether there would be significant environmental effects.
(f) Bureaus may choose to provide additional detail and depth of analysis as appropriate in those environmental assessments prepared under paragraph 46.300(b).
(g) An environmental assessment must contain objective analyses that support conclusions concerning environmental impacts.

§ 46.315 How to format an environmental assessment.
(a) An environmental assessment may be prepared in any format useful to facilitate planning, decision-making, and appropriate public participation.
(b) An environmental assessment may be accompanied by any other planning or decision-making document. The portion of the document that analyzes the environmental impacts of the proposal and alternatives must be clearly and separately identified and not spread throughout or interwoven into other sections of the document.

§ 46.320 Adopting environmental assessments prepared by another agency, entity, or person.
(a) A Responsible Official may adopt an environmental assessment prepared by another agency, entity, or person, including an applicant, if the Responsible Official:
(1) Independently reviews the environmental assessment; and
(2) Finds that the environmental assessment complies with this subpart and relevant provisions of the CEQ Regulations and with other program requirements.
(b) When appropriate, the Responsible Official may augment the environmental assessment to be consistent with the bureau’s proposed action.
(c) In adopting or augmenting the environmental assessment, the Responsible Official will cite the original environmental assessment.
(d) The Responsible Official must ensure that its bureau’s public involvement requirements have been met before it adopts another agency’s environmental assessment.

§ 46.325 Conclusion of the environmental assessment process.
Upon review of the environmental assessment by the Responsible Official, the environmental assessment process concludes with one of the following:
(1) A notice of intent to prepare an environmental impact statement;
(2) A finding of no significant impact; or
(3) A finding that no further action is proposed.

Subpart E—Environmental Impact Statements
§ 46.400 Timing of environmental impact statement development.
The bureau must prepare an environmental impact statement for each proposed major Federal action significantly affecting the quality of the human environment before making a decision on whether to proceed with the proposed action.
§ 46.405 Remaining within page limits.
To the extent possible, bureaus should use techniques such as incorporation of referenced documents into NEPA analysis (46.135) and tiering (46.140) in an effort to remain within the normal page limits stated in 40 CFR 1502.7.
modifications as alternatives considered. Before engaging in any collaborative processes, the Responsible Official must consider the Federal Advisory Committee Act (FACA) implications of such processes. (3) A proposed action or alternative(s) may include adaptive management strategies allowing for adjustment of the action during implementation. If the adjustments to an action are clearly articulated and pre-specified in the description of the alternative and fully analyzed, then the action may be adjusted during implementation without the need for further analysis. Adaptive management includes a monitoring component, approved adaptive actions that may be taken, and environmental effects analysis for the adaptive actions approved.

(c) Circulating and filing draft and final environmental impact statements. (1) The draft and final environmental impact statements shall be filed with the Environmental Protection Agency’s Office of Federal Activities in Washington, DC (40 CFR 1506.9).

(2) Requirements at 40 CFR 1506.9 “Filing requirements,” 40 CFR 1506.10 “Timing of agency action,” 40 CFR 1502.9 “Draft, final, and supplemental statements,” and 40 CFR 1502.19 “Circulation of the environmental impact statement” shall only apply to draft, final, and supplemental environmental impact statements that are filed with EPA.

§ 46.420 Terms used in an environmental impact statement.

The following terms are commonly used to describe concepts or activities in an environmental impact statement: (a) Statement of purpose and need. In accordance with 40 CFR 1502.13, the statement of purpose and need briefly indicates the underlying purpose and need to which the bureau is responding. (1) In some instances it may be appropriate for the bureau to describe its “purpose” and its “need” as distinct aspects. The “need” for the action may be described as the underlying problem or opportunity to which the agency is responding with the action. The “purpose” may refer to the goal or objective that the bureau is trying to achieve, and should be stated to the extent possible, in terms of desired outcomes. (2) When a bureau is asked to approve an application or permit, the bureau should consider the needs and goals of the parties involved in the application or permit as well as the public interest. The needs and goals of the parties involved in the application or permit may be described as background information. However, this description must not be confused with the bureau’s purpose and need for action. It is the bureau’s purpose and need for action that will determine the range of alternatives and provide a basis for the selection of an alternative in a decision.

(b) Reasonable alternatives. In addition to the requirements of 40 CFR 1502.14, this term includes alternatives that are technically and economically practical or feasible and meet the purpose and need of the proposed action.

(c) Range of alternatives. This term includes all reasonable alternatives, or when there are potentially a very large number of alternatives then a reasonable number of examples covering the full spectrum of reasonable alternatives, each of which must be rigorously explored and objectively evaluated, as well as those other alternatives that are eliminated from detailed study with a brief discussion of the reasons for eliminating them. 40 CFR 1502.14. The Responsible Official must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents, but may select elements from several alternatives discussed. Moreover, the Responsible Official must, in fact, consider all the alternatives discussed in an environmental impact statement. 40 CFR 1505.1 (e).

(d) Preferred alternative. This term refers to the alternative which the bureau believes would best accomplish the purpose and need of the proposed action while fulfilling its statutory mission and responsibilities, giving consideration to economic, environmental, technical, and other factors. It may or may not be the same as the bureau’s proposed action, the non-Federal entity’s proposal or the environmentally preferable alternative.

§ 46.425 Identification of the preferred alternative in an environmental impact statement.

(a) Unless another law prohibits the expression of a preference, the draft environmental impact statement should identify the bureau’s preferred alternative or alternatives, if one or more exists.

(b) Unless another law prohibits the expression of a preference, the final environmental impact statement must identify the bureau’s preferred alternative.

§ 46.430 Environmental review and consultation requirements.

(a) Any environmental impact statement that also addresses other environmental review and consultation requirements must clearly identify and discuss all the associated analyses, studies, or surveys relied upon by the bureau as a part of that review and consultation. The environmental impact statement must include these associated analyses, studies, or surveys, either in the text or in an appendix or indicate where such analysis, studies or surveys may be readily accessed by the public.

(b) The draft environmental impact statement must list all Federal permits, licenses, or approvals that must be obtained to implement the proposal. The environmental analyses for these related permits, licenses, and approvals should be integrated and performed concurrently. The bureau, however, need not unreasonably delay its NEPA analysis in order to integrate another agency’s analyses. The bureau may complete the NEPA analysis before all approvals by other agencies are in place.

§ 46.435 Inviting comments.

(a) A bureau must seek comment from the public as part of the Notice of Intent to prepare an environmental impact statement and notice of availability for a draft environmental impact statement;

(b) In addition to paragraph (a) of this section, a bureau must request comments from:

(1) Federal agencies;

(2) State agencies through procedures established by the Governor of such state under EO 12372;

(3) Local governments and agencies, to the extent that the proposed action affects their jurisdictions; and

(4) The applicant, if any, and persons or organizations who may be interested or affected.

(c) The bureau must request comments from the tribal governments, unless the tribal governments have designated an alternate review process, when the proposed action may affect the environment of either:

(1) Indian trust or restricted land; or

(2) Other Indian trust resources, trust assets, or tribal health and safety.

(d) A bureau does not need to delay preparation and issuance of a final environmental impact statement when any Federal, State, and local agencies, or tribal governments from which comments must be obtained or requested do not comment within the prescribed time period.

§ 46.440 Eliminating duplication with State and local procedures.

A bureau must incorporate in its directives provisions allowing a State agency to jointly prepare an environmental impact statement, to the extent provided in 40 CFR 1506.2.
§ 46.445 Preparing a legislative environmental impact statement.

When required under 40 CFR 1506.8, the Department must ensure that a legislative environmental impact statement is included as a part of the formal transmittal of a legislative proposal to the Congress.

§ 46.450 Identifying the environmentally preferable alternative(s).

In accordance with the requirements of 40 CFR 1505.2, a bureau must identify the environmentally preferable alternative(s) in the record of decision. It is not necessary that the environmentally preferable alternative(s) be selected in the record of decision.

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BILLING CODE 4310–RG–P
1.1 **Purpose.** This chapter provides instructions for implementing the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321-4347) (NEPA); Section 2 of Executive Order 11514, Protection and Enhancement of Environmental Quality, as amended by Executive Order 11991; Executive Order 12114, Environmental Effects Abroad of Major Federal Actions; and the regulations of the Council on Environmental Quality (CEQ) implementing the procedural provisions of NEPA (40 CFR 1500-1508; identified in this Part 516 as the CEQ Regulations), and the Department of the Interior (DOI) regulations (43 CFR Part 46). It supplements the CEQ and DOI regulations and must be read in conjunction with both.

1.2 **Policy.** It is the policy of the Department:

A. To provide leadership in protecting and enhancing those aspects of the quality of the Nation's environment which relate to or may be affected by the Department's policies, goals, programs, plans, or functions in furtherance of national environmental policy;

B. To cooperate with and assist the CEQ; and

C. To implement Cooperative Conservation (see E.O. 13352).

1.3 **Statutory Requirements.** NEPA requires that in certain circumstances an Environmental Impact Statement (EIS) or other environmental document be prepared by the responsible Federal official. This official is normally the lowest-level official who has overall responsibility for formulating, reviewing, or proposing an action or, alternatively, has been delegated the authority or responsibility to develop, approve, or adopt a proposal or action. Preparation at this level will ensure that the NEPA process will be incorporated into the planning process and that the EIS or other environmental document will accompany the proposal through existing review processes.

1.4 **General Responsibilities.** The following responsibilities reflect the Secretary’s decision that the officials responsible for making program decisions are also responsible for taking the requirements of NEPA into account in those decisions and will be held accountable for that responsibility:

A. **Assistant Secretary - Policy, Management and Budget (AS/PMB).**

   (1) Is the Department's focal point on NEPA matters and is responsible for overseeing the Department's implementation of NEPA and Departmental regulations at 43 CFR Part 46.

   (2) Serves as the Department's principal contact with the CEQ.

   (3) Assigns to the Director, Office of Environmental Policy and Compliance (OEPC), the responsibilities outlined for that Office in this Part.
B. Solicitor. Is responsible for providing legal advice pertaining to the Department's compliance with NEPA, CEQ regulations, 43 CFR Part 46, and this Part.

C. Program Assistant Secretaries.

(1) Are responsible for compliance with NEPA, Executive Order 11514, as amended, Executive Order 12114, the CEQ Regulations, 43 CFR Part 46, and this Part for bureaus and offices under their jurisdiction.

(2) Shall ensure that, to the fullest extent possible, the policies, regulations, and public laws of the United States administered under their jurisdiction are interpreted and administered in accordance with the requirements of NEPA.

D. Heads of Bureaus and Offices.

(1) Must comply with the provisions of NEPA, Executive Order 11514, as amended, Executive Order 12114, the CEQ Regulations, 43 CFR Part 46 and this Part.

(2) Shall interpret and administer, to the fullest extent possible, the policies, regulations, and public laws of the United States administered under their jurisdiction in accordance with the requirements of NEPA.

(3) Shall continue to review their statutory authorities, administrative regulations, policies, programs, and procedures, including those related 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 intent, purpose, and provisions of NEPA and, in consultation with the Office of the Solicitor and the Office of Congressional and Legislative Affairs, shall take or recommend, as appropriate, corrective actions as may be necessary to bring these authorities and policies into conformance with the intent, purpose, and procedures of NEPA.

(4) Shall monitor, evaluate, and control on a continuing basis their activities as needed to protect and enhance the quality of the environment. Such activities will include both 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. They will develop programs and measures to protect and enhance environmental quality. They will assess progress in meeting the specific objectives of such activities as they affect the quality of the environment.

E. Heads of Regional, Field, or Area Offices, or Responsible Officials.

(1) Must comply with the provisions of NEPA, Executive Order 11514, as amended, Executive Order 12114, the CEQ Regulations, 43 CFR Part 46 and this Part.

(2) Shall use information obtained in the NEPA process, including pertinent information provided by those persons or organizations that may be interested or affected, to identify reasonable alternatives to proposed actions that will avoid or minimize adverse impacts to the human environment while improving overall environmental results.

(3) Shall monitor, evaluate, and control their activities on a continuing basis to further protect and enhance the quality of the environment.

1.5 Consideration of Environmental Values.

A. In Departmental Management.

(1) In the management of natural, cultural, historic, and human resources under its jurisdiction, the Department must consider and balance a wide range of economic, environmental, and societal needs at the local, regional, national, and international levels, not all of which are quantifiable in comparable terms. In considering and balancing these objectives, Departmental plans, proposals, and decisions often require recognition of complements and resolution of conflicts among interrelated uses of these natural, cultural, historic, and human resources within
technological, budgetary, and legal constraints. Various Departmental conflict resolution mechanisms are available to assist this balancing effort.

(2) Environmental analyses shall strive to provide baseline data where possible and shall provide monitoring and evaluation tools as necessary to ensure that an activity is implemented as contemplated by the NEPA analysis. Baseline data gathered for these analyses may include pertinent social, economic, and environmental data.

(3) If proposed actions are planned for the same geographic area or are otherwise closely related, environmental analysis should be integrated to ensure adequate consideration of resource use interactions, to reduce resource conflicts, to establish baseline data, to monitor and evaluate changes in such data, to adapt actions or groups of actions accordingly, and to comply with NEPA and the CEQ Regulations. Proposals shall not be segmented in order to reduce the levels of environmental impacts reported in NEPA documents.

(4) When proposed actions involve approval processes of other agencies, the Department shall use its lead role to identify opportunities to consolidate those processes.

B. In Internally Initiated Proposals. Officials responsible for development or conduct of planning and decision making systems within the Department shall incorporate environmental planning as an integral part of these systems in order to ensure that environmental values and impacts are fully considered, facilitate any necessary documentation of those considerations, and identify reasonable alternatives in the design and implementation of activities that minimize adverse environmental impacts. An interdisciplinary approach shall be initiated at the earliest possible time to provide for consultation among all participants for each planning or decision making endeavor. This interdisciplinary approach should, to the extent possible, have the capacity to consider innovative and creative solutions from all participants.

C. In Externally Initiated Proposals. Officials responsible for the development or conduct of loan, grant, contract, lease, license, permit, or other externally initiated activities shall require applicants, to the extent necessary and practicable, to provide environmental information, analyses, and reports as an integral part of their applications. As with internally initiated proposals, officials shall encourage applicants and other persons, organizations or communities who may be interested or affected to consult with the Department and provide their comments, recommendations, and suggestions for improvement.

1.6 Consultation, Coordination, and Cooperation with Other Agencies and Organizations.

A. Departmental Plans and Programs.

(1) Officials responsible for planning or implementing Departmental plans and programs will develop and utilize procedures to consult, coordinate, and cooperate with relevant State, local, and tribal governments; other bureaus and Federal agencies; and public and private organizations and individuals concerning the environmental effects of these plans and programs on their jurisdictions or interests. Such efforts should, to the extent allowed by law and in accordance with the Federal Advisory Committee Act (FACA), include consensus-based management whenever possible. This is a planning process that incorporates direct community involvement into bureau activities from initial scoping through implementation of the bureau or office decision and, in practicable cases, monitoring and future adaptive management measures. All bureau NEPA and planning procedures will be made available to the public.

(2) Bureaus and offices will use, to the maximum extent possible, existing notification, coordination, and review mechanisms established by the Office of Management and Budget and CEQ. However, use of these mechanisms must not be a substitute for early consultation, coordination, and cooperation with others, especially State, local, and tribal governments.

(3) Bureaus and offices are encouraged to expand, develop, and use new forms of notification, coordination, and review, particularly by electronic means and the Internet. Bureaus are also encouraged to stay abreast of and use new technologies in environmental data gathering and problem solving.
B. **Other Departmental Activities.**

(1) Technical assistance, advice, data, and information useful in restoring, maintaining, and enhancing the quality of the environment will be made available to other Federal agencies; State, local, and tribal governments; institutions; and other entities as appropriate.

(2) Information regarding existing or potential environmental problems and control methods developed as a part of research, development, demonstration, test, or evaluation activities will be made available to other Federal agencies; State, local, and tribal governments; institutions; and other entities as appropriate.

C. **Plans and Programs of Other Agencies and Organizations.**

(1) Officials responsible for protecting, conserving, developing, or managing resources under the Department's jurisdiction shall coordinate and cooperate with State, local, tribal governments; other bureaus and Federal agencies; and those persons or organizations that may be interested or affected, and provide them with timely information concerning the environmental effects of these entities' plans and programs.

(2) Bureaus and offices are encouraged to participate early in the planning processes of other agencies and organizations in order to ensure full cooperation with, and understanding of, the Department's programs and interests in natural, cultural, historic and human resources.

(3) Bureaus and offices will use, to the fullest extent possible, existing Departmental review mechanisms to avoid unnecessary duplication of effort and to avoid confusion by other organizations.

(4) Bureaus and offices will work closely with other Federal agencies to ensure that similar or related proposed actions in the same geographic area are fully evaluated to determine if agency analyses can be integrated so that one NEPA compliance document can be used by all for their individual permitting and licensing needs.

1.7 **Public Involvement.**

A. Bureaus and offices, in accordance with 301 DM 2, 43 CFR Part 46, and this Part, will develop and implement procedures to ensure the fullest practicable provision of timely public information and understanding of their plans and programs with environmental impacts including information on the environmental impacts of alternative courses of action. This is to include appropriate public involvement in the development of NEPA analyses and documents.

B. These procedures will include, wherever appropriate, provision for public meetings in order to obtain the views of persons, organizations, or communities who may be interested or affected. Public information shall include all necessary policies and procedures concerning plans and programs in a readily accessible, consistent format.

C. Bureaus and offices will also coordinate and collaborate with State and local agencies and tribal governments in developing and using similar procedures for informing the public concerning their activities affecting the quality of the environment.

1.8 **Mandate.**

A. The provisions of Part 516 are intended to establish guidelines to be followed by the Department and its bureaus, and offices. Part 516 is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any person or party against the United States, its agencies, its officers, or any other person. The provisions of Part 516 are not intended to direct or bind any person outside the Department.

B. Instructions supplementing the CEQ Regulations are provided in Departmental regulations at 43 CFR Part 46.
C. Instructions specific to each bureau are found in Chapters 8 through 15. This portion of the manual may expand or contract depending on the number of bureaus existing at any particular time. In addition, bureaus may prepare handbooks or other technical guidance for their personnel on how to apply this Part to principal programs. In the case of any apparent discrepancies between these procedures and bureau handbooks or technical guidance, Departmental regulations at 43 CFR 46 and 516 DM 1 - 4 shall govern.

1.9 **Lead Agencies** (40 CFR 1501.5; 43 CFR 46.220).

A. The AS/PMB shall designate lead bureaus within the Department when bureaus under more than one Assistant Secretary are involved and cannot reach agreement on lead bureau status. The AS/PMB shall represent the Department in consultations with CEQ or other Federal agencies in the resolution of lead agency determinations.

B. Bureaus will inform the OEPC of any agreements to assume lead agency status. OEPC will assist in the coordination and documentation of any AS/PMB designations made in 1.9A.

C. To eliminate duplication with State and local procedures, a non-Federal agency (including tribal governments) may be designated as a joint lead agency when it has a duty to comply with non-Federal requirements that are comparable to the NEPA requirements.

D. 40 CFR 1501.5 describes the selection of lead agencies, the settlement of lead agency disputes, and the use of joint lead agencies. While the joint lead relationship is not precluded among several Federal agencies, the Department recommends that it be applied sparingly and that one Federal agency be selected as the lead with the remaining Federal, State, tribal governments, and local agencies assuming the role of cooperating agency. In this manner, the other Federal agencies, as well as State, tribal, and local agencies can work to ensure that the ensuing NEPA document will meet their needs for adoption and application to their related decision. If joint lead is dictated by other law, regulation, policy, or practice, then one Federal agency shall be identified as the agency responsible for filing the EIS.

E. Lead agency designations may be required by law in certain circumstances.

1.10 **Cooperating Agencies** (40 CFR 1501.6 and 1508.5; 43 CFR 46.225).

A. Upon the request of a bureau, the OEPC will assist bureaus in determining cooperating agencies and coordinating requests from non-Interior agencies.

B. Bureaus will inform the OEPC of any requests to become a cooperating agency or any declinations to become a cooperating agency pursuant to 40 CFR 1501.6(c).

C. Bureaus will consult with the Solicitor's Office in cases where such non-Federal agencies are also applicants before the Department to determine relative lead/cooperating agency responsibilities.

D. An agency meeting the requirements of 43 CFR 46.225(a) is defined as an eligible governmental entity for the purposes of designation as a cooperating agency.

1.11 **Scoping** (40 CFR 1501.7; 43 CFR 46.235). Scoping should encourage the responsible official to integrate analyses required by other environmental laws. Scoping should also be used to integrate other planning activities for separate projects that may have similar or cumulative impacts. Integrated analysis facilitates the resolution of resource conflicts and minimizes redundancy.

1.12 **Environmental Assessments** (40 CFR 1501.3; 43 CFR 46.120, 46.140, 46.320).

A. Previous NEPA analyses should be used in a tiered analysis or transferred and used in a subsequent analysis to enhance the content of an EA whenever possible.
B. If such an EA is adopted or augmented, responsible officials must prepare their own notice of intent (NOI) or Finding of No Significant Impact (FONSI) that acknowledges the origin of the EA and takes full responsibility for its scope and content.

1.13 Environmental Impact Statements (40 CFR 1501.4, 1502.3; 43 CFR 46.100(b), and Subpart E).

A. If an agency’s assessment of the environmental effects of a proposed action reveals that such action may significantly affect the quality of the human environment, and the agency elects to go forward with the proposed action, an EIS should be commenced.

B. The feasibility analysis (go/no-go) stage, at which time an EIS is to be prepared for proposed projects undertaken by DOI, is to be interpreted as the stage prior to the first point of major commitment to the proposal. For example, this would normally be at the authorization stage for proposals requiring Congressional authorization; the location or corridor stage for transportation, transmission, and communication projects; and the leasing stage for offshore mineral resources proposals (40 CFR 1502.5(a)).

C. For situations involving applications to DOI or the bureaus, an EIS need not be commenced until an application is essentially complete; i.e., any required environmental information is submitted and any required advance funding is paid by the applicant (40 CFR 1502.5(b)). Officials shall also inform applicants of any responsibility they will bear for funding environmental analyses associated with their proposals (43 CFR 46.200(e)).

1.14 Supplemental Statements (40 CFR 1502.9).

A. Supplements are required if an agency makes substantial changes in the proposed action relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

B. A bureau and/or the appropriate program Assistant Secretary will consult with the OEPC and the Office of the Solicitor prior to proposing to CEQ to prepare a supplemental statement using alternative arrangements such as issuing a final supplement without preparing an intervening draft.

C. If, after a decision has been made based on a final EIS, a described proposal is further defined or modified and if its changed effects are not significant and still within the scope of the earlier EIS, an EA, and a FONSI may be prepared for subsequent decisions rather than a supplement.

1.15 Format (40 CFR 1502.10).

A. Proposed departures from the standard format described in the CEQ regulations and this chapter must be approved by the OEPC.

B. The section listing the preparers of the EIS will also include other sources of information, including a bibliography or list of cited references, when appropriate.

C. Cover Sheet (40 CFR 1502.11). The cover sheet will also indicate whether the EIS is intended to serve any other environmental review or consultation requirements pursuant to Section 1502.25. The cover sheet will also identify cooperating agencies, the location of the action, and whether the analysis is programmatic in nature.

D. Summary (40 CFR 1502.12). The emphasis in the summary should be on those considerations, controversies, and issues that significantly affect the quality of the human environment.

1.16 Alternatives Including the Proposed Action (40 CFR 1502.14; 43 CFR 46.425). For externally initiated proposals, i.e., for those cases where the Department is reacting to an application or similar request, the draft and final EIS shall identify the applicant’s proposed action. Proposed departures from 43 CFR 46.425(a) or this guidance must
be approved by the OEPC and the Office of the Solicitor.

1.17 Appendix (40 CFR 1502.18). If an EIS is intended to serve other environmental review or consultation requirements pursuant to Section 1502.25, any more detailed information needed to comply with these requirements may be included as an appendix.

1.18 Tiering (40 CFR 1502.20; 43 CFR 46.120, 46.140). Bureaus must maintain access to such things as: sources of similar information, examples of tiered and transferred analyses, a set of procedural steps to make the most of tiered and transferred analyses, knowledge of when to use previous material, and how to used tiered and transferred analyses without sacrificing references to original sources.

1.19 Methodology and Scientific Accuracy (40 CFR 1502.24). Conclusions about environmental effects will be preceded by an analysis that supports that conclusion unless explicit reference by footnote is made to other supporting documentation that is readily available to the public. Bureaus will also follow Departmental procedures for information quality as required under Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L.106-554, 114 Stat. 2763).

1.20 Environmental Review and Consultation Requirements (40 CFR 1502.25; 43 CFR 46.155, 46.430).

A. A list of related environmental review and consultation requirements is available from the OEPC (ESM 09-8).

B. Bureaus shall ensure that they have a process in place to make integrated analyses a standard part of their NEPA compliance efforts.

C. The comments of bureaus and offices must also be requested. In order to do this, the preparing bureau must furnish copies of the environmental document to the other bureaus in quantities sufficient to allow simultaneous review. Bureaus may be removed from this circulation following consultation with, and concurrence of, a bureau.

D. Informal attempts will be made to determine the status of any late comments and a reasonable attempt should be made to include the comments and a response in the final EIS. Late introduction of new issues and alternatives is to be avoided and they will be considered only to the extent practicable.

E. For those EISs requiring the approval of the AS/PMB pursuant to 516 DM 3.3B, bureaus will consult with the OEPC when they propose to prepare an abbreviated final EIS [40 CFR 1503.4(c)].

1.21 Further Guidance (40 CFR 1506.7). The OEPC may provide further guidance concerning NEPA pursuant to its organizational responsibilities (112 DM 4) and through supplemental directives (381 DM 4.5B). Current guidance is located in the Environmental Memoranda Series periodically updated by OEPC and available on the OEPC website at: http://www.doi.gov/oepc/.

1.22 Time Periods (40 CFR 1506.10).

A. The minimum review period for a draft EIS will be forty-five (45) days from the date of publication by the Environmental Protection Agency (EPA) of the notice of availability, unless a longer period is required by individual agency regulation or process.

B. For those EISs requiring the approval of the AS/PMB pursuant to 516 DM 3.3B, the OEPC will be responsible for consulting with the EPA and/or CEQ about any proposed reductions in time periods or any extensions of time periods proposed by the bureaus.

9/1/09 #3846
Replaces 5/27/04 #3611; 6/21/05 #3675; 5/27/04 #3613; and 5/27/04 #3614

2.1 **Purpose.** This chapter provides supplementary instructions for implementing those portions of the Council of Environmental Quality (CEQ) Regulations and the Department’s NEPA Regulations pertaining to decision making.

2.2 **Pre-Decision Referrals to CEQ** (40 CFR 1504.3).

   A. Upon receipt of advice that another Federal agency intends to refer a Departmental matter to CEQ, the lead bureau will immediately meet with that Federal agency to attempt to resolve the issues raised and expeditiously notify its Program Assistant Secretary, the Solicitor, and the Office of Environmental Policy and Compliance (OEPC).

   B. Upon any referral of a Departmental matter to CEQ by another Federal agency, the OEPC will be responsible for coordinating the Department's role with CEQ. The lead bureau will be responsible for developing and presenting the Department’s position at CEQ including preparation of briefing papers and visual aids.

2.3 **Decision Making Procedures** (40 CFR 1505.1).

   A. Procedures for decisions by the Secretary/Deputy Secretary are specified in 301 DM 1. Program Assistant Secretaries should follow a similar process when an environmental document accompanies a proposal for their decision.

   B. Bureaus will incorporate in their decision making procedures and NEPA handbooks provisions for consideration of environmental factors and relevant environmental documents. The major decision points for principal programs likely to have significant environmental effects will be identified in the bureau chapters on “Managing the NEPA Process” beginning with chapter 8 of this Part.

   C. Relevant environmental documents, including supplements, will be included as part of the record in formal rulemaking or adjudicatory proceedings.

   D. Relevant environmental documents, comments, and responses will accompany proposals through existing review processes so that Departmental officials use them in making decisions.

   E. The Responsible Official (RO) will consider the environmental impacts of the alternatives described in any relevant environmental document and the range of these alternatives must encompass the alternatives considered by the RO.

   F. To the extent practicable, the RO will consider other substantive and legal obligations beyond the immediate context of the proposed action.

2.4 **Record of Decision** (40 CFR 1505.2).
A. Any decision documents prepared pursuant to 301 DM 1 for proposals involving an Environmental Impact Statement (EIS) shall incorporate all appropriate provisions of Section 1505.2(b) and (c).

B. If a decision document incorporating these provisions is made available to the public following a decision, it will serve the purpose of a record of decision.

2.5 Implementing the Decision (40 CFR 1505.3). The terms “monitoring” and “conditions” will be interpreted as being related to factors affecting the quality of the natural and human environment.

2.6 Limitations on Actions (40 CFR 1506.1). A bureau will immediately notify its Program Assistant Secretary, the Solicitor, and the OEPC of any situations described in Section 1506.1(b).

2.7 Timing of Actions (40 CFR 1506.10). For those EISs requiring the approval of the AS/PMB pursuant to 516 DM 3.3, the responsible official will consult with the OEPC before making any request for reducing the time period before a decision or action.

2.8 Emergencies (40 CFR 1506.11). In the event of an emergency situation, a bureau will follow the requirements of 43 CFR 46.150.

9/1/09 #3847
Replaces 5/27/04 #3615
3.1 **Purpose.** This chapter provides supplementary instructions for implementing those provisions of the CEQ Regulations and the Department’s National Environmental Policy Act (NEPA) Regulations pertaining to procedures for implementing and managing the NEPA process.

3.2 **Organizational Responsibilities for Environmental Quality.**

   A. **Office of Environmental Policy and Compliance (OEPC).** The Director, OEPC, is responsible for providing advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department's compliance with NEPA. (See also 112 DM 4.)

   B. **Bureaus and Offices.** Heads of bureaus and offices will designate organizational elements or individuals, as appropriate, at headquarters and regional levels to be responsible for overseeing matters pertaining to the environmental effects of the bureau’s plans and programs. The individuals assigned these responsibilities should have management experience or potential, understand the bureau's planning and decision making processes, and be well trained in environmental matters, including the Department's policies and procedures so that their advice has significance in the bureau’s planning and decisions. These organizational elements will be identified in chapters 8-15, which contain all bureau NEPA requirements.

3.3 **Approval of Environmental Impact Statements (EISs).**

   A. A program Assistant Secretary is authorized to approve an EIS in those cases where the responsibility for the decision for which the EIS has been prepared rests with the Assistant Secretary or below. The Assistant Secretary may further assign the authority to approve the EIS if he or she chooses. The AS/PMB will make certain that each program Assistant Secretary has adequate safeguards to ensure that the EISs comply with NEPA, the Council of Environmental Quality (CEQ) Regulations, the Department’s NEPA Regulations, and the Departmental Manual (DM).

   B. The AS/PMB is authorized to approve an EIS in those cases where the decision for which the EIS has been prepared will occur at a level in the Department above an individual program Assistant Secretary.

3.4 **List of Specific Compliance Responsibilities.**

   A. Bureaus and offices shall:

      1. Prepare NEPA handbooks providing guidance on the interpretation of NEPA, the CEQ regulations, 43 CFR Part 46, and the applicable portions of this Part in principal program areas.

      2. Prepare program regulations or directives for applicants.
(3) Propose and apply categorical exclusions (CEs).

(4) Prepare and approve Environmental Assessments (EAs).

(5) Decide whether to prepare an EIS.

(6) Prepare and publish NOIs and FONSIs.

(7) Prepare and, when assigned, approve EISs.

B. Program Assistant Secretaries shall:

(1) Approve bureau and office handbooks.

(2) Approve regulations or directives for applicants.

(3) Approve proposed categorical exclusions.

(4) Approve EISs pursuant to 516 DM 3.3.

C. The AS/PMB shall:

(1) Concur with regulations or directives for applicants.

(2) Concur with proposed categorical exclusions.

(3) Approve EISs pursuant to 516 DM 3.3. (See also 43 CFR 46.150).

3.5 **Bureau Requirements.**

A. Requirements specific to bureaus appear as separate chapters beginning with chapter 8 of this Part and include the following:

(1) Identification of officials and organizational elements responsible for NEPA compliance.

(2) List of program regulations or directives which provide information to applicants.

(3) Identification of major decision points in principal programs for which an EIS is normally prepared.

(4) List of projects or groups of projects for which an EA is normally prepared.

(5) List of categorical exclusions.

B. Bureau requirements are found in the following chapters for the current bureaus:

(1) U.S. Fish and Wildlife Service (Chapter 8).

(2) U.S. Geological Survey (Chapter 9).

(3) Bureau of Indian Affairs (Chapter 10).

(4) Bureau of Land Management (Chapter 11).

(5) National Park Service (Chapter 12).
C. Offices in the Office of the Secretary (O/S) must comply with the policy in this chapter and will consult with the OEPC about compliance activities.

3.6 **Information about the NEPA Process.** The OEPC will periodically publish a Departmental list of bureau contacts where information about the NEPA process and the status of EISs may be obtained. This list will be available on OEPC’s website at: [http://www.doi.gov/oepc/](http://www.doi.gov/oepc/).

9/1/09 #3848
Replaces 5/27/04 #3616
516 DM 4

4.1 Purpose.

A. These procedures implement the policy and directives of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq. (NEPA); Section 2(f) of Executive Order No. 11514 (March 5, 1970); the Council of Environmental Quality (CEQ) Regulations, 40 Parts 1500-1508; Bulletin No. 72-6 of the Office of Management and Budget (September 14, 1971); and provide guidance to bureaus and offices of the Department in the review of Environmental Impact Statements (EISs) prepared by and for other Federal agencies.

B. In accordance with 112 DM 4.2F, these procedures further govern the Department’s environmental review of non-Interior proposals such as regulations, applications, plans, reports, and other environmental documents which affect the interests of the Department. Such proposals are prepared, circulated, and reviewed under a wide variety of statutes and regulations. These procedures ensure that the Department responds to these review requests with coordinated comments and recommendations under the Department’s various authorities.

4.2 Policy. The Department considers it a priority to provide competent and timely review comments on EISs and other environmental or project review documents prepared by other Federal agencies for their major actions that significantly affect the quality of the human environment. All such documents are hereinafter referred to as “environmental review documents.” The term “environmental review document” as used in this chapter is separate from and broader than the term “environmental document” found in 40 CFR 1508.10 of the CEQ Regulations. These reviews are predicated on the Department's jurisdiction by law or special expertise with respect to the environmental impact involved and shall provide constructive comments to other Federal agencies to assist them in meeting their environmental responsibilities.

4.3 Responsibilities.

A. The Assistant Secretary - Policy, Management and Budget (AS/PMB) shall be the Department's contact point for the receipt of requests for reviews of environmental review documents prepared by or for other Federal agencies. This authority shall be carried out through the Director, Office of Environmental Policy and Compliance (OEPC).

B. The Director, Office of Environmental Policy and Compliance.

   (1) Shall determine whether such review requests are to be answered by a Secretarial Officer, the Director, OEPC, or by a Regional Environmental Officer (REO), and determine which bureaus and/or offices shall perform such reviews.

   (2) Shall prepare, or where appropriate, shall designate a lead bureau responsible for preparing the Department's review comments. The lead bureau may be a bureau, Secretarial office, other Departmental office,
task force and shall be that organizational entity with the most significant jurisdiction or environmental expertise in regard to the requested review.

(3) Shall establish review schedules and target dates for responding to review requests and monitor their compliance.

(4) Shall review, sign, and transmit the Department's review comments to the requesting agency.

(5) Shall consult with the requesting agency on the Department's review comments on an “as needed” basis to ensure resolution of the Department's concerns.

(6) Shall consult with the Office of Congressional and Legislative Affairs and the Solicitor when environmental reviews pertain to legislative or legal matters, respectively.

C. The Office of Congressional and Legislative Affairs shall ensure that requests for reviews of environmental review documents prepared by other Federal agencies that accompany or pertain to legislative proposals are immediately referred to the AS/PMB.

D. Regional Environmental Officers, when designated by the Director, OEPC, shall review, sign, and transmit the Department's review comments to the requesting agency.

E. Program Assistant Secretaries and Heads of Bureaus and Offices.

(1) Shall designate officials and organizational elements responsible for the coordination and conduct of environmental reviews and report this information to the Director, OEPC.

(2) Shall provide the Director, OEPC, with appropriate information and material concerning their delegated jurisdiction and special expertise in order to assist in assigning review responsibilities.

(3) Shall conduct reviews based upon their areas of jurisdiction or special expertise and provide comments to the designated lead bureau or office assigned responsibility for preparing the Department’s comments.

(4) When designated lead bureau by the Director, OEPC, shall prepare and forward the Department's review comments as instructed.

(5) Shall ensure that review schedules for discharging assigned responsibilities are met and promptly inform other concerned offices if established target dates cannot be met and when they will be met.

(6) Shall provide a single, unified bureau response to the lead bureau, as directed.

(7) Shall ensure that the policies of 516 DM 4.2 regarding competency and timeliness are carried out.

(8) Shall provide the necessary authority to those designated in 4.3E(1) above to carry out all the requirements of 516 DM 4.

4.4 Types of Reviews.

A. Descriptions of Proposed Actions.

(1) Federal agencies and applicants for Federal assistance may circulate descriptions of proposed actions for the purpose of soliciting information concerning environmental impacts in order to determine whether to prepare EISs. Such descriptions of proposed actions are not substitutes for EISs.

(2) Requests for reviews of descriptions of proposed actions are not required to be processed through the...
OEPC. Review comments may be handled independently by bureaus and offices, with the Regional Environmental Officer or Director, OEPC, being advised of significant or highly controversial issues. Review comments are for the purpose of providing informal technical assistance to the requesting agency and should state that they do not represent the views and comments of the Department.

B. **Environmental Assessments.**

(1) Environmental Assessments are not substitutes for EISs. These assessments or reports may be prepared by Federal agencies, their consultants, or applicants for Federal assistance. They are prepared either to provide information in order to make a finding that there are no significant impacts or that an EIS should be prepared. If they are separately circulated, it is generally for the purpose of soliciting additional information concerning environmental impacts.

(2) Requests for reviews of EAs are not required to be processed through the OEPC. Review comments may be handled independently by bureaus and offices, with the Regional Environmental Officer or Director, OEPC, being advised of significant or highly controversial issues. If a bureau requests and OEPC agrees, a control number may be assigned with appropriate instructions. Review comments are for the purpose of providing informal technical assistance to the requesting agency and should state that they do not represent the views and comments of the Department.

C. **Finding of No Significant Impact.**

(1) Findings of No Significant Impact (FONSI) are prepared by Federal agencies to document that there is no need to prepare an EIS. A FONSI is a statement for the record by the proponent Federal agency that it has reviewed the environmental impact of its proposed action (in an EA), that it determines that the action will not significantly affect the quality of the human environment, and that an EIS is not required. Public notice of the availability of such findings shall be announced; however, FONSI are not normally circulated.

(2) FONSI are not required to be processed through the OEPC. Review comments may be handled independently by bureaus and offices, with the Regional Environmental Officer or Director, OEPC, being advised of significant or highly controversial issues.

D. **Notice of Intent and Scoping Requests.**

(1) Notices of intent (NOI) and scoping requests mark the beginning of the formal review process. NOI are published in the Federal Register and announce that an agency plans to prepare an environmental review document under NEPA. Often the NOI and notice of scoping meetings and/or requests are combined into one Federal Register notice.

(2) Reviews of NOI and scoping requests are processed through the OEPC with instructions to bureaus to comment directly to the requesting agency. Review comments are for the purpose of providing informal technical assistance to the requesting agency and should state that they do not represent the views and comments of the Department.

E. **Preliminary, Proposed, or Working Draft Environmental Impact Statements.**

(1) Preliminary, proposed, or working draft EISs are sometimes prepared and circulated by Federal agencies and applicants for Federal assistance for consultative purposes.

(2) Requests for reviews of these types of draft EISs are not required to be processed through the OEPC. Review comments may be handled independently by bureaus and offices with the Regional Environmental Officer or Director, OEPC, being advised of significant or highly controversial issues. Review comments are for the purpose of providing informal technical assistance to the requesting agency and should state that they do not represent the views and comments of the Department.

F. Draft Environmental Impact Statements.

(1) Draft EISs are prepared by Federal agencies under the provisions of Section 102(2)(C) of NEPA and provisions of the CEQ Regulations. They are filed with the Environmental Protection Agency (EPA) and officially circulated to other Federal, State, and local agencies (see 40 CFR 1503.1(a), 1506.9, 1506.10) for review based upon their jurisdiction by law or special expertise with respect to the agency mission, related program experience, or environmental impact of the proposed action or alternatives to the action (see 4.5A(1)). They are presented to the public for review and comment as well (see 40 CFR 1503.1(a)(4); 43 CFR 46.435).

(2) All requests from other Federal agencies for review of draft EISs shall be made through the Director, OEPC. Review comments shall be handled in accordance with the provisions of this chapter and guidance memoranda may be issued and updated by the OEPC.

G. Final Environmental Impact Statements.

(1) Final EISs are prepared by Federal agencies following receipt and consideration of review comments. They are filed with the EPA and are circulated to the public for an administrative waiting period of thirty days and sometimes for comment.

(2) The Director, OEPC, shall review final EISs to determine whether they reflect adequate consideration of the Department's comments. Bureaus and offices shall not comment independently on final EISs, but shall inform the Director, OEPC, of their views. Any review comments shall be handled in accordance with the instructions of the OEPC.

H. License and Permit Applications.

(1) The Department receives draft and final environmental review documents associated with applications for other Federal licenses and permits. This activity largely involves the regulatory program of the Corps of Engineers and the hydroelectric and natural gas pipeline licensing programs of the Federal Energy Regulatory Commission (FERC).

(2) Environmental review of applications is generally handled in the same manner as for draft and final EISs. Additional review guidance may be made available as necessary to efficiently manage this activity. Bureau reviewers should review information on the OEPC website and consult with the OEPC for the most current review guidance.

(3) While review of NEPA compliance documents associated with Corps of Engineers permit applications is managed in accordance with this chapter, review of Corps of Engineers permit applications is managed in accordance with 503 DM 1. Reviewers are referred to that Manual Part and to 4.5C(3) below for the processing of concurrent reviews.

I. Project Plans and Reports without Associated Environmental Review Documents.

(1) The Department receives draft and final project plans and reports under various authorities which do not have environmental review documents circulated with them. This may be because NEPA compliance has been completed, will be completed on a slightly different schedule, NEPA does not apply, or other reasons.

(2) Environmental review of these documents is handled in the same manner as for draft and final EISs. Additional review guidance may be made available as necessary to efficiently manage this activity. Bureau reviewers should review information on the OEPC website and consult with the OEPC for the most current review guidance.

J. Federal Regulations.
(1) The Department circulates and controls the review of advance notices of proposed rulemaking, proposed rulemaking, and final rulemaking which are environmental in nature, may impact the quality of the human environment, and may impact the Department’s natural resources and programs.

(2) Environmental review of these documents is handled in the same manner as for draft and final EISs. Additional review guidance may be made available as necessary to efficiently manage this activity. Bureau reviewers should review information on the OEPC website and consult with the OEPC for the most current review guidance.

K. Documents Prepared Pursuant to Other Environmental Statutes.

(1) The Department receives draft and final project plans prepared pursuant to other environmental statutes [e.g., National Historic Preservation Act (NHPA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); Resource Conservation and Recovery Act (RCRA), and the Oil Pollution Act (OPA)], which may not have environmental review documents circulated with them.

(2) Environmental review of these documents is handled consistently with the policies and provisions of this part, and in accordance with further guidance from the Director, OEPC. Additional review guidance may be made available as necessary to efficiently manage this activity. Bureau reviewers should review information on the OEPC website and consult with the OEPC for the most current review guidance.

L. Section 4(f) Documents.

(1) Under Section 4(f) of the Department of Transportation Act, the Secretary of Transportation may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if there is no prudent and feasible alternative to using that land and the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(2) Environmental review of Section 4(f) documents is handled in the same manner as for draft and final EISs. Additional review guidance may be made available as necessary to efficiently manage this activity. Bureau reviewers should review information on the OEPC website and consult with the OEPC for the most current review guidance.

4.5 Content of Comments on Environmental Review Documents.

A. Departmental Comments.

(1) Departmental comments on environmental review documents prepared by other Federal agencies shall be based upon the Department's jurisdiction by law or special expertise with respect to the agency mission, related program experience, or environmental impact of the proposed action or alternatives to the action. The adequacy of the document in regard to applicable statutes is the responsibility of the agency that prepared the document and any comments on its adequacy shall be limited to the Department's jurisdiction or environmental expertise.

(2) Reviews shall be conducted in sufficient detail to ensure that both potentially beneficial and adverse environmental effects of the proposed action and alternatives, including cumulative and secondary effects, are adequately identified. Wherever possible, and within the Department's competence and resources, other agencies will be advised on ways to avoid or minimize adverse impacts of the proposed action and alternatives, and on alternatives to the proposed action that may have been overlooked or inadequately treated.

(3) Review comments should not capitulate or restate the environmental review document, but should provide clear, concise, substantive, fully justified, and complete comments on the stated or unstated environmental
impacts of the proposed action and, if appropriate, on alternatives to the action. Comments, either positive or negative, shall be objective and constructive.

(4) Departmental review comments shall be organized as follows:

(a) **Control Number.** The Departmental review control number shall be typed in the upper left hand corner below the Departmental seal on the letterhead page of the comments.

(b) **Introduction.** The introductory paragraph shall reference the other Federal agency's review request, including the date, the type of review requested, the subject of the review; and, where appropriate, the geographic location of the subject and the other agency's control number.

(c) **General Comments, if any.** This section will include those comments of a general nature and those which occur throughout the review which ought to be consolidated in order to avoid needless repetition.

(d) **Detailed Comments.** The format of this section shall follow the organization of the other agency's environmental review document. These comments shall not comment on the proposed actions of other Federal agencies, but shall constructively and objectively comment on the statement’s adequacy in describing the environmental impacts of the action, the alternatives, and the impacts of the alternatives. Comments shall specify any corrections, additions, or other changes required to make the statement adequate.

(e) **Summary Comments, if any.** In general, the Department will not take a position on the proposed action of another Federal agency, but will limit its comments to those above. However, in those cases where the Department has jurisdiction by statute, Executive Order, memorandum of agreement, or other authority, the Department may comment on the proposed action. These comments shall be provided in this section and may take the form of support for, concurrence with, concern over, or objection to the proposed action and/or the alternatives.

B. **Bureau and Office Comments.** Bureau and office reviews of EISs prepared by other Federal agencies are considered informal inputs to the Department's comments and their content will generally conform to paragraph 4.5A of this chapter with the substitution of the bureau's or office's delegated jurisdiction or special environmental expertise for that of the Department.

C. **Relationship to Other Concurrent Reviews.**

(1) Where the Department, because of other authority or agreement, is concurrently requested to review a proposal as well as its EIS, the Department's comments on the proposal shall be separately identified and placed in front of the comments on the EIS. A summary of the Department's position, if any, on the proposal and its environmental impact shall be separately identified and follow the review comments on the EIS.

(2) Where another Federal agency elects to combine other related reviews into the review of the EIS by including additional or more specific information into the statement, the introduction to the Department's review comments will acknowledge the additional review request and the review comments will be incorporated into appropriate parts of the combined statement review. A summary of the Department's position, if any, on the environmental impacts of the proposal and any alternatives shall be separately identified and follow the detailed review comments on the combined statement.

(3) In some cases, the concurrent review is not an integral part of the environmental compliance review but is being processed within the same general time period as the environmental review. If there is also an environmental review being processed by the OEPC, there is potential for two sets of conflicting comments to reach the requesting agency. Bureaus must recognize that this possibility exists and must check with the Regional Environmental Officer to determine the status of any environmental review prior to forwarding the concurrent review comments to the requesting agency. Any conflicts must be resolved before the separate comments may be filed. One review may be held up pending completion of the concurrent review and consideration of filing a single comment letter. A time extension may be necessary and must be obtained if a review is to be held up pending completion of a
concurrent review.

(4) The Department’s intervention in another agency’s adjudicatory process is also a concurrent review. Such reviews are governed by 452 DM 2 which must be consulted in applicable cases. The most common cases involve the Department’s review of hydroelectric and natural gas applications of FERC. In these cases, it is recommended that bureaus consult frequently with the appropriate attorney of record in the Office of the Solicitor.

4.6 Availability of Review Comments.

A. Prior to the public availability of another Federal agency's final EIS, the Department shall not independently release to the public its comments on that agency's draft EIS. In accordance with Section 1506.6(f) of the CEQ Regulations, the agency that prepared the statement is responsible for making the comments available to the public, and requests for copies of the Department's comments shall be referred to that agency. Exceptions to this procedure shall be made by the OEPC and the Office of the Solicitor.

B. The availability of various internal Departmental memoranda, such as the review comments of bureaus, offices, task forces, and individuals, which are used as inputs to the Department's review comments is governed by the Freedom of Information Act (5 U.S.C. Section 552) and the Departmental procedures established by 43 CFR 2. Upon receipt of such requests and in addition to following the procedures above in 4.6A, the responsible bureau or office shall notify and consult their bureau Freedom of Information Act Officer and the OEPC to coordinate any responses.

4.7 Procedures for Processing Environmental Reviews.

A. General Procedures.

(1) All requests for reviews of environmental review documents prepared by or for other Federal agencies shall be received and controlled by the Director, OEPC.

(2) If a bureau or office, whether at headquarters or field level, receives an environmental review document for review directly from outside of the Department, it should ascertain whether the document is a preliminary, proposed, or working draft circulated for technical assistance or input in order to prepare a draft document or whether the document is in fact a draft environmental review document being circulated for official review.

   (a) If the document is a preliminary, proposed, or working draft, the bureau or office should handle independently and provide whatever technical assistance possible, within the limits of their resources, to the requesting agency. The response should clearly indicate the type of assistance being provided and state that it does not represent the Department's review of the document. Each bureau or office should provide the Regional Environmental Officer and the Director, OEPC, copies of any comments involving significant or controversial issues.

   (b) If the document is a draft or final environmental review document circulated for official review, the bureau or office should inform the requesting agency of the Department’s procedures in subparagraph (1) above and promptly refer the request and the document to the Director, OEPC, for processing.

(3) All bureaus and offices processing and reviewing environmental review documents of other Federal agencies will do so within the time limits specified by the Director, OEPC. From thirty (30) to forty-five (45) days are normally available for responding to other Federal agency review requests. Whenever possible the Director, OEPC, shall seek a forty-five (45) day review period. Further extensions shall be handled in accordance with paragraph 4.7B(3) of this chapter.

(4) The Department's review comments on other Federal agencies' environmental review documents shall reflect the full and balanced interests of the Department in the protection and enhancement of the environment. Lead bureaus shall be responsible for resolving any intra-Departmental differences in bureau or office review comments submitted to them. The OEPC is available for guidance and assistance in this regard. In cases where agreement cannot be reached, the matter shall be referred through channels to the AS/PMB with attempts to resolve the disagreement at
each intervening management level. The OEPC will assist in facilitating this process.

B. Processing Environmental Reviews.

(1) The OEPC shall secure and distribute sufficient copies of environmental review documents for Departmental review. Bureaus and offices should keep the OEPC informed as to their needs for review copies, which shall be kept to a minimum, and shall develop internal procedures to efficiently and expeditiously distribute environmental review documents to reviewing offices.

(2) Reviewing bureaus and offices which cannot meet the review schedule shall so inform the lead bureau or office and shall provide the date that the review will be delivered. The lead bureau or office shall inform the OEPC in cases of headquarters-level response, or the REO in cases of field-level response, if it cannot meet the schedule, why it cannot, and when it will. The OEPC or the REO shall be responsible for informing the other Federal agency of any changes in the review schedule.

(3) Reviewing offices shall route their review comments through channels to the lead bureau or office, with a copy to the OEPC. When, in cases, of headquarters-level response, review comments cannot reach the lead bureau within the established review schedule, reviewing bureaus and offices shall send a copy marked "Advance Copy" directly to the lead bureau or office. Review comments shall also be sent to the lead bureau or office by electronic means to facilitate meeting the requesting agency’s deadline.

(4) In cases of headquarters-level response.

(a) The lead bureau shall route the completed comments through channels to the OEPC in both paper copy and electronic word processor format. Copies shall be prepared and attached for all bureaus and offices from whom review comments were requested, for the OEPC, and for the REO when the review pertains to a project within a regional jurisdiction. In addition, original copies of all review comments received or documentation that none were provided shall accompany the Department's comments through the clearance process and shall be retained by the OEPC.

(b) The OEPC shall review, secure any necessary additional surnames, surname, and either sign the Department’s comments or transmit the Department's comments to another appropriate Secretarial Officer for signature. Upon signature, the OEPC shall transmit the comments to the requesting agency.

(5) In cases of field-level response.

(a) The lead bureau shall provide the completed comments to the appropriate REO in both paper-copy and electronic word processor format. In addition, original copies of all review comments received or documentation that none were provided shall be attached to the paper copy.

(b) The REO shall review, sign, and transmit the Department's comments to the agency requesting the review. In addition they shall reproduce and send the Department's comments to the regional bureau reviewers. The entire completed package including the bureau review comments shall be sent to the OEPC for recording and filing.

(c) If the REO determines that the review involves policy matters of Secretarial significance, they shall not sign and transmit the comments as provided in subparagraph (b) above, but shall forward the review to the OEPC in headquarters for final disposition.

C. Referrals of Environmentally Unsatisfactory Proposals to the Council on Environmental Quality.

(1) Referral to CEQ is a formal process provided for in the CEQ Regulations (40 CFR 1504). It is used sparingly and only when all other administrative processes have been exhausted in attempting to resolve issues between the project proponent and one or more other Federal agencies. These issues must meet certain criteria (40 CFR 1504.121(b)).
and practice has shown that these issues generally involve resource concerns of national importance to the Department.

(2) A bureau or office intending to recommend referral of a proposal to CEQ must, at the earliest possible time, advise the proponent Federal agency that it considers the proposal to be a possible candidate for referral. If not expressed at an earlier time, this advice must be outlined in the Department’s comments on the draft EIS.

(3) CEQ referral is a high level activity that must be conducted in an extremely short time frame. A referring bureau or office has 25 days after EPA has published a notice of availability of the final EIS in the Federal Register in which to file the referral unless an extension is granted per 40 CFR 1504.3(b). The referral documents must be signed by the Secretary of the Interior.

(4) Additional review guidance may be made available as necessary to efficiently manage this activity. Bureau reviewers should review information on the OEPC website at: http://www.doi.gov/oepc/, and consult with the OEPC for the most current review guidance.

9/1/09 #3849
Replaces 5/27/04 #3617
14.1 **Purpose.** This Chapter provides supplementary requirements for implementing provisions of 516 DM 1 through 6 within the Department’s Bureau of Reclamation. This Chapter is referenced in 516 DM 6.5.

14.2 **NEPA Responsibility.**

A. **Commissioner.** Is responsible for NEPA compliance for Bureau of Reclamation (BuRec) activities.

B. **Assistant Commissioners.**

   (1) Are responsible to the Commissioner for supervising and coordinating NEPA activities in their assigned areas of responsibility.

   (2) Are responsible, in assigned areas of responsibility, for the Washington level review of EISs prepared in the regions or E&R Center for compliance with program area policy guidance.

   (3) Provide supervision and coordination in assigned areas of responsibility to insure that environmental concerns are identified in the planning stages and to see that Regional Directors follow through with environmental commitments during the construction and operation and maintenance stages.

   (4) May designate a staff position to be responsible for NEPA oversight and coordination in their assigned areas of responsibility.

C. **Regional Directors.**

   (1) Are fully responsible to the Commissioner for integrating the NEPA compliance activities in their regional area.

   (2) Will designate a staff position with the full responsibility to the Regional Director for providing direction of the NEPA process including information, guidance, training, advice, consistency, quality, adequacy, oversight, and coordination on NEPA documents or matters.

D. **Division and Office Chiefs in E&R Center.**

   (1) Are responsible for integrating the NEPA process into their activities.

   (2) Will designate a staff position to be responsible to the division or office chief for providing guidance, advice, consistency, quality, adequacy, oversight, and coordination on NEPA documents for matters originating in the E&R Center.
(3) Will provide a technical review within their area of expertise of environmental documents directed to their office for review and comment.

E. Director, Office of Environmental Affairs (Washington). Is the position designated by the Commissioner to be responsible for overall policy review of BuRec NEPA compliance. Information about BuRec NEPA documents of the NEPA process can be obtained by contacting this office.

14.3 Guidance to Applicants.

A. Types of Applicants.

(1) Actions that are initiated by private or non-Federal entities through applications include the following: Repayment contracts, water service contracts, Small Reclamation Projects Act Loans, Emergency Loans, Rehabilitation and Betterment Loans, Distribution System Loans, land use permits, licenses, easements, crossing agreements, permits for removal of sand and gravel, renewal of grazing, recreation management, or cabin site leases.

(2) Applicants will be provided information by the regional office on what environmental reports, analysis, or information are needed when they initiate their application. The environmental information requested may, of necessity, be related to impacts on private lands or other lands not under the jurisdiction of the Bureau to allow the BuRec to meet its environmental responsibilities.

B. Prepared Program Guidance for Applicants.


14.4 Major Actions Normally Requiring an EIS.

A. The following types of BuRec proposals will normally require the preparation of an EIS:

(1) Proposed Feasibility Reports on water resources projects.

(2) Proposed Definite Plan Reports (DPR) on water resources projects if not covered by an EIS at the feasibility report stage or if there have been major changes in the project plan which may cause significantly different or additional new impacts.

(3) Proposed repayment contracts and water service contracts or amendments thereof or supplements thereto, for irrigation, municipal, domestic, or industrial water where NEPA compliance has not already been accomplished.

(4) Proposed modifications to existing projects or proposed changes in the programmed operation of an existing project that may cause a significant new impact.

(5) Proposed initiation of construction of a project or major unit thereof, if not already covered by an
EIS, or if significant new impacts are anticipated.

(6) Proposed major research projects where there may be significant impacts resulting from experimentation or other such research activities.

B. If, for any of these proposals it is initially decided not to prepare an EIS, an EA will be prepared and handled in accordance with Section 1501.4(e)(2).

14.5 Categorical Exclusions. In addition to the actions listed in the Departmental categorical exclusions outlined in Appendix 1 of 516 DM 2, many of which the Bureau also performs, the following Bureau actions are designated categorical exclusions unless the action qualifies as an exception under 516 DM 2.3A(3):

A. General Activities.

(1) Changes in regulations or policy directives and legislative proposals where the impacts are limited to economic and/or social effects.

(2) Training activities of enrollees assigned to the various youth programs. Such training may include minor construction activities for other entities.

(3) Research activities, such as nondestructive data collection and analysis, monitoring, modeling, laboratory testing, calibration, and testing of instruments or procedures and nonmanipulative field studies.

B. Planning Activities.

(1) Routine planning investigation activities where the impacts are expected to be localized, such as land classification surveys, topographic surveys, archeological surveys, wildlife studies, economic studies, social studies, and other study activity during any planning, preconstruction, construction, or operation and maintenance phases.

(2) Special, status, concluding, or other planning reports that do not contain recommendations for action, but may or may not recommend further study.

(3) Data collection studies that involve test excavations for cultural resources investigations or test pitting, drilling, or seismic investigations for geologic exploration purposes where the impacts will be localized.

C. Project Implementation Activities.

(1) Classification and certification of irrigable lands.

(2) Minor acquisition of land and rights-of-way or easements.

(3) Minor construction activities associated with authorized projects which correct unsatisfactory environmental conditions or which merely augment or supplement, or are enclosed within existing facilities.

(4) Approval of land management plans where implementation will only result in minor construction activities and resultant increased operation and maintenance activities.

D. Operation and Maintenance Activities.

(1) Maintenance, rehabilitation, and replacement of existing facilities which may involve a minor change in size, location, and/or operation.

(2) Transfer of the operation and maintenance of Federal facilities to water districts, recreation agencies, fish and wildlife agencies, or other entities where the anticipated operation and maintenance activities are agreed to in
a contract or a memorandum of agreement, follow approved Reclamation policy, and no major change in operation and
maintenance is anticipated.

(3) Administration and implementation of project repayment and water service contracts, including
approval of organizational or other administrative changes in contracting entities brought about by inclusion or
exclusion of lands in these contracts.

(4) Approval, execution, and implementation of water service contracts for minor amounts of long-term
water use or temporary or interim water use where the action does not lead to long-term changes and where the
impacts are expected to be localized.

(5) Approval of changes in pumping power and water rates charged contractors by the Bureau for project
water service or power.

(6) Execution and administration of recordable contracts for disposal of excess lands.

(7) Withdrawal, termination, modification, or revocation where the land would be opened to
discretionary land laws and where such future discretionary actions would be subject to the NEPA process, and
disposal and sale of acquired lands where no major change in usage is anticipated.

(8) Renewal of existing grazing, recreation management, or cabin site leases which do not increase the
level of use or continue unsatisfactory environmental conditions.

(9) Issuance of permits for removal of gravel or sand by an established process from existing quarries.

(10) Issuance of permits, licenses, easements, and crossing agreements which provide right-of-way over
Bureau lands where the action does not allow for or lead to a major public or private action.

(11) Implementation of improved appearance and soil and moisture conservation programs where the
impacts are localized.

(12) Conduct of programs of demonstration, educational, and technical assistance to water user
organizations for improvement of project and on-farm irrigation water use and management.

(13) Follow-on actions such as access agreements, contractual arrangements, and operational procedures
for hydropower facilities which are on or appurtenant to Bureau facilities or lands which are permitted or licensed by
the Federal Energy Regulatory Commission (FERC), when FERC has accomplished compliance with NEPA (including
actions to be taken by the Bureau) and when the Bureau’s environmental concerns have been accommodated in
accordance with the Bureau/FERC Memorandum of Understanding of June 22, 1981.

(14) Approval, renewal, transfer, and execution of an original, amendatory, or supplemental water service
or repayment contract where the only result will be to implement an administrative or financial practice or change.

(15) Approval of second party water sales agreements for small amounts of water (usually less than 10
acre-feet) where the Bureau has an existing water sales contract in effect.

(16) Approval and execution of contracts requiring the repayment of funds furnished or expended on
behalf of an entity pursuant to the Emergency Fund Act of June 26, 1948 (43 U.S.C. 502), where the action taken is
limited to the original location of the damaged facility.

(17) Minor safety of dams construction activities where the work is confined to the dam, abutment areas,
or appurtenant features, and where no major change in reservoir or downstream operation is anticipated as a result of
the construction activities.
E. Grant and Loan Activities.

(1) Rehabilitation and Betterment Act loans and contracts which involve repair, replacement, or modification of equipment in existing structures or minor repairs to existing dams, canals, laterals, drains, pipelines, and similar facilities.

(2) Small Reclamation Projects Act grants and loans where the work to be done is confined to areas already impacted by farming or development activities, work is considered minor, and where the impacts are expected to be localized.

(3) Distribution System Loans Act loans where the work to be done is confined to areas already impacted by farming or developing activities, work is considered minor, and where the impacts are expected to be localized.

5/27/04 #3624
Replaces 3/18/80 #3511
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Reclamation Manual
Policy

Subject: National Environmental Policy Act

Purpose: Establish policy for implementation of the National Environmental Policy Act.


Contact: Environmental and Planning Coordination Office, D-5100

1. National Environmental Policy.

A. Objective. Reclamation will use all practicable means and measures to create and maintain water development and management conditions under which people and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.

B. Policy. Reclamation will integrate environmental considerations into all decisionmaking that potentially affects the environment.

(1) Reclamation will provide all reasonable opportunity for input and involvement from the public and other Federal, State, Tribal, and local agencies on environmental issues.

(2) Decisionmaking will integrate, as practicable, all applicable environmental laws and Executive Orders, Secretarial Orders, etc., including but not limited to NEPA, the Endangered Species Act, the Clean Water Act, the National Historic Preservation Act, the Fish and Wildlife Coordination Act, E.O. 11990, E.O. 11988, E.O. 12898, and E.O. 12114.

(3) Appropriate and reasonable alternatives will be developed and assessed for actions that may significantly affect the environment.

(4) Reclamation will use the best available environmental data, and acquire additional data as appropriate and reasonable, to support decisionmaking.

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

1a. Q. 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. Q. 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 1, 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. Q. 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. Q. 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. Q. 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 the 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 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. Q. 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. Q. 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(c) 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. Q. 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. Q. 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 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. Q. 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. Q. 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 environmental; 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 the 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. Q. 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. Q. 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 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 impact in 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. Q. 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 and 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 agency’s NEPA obligations. However, in such cases the agency must still evaluate independently the environmental issues 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. Q. 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 ensure 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 ensure 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. Q. 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 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. Q. Do these limitations on action (described in Question 10a) apply to state and 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. Q. 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 an 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. Q. 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 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. Q. 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 subject to the Council's former Guidelines.

12c. Q. 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. Q. Can the scoping process be used in connection with the 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 the 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. Q. 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 (Section 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 and 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. Q. 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 alternative even though the lead agency has decided in its separate ROD that Alternative B is environmentally preferable.

14c. Q. 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 the 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. Q. 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. Q. 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. Q. 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 contracts” 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 CFR 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. Q. 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. Q. 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. Q. 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. Q. 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. Q. 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 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 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.
21. Q. 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 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 throughout 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 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. Q. 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 acts? How do they resolve differences in perspective where, for example, national and local needs differ?

A. Under Section 1501.5(b), federal, state or local agencies, as long as they include one federal agency, may act as joint lead agencies to prepare an EIS. Section 1506.2 also strongly urges state and local 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 perspectives as well as conflicts among 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. Q. 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 Section 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. Q. 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 been formally adopted by the local, regional or state legislative body.

23c. Q. 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. Q. 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 Procedures 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. Q. 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. Q. 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 general discussions and relevant specific discussion 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. Q. 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 methodologies, 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 the 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. Q. 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 to commentors directly 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. Q. 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 a reader is reasonably likely to be interested in a topic, it should be included.

26b. Q. 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 modelling 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. Q. 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. Q. 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. Q. 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. Q. 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 with EPA no earlier than the EIS is distributed to the public. However, this section does not prohibit xerography as a form of reproduction and distribution. When an agency chooses xerography 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. Q. What response must an agency provide to a comment on a draft EIS which states that the draft 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 to the text of an 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 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 the analysis in the EIS, little if anything need be added in response to such a comment. However, if the commentor 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. Q. 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 commentor on a draft EIS may indicate that there is a possible new 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 commentor on a draft EIS for 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 on 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 suplemental draft will not be needed. For example, a commentor 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 suplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that 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 commentor 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 commentor on a draft EIS on a nuclear power plant might suggest that a 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, commentors 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. Q. 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 jurisdiction by law (e.g., an agency with independent legal responsibilities with respect to a 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 suplemental 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 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. Q. 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 requirements 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 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. Q. 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. Q. 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. Q. 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. Q. 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. Q. 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 as required by Section 1506.10(b). However, there is no specific requirement for publication of the ROD itself, either in the Federal Register or elsewhere.

34b. Q. 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 comment period after notice is published that the final EIS has been filed with EPA before the agency may take further 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. Q. 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 11505.3. 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 practical 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 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. Q. 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 Record 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. Q. How long should the NEPA process take to complete?
A. When an EIS is required, the process will obviously 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. Q. 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 EAs, 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. Q. 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. Q. 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 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. Q. 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. Q. Must (EAs) and FONSIs be made public? If so, how should this be done?
A. Yes, they must be made 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 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 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. Q. Can an EA and FONSI be used to impose enforceable mitigation measures, monitoring programs, or other requirements, even though there is no such 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 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. Q. 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?
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 and 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 identified 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 downstream 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 applicants resubmits the entire proposal and the EA and FONSI 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.
MEMORANDUM FOR GENERAL COUNSEL, NEPA LIAISONS AND PARTICIPANTS IN SCOPING

SUBJECT:

Scoping Guidance

As part of its continuing oversight of the implementation of the NEPA regulations, the Council on Environmental Quality has been investigating agency experience with scoping. This is the process by which the scope of the issues and alternatives to be examined in an EIS is determined. In a project led by Barbara Bramble of the General Counsel's staff the Council asked federal agencies to report their scoping experiences; Council staff held meetings and workshops in all regions of the country to discuss scoping practice; and a contract study was performed for the Council to investigate what techniques work best for various kinds of proposals. Out of this material has been distilled a series of recommendations for successfully conducting scoping. The attached guidance document consists of advice on what works and what does not, based on the experience of many agencies and other participants in scoping. It contains no new legal requirements beyond those in the NEPA regulations. It is intended to make generally available the results of the Council's research, and to encourage the use of better techniques for ensuring public participation and efficiency in the scoping process.

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General Counsel Scoping Guidance

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I. Introduction

A. Background of this document.

In 1978, with the publication of the proposed NEPA regulations (since adopted as formal rules, 40 C.F.R. Parts 1500-1508), the Council on Environmental Quality gave formal recognition to an increasingly used term -- scoping. Scoping is an idea that has long been familiar to those involved in NEPA compliance: In order to gage effectively the preparation of an environmental impact statement (EIS), one must determine the scope of the document - that is, what will be covered, and in what detail. Planning of this kind was a normal component of EIS preparation. But the consideration of issues and choice of alternatives to be examined was in too many cases completed outside of public view. The innovative approach to scoping in the regulations is that the process is open to the public and state and local averments, as well as to affected federal agencies. This open process gives rise to important new opportunities for better and more efficient NEPA analyses; and simultaneously places new responsibilities on public and agency participants alike to surface their concerns early. Scoping helps insure that real problems are identified early and properly studied; that issues that are of no concern do not consume time and effort; that the draft statement when first made public is balanced and thorough; and that the delays occasioned by re-doing an inadequate draft are avoided. Scoping does not create problems that did not already exist; it ensures that problems that would have been raised anyway are identified early in the process. Many members of the public as well as agency staffs engaged in the NEPA process have told the Council that the open scoping requirement is one of the most far-reaching changes engendered by the NEPA regulations. They have predicted that scoping could have a profound positive effect on environmental analyses, on the impact statement process itself, and ultimately on decisionmaking. Because the concept of open scoping was new, the Council decided to encourage agencies' innovation without unduly restrictive guidance. Thus the regulations relating to scoping are very simple. They state that "there shall be an early and open process for determining the scope of issues to be addressed" which "shall be termed scoping," but they lay down few specific requirements. (Section 1501.7). They require an open process with public notice; identification of significant and insignificant issues; allocation of EIS preparation assignments; identification of related analysis requirements in order to avoid duplication of work; and the planning of a schedule for EIS preparation that meshes with the agency's decisionmaking schedule. (Section 1501.7(a)). The regulations encourage but do not require, setting time limits and page limits for the EIS, and holding scoping meetings. (Section 1501.7(b)). Aside from these general outlines, the regulations left the agencies on their own. The Council did not believe, and still does not, that it is necessary or appropriate to dictate the specific manner in which over 100 federal agencies should deal with the public. However, the Council has received several requests for more guidance. In 1980 we decided to investigate the agency...
and public response to the scoping requirement, to find out what was working and what was not, and to share this with all agencies and the public. The Council first conducted its own survey, asking federal agencies to report some of their scoping experiences. The Council then contracted with the American Arbitration Association and Clark McGlennon Associates to survey the scoping techniques of major agencies and to study several innovative methods in detail. Council staff conducted a two-day workshop in Atlanta in June 1980, to discuss with federal agency NEPA staff and several EIS contractors what seems to work best in scoping of different types of proposals, and discussed scoping with federal, state and local officials in meetings in all 10 federal regions. This document is a distillation of all the work that has been done so far by many people to identify valuable scoping techniques. It is offered as a guide to encourage success and to help avoid pitfalls. Since scoping methods are still evolving, the Council welcomes any cements on this guide, and may add to it or revise it in coming years.

B. What scoping is and what it can do.

Scoping is often the first contact between proponents of a proposal and the public. This fact is the source of the power of scoping and of the trepidation that it sometimes evokes. If a scoping meeting is held, people on both sides of an issue will be in the same room and, if all goes well, will speak to each other. The possibilities that flow from this situation are vast. Therefore, a large portion of this document is devoted to the productive management of meetings and the de-fusing of possible heated disagreements. Even if a meeting is not held, the scoping process leads EIS preparers to think about the proposal early on, in order to explain it to the public and affected agencies. The participants respond with their own concerns about significant issues and suggestions of alternatives. Thus as the draft EIS is prepared, it will include, from the beginning, a reflection or at least an acknowledgement of the cooperating agencies' and the public's concerns. This reduces the need for changes after the draft is finished, because it reduces the chances of overlooking a significant issue or reasonable alternative. It also in many cases increases public confidence in NEPA and the decisionmaking process, thereby reducing delays, such as from litigation, later on when implementing the decisions. As we will discuss further in this document, the public generally responds positively when its views are taken seriously, even if they cannot be wholly accommodated. But scoping is not simply another "public relations" meeting requirement. It has specific and fairly limited objectives: (a) to identify the affected public, and agency concerns; (b) to facilitate an efficient EIS preparation process, through assembling the cooperating agencies, assigning EIS writing tasks, ascertaining all the related permits and reviews that must be scheduled concurrently, and setting time or page limits; (c) to define the issues and alternatives that will be examined in detail in the EIS while simultaneously devoting less attention and time to issues which cause no concern; and (d) to save time in the overall process by helping to ensure that draft statements adequately address relevant issues, reducing the possibility that new comments will cause a statement to be rewritten or supplemented.

Sometimes the scoping process enables early identification of a few serious problems with a proposal, which can be changed or solved because the proposal is still being developed. In these cases, scoping the EIS can actually lead to the solution of a conflict over the proposed action itself. We have found that this extra benefit of scoping occurs fairly frequently. But it cannot be expected in most cases, and scoping can still be considered successful when conflicts are clarified but not solved. This guide does not presume that resolution of conflicts over proposals is a principal goal of scoping, because it is only possible in limited circumstances. Instead, the Council views the principal goal of scoping to be an adequate and efficiently prepared EIS. Our suggestions and recommendations are aimed at reducing the conflicts among affected interests that impede this limited objective. But we are aware of the possibilities of more general conflict resolution that are inherent in any productive
discussions among interested parties. We urge all participants in scoping processes to be alert to this larger context, in which scoping could prove to be the first step in environmental problem-solving.

Scoping can lay a firm foundation for the rest of the decisionmaking process. If the EIS can be relied upon to include all the necessary information for formulating policies and making rational choices, the agency will be better able to make a sound and prompt decision. In addition, if it is clear that all reasonable alternatives are being seriously considered, the public will usually be more satisfied with the choice among them.

II. Advice for Government Agencies Conducting Scoping

A. General context.

Scoping is a process, not an event or a meeting. It continues throughout the planning for an EIS, and may involve a series of meetings, telephone conversations, or written comments from different interested groups. Because it is a process, participants must remain flexible. The scope of an EIS occasionally may need to be modified later if a new issue surfaces, no matter how thorough the scoping was. But it makes sense to try to set the scope of the statement as early as possible.

Scoping may identify people who already have knowledge about a site or an alternative proposal or a relevant study, and induce them to make it available. This can save a lot of research time and money. But people will not come forward unless they believe their views and materials will receive serious consideration. Thus scoping is a crucial first step toward building public confidence in a fair environmental analysis and ultimately a fair decisionmaking process. One further point to remember: the lead agency cannot shed its responsibility to assess each significant impact or alternative even if one is found after scoping. But anyone who hangs back and fails to raise something that reasonably could have been raised earlier on will have a hard time prevailing during later stages of the NEPA process or if litigation ensues. Thus a thorough scoping process does provide some protection against subsequent lawsuits.

B. Step-by-step through the process.

1. Start scoping after you have enough information.

Scoping cannot be useful until the agency knows enough about the proposed action to identify most of the affected parties, and to present a coherent proposal and a suggested initial list of environmental issues and alternatives. Until that time there is no way to explain to the public or other agencies what you want them to get involved in. So the first stage is to gather preliminary information from the applicant, or to compose a clear picture of your proposal, if it is being developed by the agency.

2. Prepare an information packet.

In many cases, scoping of the EIS has been preceded by preparation of an environmental assessment (EA) as the basis for the decision to proceed with an EIS. In such cases, the EA will, of course, include the preliminary information that is needed. If you have not prepared an EA, you should put together a brief information packet consisting of a description of the proposal, an initial list of impacts and alternatives, maps, drawings, and any other material or references that can help the interested public to understand what is being proposed. The proposed work plan of the EIS is not usually sufficient for this purpose. Such documents rarely contain a description of the goals of the proposal to enable readers to develop
alternatives. At this stage, the purpose of the information is to enable participants to make an intelligent contribution to scoping the EIS. Because they will be helping to plan what will be examined during the environmental review, they need to know where you are now in that planning process. Include in the packet a brief explanation of what scoping is, and what procedure will be used, to give potential participants a context for their involvement. Be sure to point out that you want comments from participants on very specific matters. Also reiterate that no decision has yet been made on the contents of the EIS, much less on the proposal itself. Thus, explain that you do not yet have a preferred alternative, but that you may identify the preferred alternative in the draft EIS. (See Section 1502.14(e)). This should reduce the tendency of participants to perceive the proposal as already a definite plan. Encourage them to focus on recommendations for improvements to the various alternatives. Some of the complaints alleging that scoping can be a waste of time stem from the fact that the participants may not know what the proposal is until they arrive at a meeting. Even the most intelligent among us can rarely make useful, substantive comments on the spur of the moment. Don't expect helpful suggestions to result if participants are put in such a position.

3. Design the scoping process for each project.

There is no established or required procedure for scoping. The process can be carried out by meetings, telephone conversations, written comments, or a combination of all three. It is important to tailor the type, the timing and the location of public and agency comments to the proposal at hand. For example, a proposal to adopt a land management plan for a National Forest in a sparsely populated region may not lend itself to calling a single meeting in a central location. While people living in the area and elsewhere may be interested, any meeting place will be inconvenient for most of the potential participants. One solution is to distribute the information packet, solicit written comments, list a telephone number with the name of the scoping coordinator, and invite comments to be phoned in. Otherwise, small meetings in several locations may be necessary when face-to-face communication is important. In another case, a site-specific construction project may be proposed. This would be a better candidate for a central scoping meeting. But you must first find out if anyone would be interested in attending such a meeting. If you simply assume that a meeting is necessary, you may hire a hall and a stenographer, assemble your staff for a meeting, and find that nobody shows up. There are many proposals that just do not generate sufficient public interest to cause people to attend another public meeting. So a wise early step is to contact known local citizens groups and civic leaders. In addition, you may suggest in your initial scoping notice and information packet that all those who desire a meeting should call to request one. That way you will only hear from those who are seriously interested in attending. The question of where to hold a meeting is a difficult one in many cases. Except for site specific construction projects, it may be unclear where the interested parties can be found. For example, an EIS on a major energy development program may involve policy issues and alternatives to the program that are of interest to public groups all over the nation, and to agencies headquartered in Washington, D.C., while the physical impacts might be expected to be felt most strongly in a particular region of the country. In such a case, if personal contact is desired, several meetings would be necessary, especially in the affected region and in Washington, to enable all interests to be heard. As a general guide, unless a proposal has no site specific impacts, scoping meetings should not be confined to Washington. Agencies should try to elicit the views of people who are closer to the affected regions. The key is to be flexible. It may not be possible to plan the whole scoping process at the outset, unless you know who all the potential players are. You can start with written comments, move on to an informal meeting, and hold further meetings if desired. There are several reasons to hold a scoping meeting. First, some of the best effects of scoping stem from the fact that all parties have the opportunity to meet one another and to listen to the concerns of the others. There is no satisfactory substitute for personal
contact to achieve this result. If there is any possibility that resolution of underlying conflicts over a proposal may be achieved, this is always enhanced by the development of personal and working relationships among the parties. Second, even in a conflict situation people usually respond positively when they are treated as partners in the project review process. If they feel confident that their views were actually heard and taken seriously, they will be more likely to be satisfied that the decisionmaking process was fair even if they disagree with the outcome. It is much easier to show people that you are listening to them if you hold a face-to-face meeting where they can see you writing down their points, than if their only contact is through written comments. If you suspect that a particular proposal could benefit from a meeting with the affected public at any time during its review, the best time to have the meeting is during this early scoping stage. The fact that you are willing to discuss openly a proposal before you have committed substantial resources to it will often enhance the chances for reaching an accord. If you decide that a public meeting is appropriate, you still must decide what type of meeting, or how many meetings, to hold. We will discuss meetings in detail below in "Conducting a Public Meeting." But as part of designing the scoping process, you must decide between a single meeting and multiple ones for different interest groups, and whether to hold a separate meeting for government agency participants. The single large public meeting brings together all the interested parties, which has both advantages and disadvantages. If the meeting is efficiently run, you can cover a lot of interests and issues in a short time. And a single meeting does reduce agency travel time and expense. In some cases it may be an advantage to have all interest groups hear each others' concerns, possibly promoting compromise. It is definitely important to have the staffs of the cooperating agencies, as well as the lead agency, hear the public views of what the significant issues are; and it will be difficult and expensive for the cooperating agencies to attend several meetings. But if there are opposing groups of citizens who feel strongly on both sides of an issue, the setting of the large meeting may needlessly create tension and an emotional confrontation between the groups. Moreover, some people may feel intimidated in such a setting, and won't express themselves at all. The principal drawback of the large meeting, however, is that it is generally unwieldy. To keep order, discussion is limited, dialogue is difficult, and often all participants are frustrated, agency and public alike. Large meetings can serve to identify the interest groups for future discussion, but often little else is accomplished. Large meetings often become "events" where grandstanding substitutes for substantive comments. Many agencies resort to a formal hearing-type format to maintain control, and this can cause resentments among participants who came to the meeting expecting a responsive discussion. For these reasons, we recommend that meetings be kept small and informal, and that you hold several, if necessary, to accommodate the different interest groups. The other solution is to break a large gathering into small discussion groups, which is discussed below. Using either method increases the likelihood that participants will level with you and communicate their underlying concerns rather than make an emotional statement just for effect. Moreover, in our experience, a separate meeting for cooperating agencies is quite productive. Working relationships can be forged for the effective participation of all involved in the preparation of the EIS. Work assignments are made by the lead agency, a schedule may be set for production of parts of the draft EIS, and information gaps can be identified early. But a productive meeting such as this is not possible at the very beginning of the process. It can only result from the same sort of planning and preparation that goes into the public meetings. We discuss below the special problems of cooperating agencies, and their information needs for effective participation in scoping.

4. Issuing the public notice.

The preliminary look at the proposal, in which you develop the information packet discussed above, will enable you to tell what kind of public notice will be most appropriate and effective. Section 1501.7 of the NEPA regulations requires that a notice of intent to
prepare an EIS must be published in the Federal Register prior to initiating scoping. This means that one of the appropriate means of giving public notice of the upcoming scoping process could be the same Federal Register notice. And because the notice of intent must be published anyway, the scoping notice would be essentially free. But use of the Federal Register is not an absolute requirement, and other means of public notice often are more effective, including local newspapers, radio and TV, posting notices in public places, etc. (See Section 1506.6 of the regulations.) What is important is that the notice actually reach the affected public. If the proposal is an important new national policy in which national environmental groups can be expected to be interested, these groups can be contacted by form letter with ease. (See the Conservation Directory for a list of national groups.) Similarly, for proposals that may have major implications for the business community, trade associations can be helpful means of alerting affected groups. The Federal Register notice can be relied upon to notify others that you did not know about. But the Federal Register is of little use for reaching individuals or local groups interested in a site specific proposal. Therefore notices in local papers, letters to local government officials and personal contact with a few known interested individuals would be more appropriate. Land owners abutting any proposed project site should be notified individually. Remember that issuing press releases to newspapers, and radio and TV stations is not enough, because they may not be used by the media unless the proposal is considered "newsworthy." If the proposal is controversial, you can try alerting reporters or editors to an upcoming scoping meeting for coverage in special weekend sections used by many papers. But placing a notice in the legal notices section of the paper is the only guarantee that it will be published.

5. Conducting a public meeting.

In our study of agency practice in conducting scoping, the most interesting information on what works and doesn't work involves the conduct of meetings. Innovative techniques have been developed, and experience shows that these can be successful. One of the most important factors turns out to be the training and experience of the moderator. The U.S. Office of Personnel Management and others give training courses on how to run a meeting effectively. Specific techniques are taught to keep the meeting on course and to deal with confrontations. These techniques are sometimes called "meeting facilitation skills." When holding a meeting, the principle thing to remember about scoping is that it is a process to initiate preparation of an EIS. It is not concerned with the ultimate decision on the proposal. A fruitful scoping process leads to an adequate environmental analysis, including all reasonable alternatives and mitigation measures. This limited goal is in the interest of all the participants, and thus offers the possibility of agreement by the parties on this much at least. To run a successful meeting you must keep the focus on this positive purpose. At the point of scoping therefore, in one sense all the parties involved have a common goal, which is a thorough environmental review. If you emphasize this in the meeting you can stop any grandstanding speeches without a heavy hand, by simply asking the speaker if he or she has any concrete suggestions for the group on issues to be covered in the EIS. By frequently drawing the meeting back to this central purpose of scoping, the opponents of a proposal will see that you have not already made a decision, and they will be forced to deal with the real issues. In addition, when people see that you are genuinely seeking their opinion, same will volunteer useful information about a particular subject or site that they may know better than anyone on your Staff. As we stated above, we found that informal meetings in mall groups are the most satisfactory for eliciting useful issues and information. Small groups can be formed in two ways: you can invite different interest groups to different meetings, or you can break a large number into small groups for discussion. One successful model is used by the Army Corps of Engineers, among others. In cases where a public meeting is desired, it is publicized and scheduled for a location that will be convenient for as many potential participants as possible. The information packet is made available in several ways, by sending it to those known to be interested, giving a telephone number in
the public notices for use in requesting one, and providing more at the door of the meeting place as well. As participants enter the door, each is given a number. Participants are asked to register their name, address and/or telephone number for use in future contact during scoping and the rest of the NEPA process. The first part of the meeting is devoted to a discussion of the proposal in general, covering its purpose, proposed location, design, and any other aspects that can be presented in a lecture format. A question and answer period concerning this information is often held at this time. Then if there are more than 15 or 20 attendees at the meeting, the next step is to break it into small groups for more intensive discussion. At this point, the numbers held by the participants are used to assign them to small groups by sequence, random drawing, or any other method. Each group should be no larger than 12, and 8-10 is better. The groups are informed that their task is to prepare a list of significant environmental issues and reasonable alternatives for analysis in the EIS. These lists will be presented to the main group and combined into a master list, after the discussion groups are finished. The rules for how priorities are to be assigned to the issues identified by each group should be made clear before the large group breaks up. Some agencies ask each group member to vote for the 5 or 10 most important issues. After tallying the votes of individual members, each group would only report out those issues that received a certain number of votes. In this way only those items of most concern to the members would even make the list compiled by each group. Some agencies go further, and only let each group report out the top few issues identified. But you must be careful not to ignore issues that may be considered a medium priority by many people. They may still be important, even if not in the top rank. Thus instead of simply voting, the members of the groups should rank the listed issues in order of perceived importance. Points may be assigned to each item on the basis of the rankings by each member, so that the group can compile a list of its issues in priority order. Each group should then be asked to assign cut-off numbers to separate high, medium and low priority items. Each group should then report out to the main meeting all of its issues, but with priorities clearly assigned. one member of the lead agency or cooperating agency staff should join each group to answer questions and to listen to the participants’ expressions of concern. It has been the experience of many of those who have tried this method that it is better not to have the agency person lead the group discussions. There does need to be a leader, who should be chosen by the group members. In this way, the agency staff member will not be perceived as forcing his opinions on the others. If the agency has a sufficient staff of formally trained "meeting facilitators," they may be able to achieve the same result even where agency staff people lead the discussion groups. But absent such training, the staff should not lead the discussion groups. A good technique is to have the agency person serve as the recording secretary for the group, writing down each impact and alternative that is suggested for study by the participants. This enhances the neutral status of the agency representative, and ensures that he is perceived as listening and reacting to the views of the group. Frequently, the recording of issues is done with a large pad mounted on the wall like a blackboard, which has been well received by agency and public alike, because all can see that the views expressed actually have been heard and understood. When the issues are listed, each must be clarified or combined with others to eliminate duplication or fuzzy concepts. The agency staff person can actually lead in this effort because of his need to reflect on paper exactly what the issues are. After the group has listed all the environmental impacts and alternatives and any other issues that the members wish to have considered, they are asked to discuss the relative merits and importance of each listed item. The group should be reminded that one of its tasks is to eliminate insignificant issues. Following this, the members assign priorities or vote using one of the methods described above. The discussion groups are then to return to the large meeting to report on the results of their ranking. At this point further discussion may be useful to seek a consensus on which issues are really insignificant. But the moderator must not appear to be ruthlessly eliminating issues that the participants ranked of high or medium importance. The best that can usually be achieved is to "deemphasize" some of them, by placing them in the low priority category.
6. What to do with the comments.

After you have comments from the cooperating agencies and the interested public, you must evaluate them and make judgments about which issues are in fact significant and which ones are not. The decision of what the EIS should contain is ultimately made by the lead agency. But you will now know what the interested participants consider to be the principal areas for study and analysis. You should be guided by these concerns, or be prepared to briefly explain why you do not agree. Every issue that is raised as a priority matter during scoping should be addressed in some manner in the EIS, either by in-depth analysis, or at least a short explanation showing that the issue was examined, but not considered significant for one or more reasons. Some agencies have complained that the time savings claimed for scoping have not been realized because after public groups raise numerous minor matters, they cannot focus the EIS on the significant issues. It is true that it is always easier to add issues than it is to subtract them during scoping. And you should realize that trying to eliminate a particular environmental impact or alternative from study may arouse the suspicions of some people. Cooperating agencies may be even more reluctant to eliminate issues in their areas of special expertise than the public participants. But the way to approach it is to seek consensus on which issues are less important. These issues may then be deemphasized in the EIS by a brief discussion of why they were not examined in depth. If no consensus can be reached, it is still your responsibility to select the significant issues. The lead agency cannot abdicate its role and simply defer to the public. Thus a group of participants at a scoping meeting should not be able to "vote" an insignificant matter into a big issue. If a certain issue is raised and in your professional judgment you believe it is not significant, explain clearly and briefly in the EIS why it is not significant. There is no need to devote time and pages to it in the EIS if you can show that it is not relevant or important to the proposed action. But you should address in some manner all matters that were raised in the scoping process, either by an extended analysis or a brief explanation showing that you acknowledge the concern. Several agencies have made a practice of sending out a post-scoping document to make public the decisions that have been made on what issues to cover in the EIS. This is not a requirement, but in certain controversial cases it can be worthwhile. Especially when scoping has been conducted by written comments, and there has been no face-to-face contact, a post-scoping document is the only assurance to the participants that they were heard and understood until the draft EIS comes out. Agencies have acknowledged to us that "letters instead of meetings seem to get disregarded easier." Thus a reasonable quid pro quo for relying on comment letters would be to send out a post-scoping document as feedback to the commentors. The post-scoping document may be as brief as a list of impacts and alternatives selected for analysis; it may consist of the "scope of work" produced by the lead and cooperating agencies for their own EIS work or for the contractor; or it may be a special document that describes all the issues and explains why they were selected.

7. Allocating work assignments and setting schedules.

Following the public participation in whatever form, and the selection of issues to be covered, the lead agency must allocate the EIS preparation work among the available resources. If there are no cooperating agencies, the lead agency allocates work among its own personnel or contractors. If there are cooperating agencies involved, they may be assigned specific research or writing tasks. The NEPA regulations require that they normally devote their own resources to the issues in which they have special expertise or jurisdiction by law. (Sections 1501.6(b)(3), (5), and 1501.7(a)(4)). In all cases, the lead agency should set a schedule for completion of the work, designate a project manager and assign the reviewers, and must set a time limit for the entire NEPA analysis if requested to do so by an applicant. (Section 1501.8).
8. A few ideas to try.

- **a. Route design workshop** As part of a scoping process, a successful innovation by one agency involved route selection for a railroad. The agency invited representatives of the interested groups (identified at a previous public meeting) to try their hand at designing alternative routes for a proposed rail segment. Agency staff explained design constraints and evaluation criteria such as the desire to minimize damage to prime agricultural land and valuable wildlife habitat. The participants were divided into small groups for a few hours of intensive work. After learning of the real constraints on alternative routes, the participants had a better understanding of the agency's and applicant's viewpoints. Two of the participants actually supported alternative routes that affected their own land because the overall impacts of these routes appeared less adverse. The participants were asked to rank the five alternatives they had devised and the top two were included in the EIS. But the agency did not permit the groups to apply the same evaluation criteria to the routes proposed by the applicant or the agency. Thus public confidence in the process was not as high as it could have been, and probably was reduced when the applicant's proposal was ultimately selected. The Council recommends that when a hands-on design workshop is used, the assignment of the group be expanded to include evaluation of the reasonableness of all the suggested alternatives.

- **b. Hotline** Several agencies have successfully used a special telephone number, essentially a hotline, to take public comments before, after, or instead of a public meeting. It helps to designate a named staff member to receive these calls so that sane continuity and personal relationships can be developed.

- **c. Videotape of sites** A videotape of proposed sites is an excellent tool for explaining site differences and limitations during the lecture-format part of a scoping meeting.

- **d. Videotape meetings** One agency has videotaped whole scoping meetings. Staff found that the participants took their roles more seriously and the taping appeared not to precipitate grandstanding tactics.

- **e. Review committee** Success has been reported from one agency which sets up review committees, representing all interested groups, to oversee the scoping process. The committees help to design the scoping process. In cooperation with the lead agency, the committee reviews the materials generated by the scoping meeting. Again, however, the final decision on EIS content is the responsibility of the lead agency.

- **f. Consultant as meeting moderator** In some hotly contested cases, several agencies have used the EIS consultant to actually run the scoping meeting. This is permitted under the NEPA regulations and can be useful to de-fuse a tense atmosphere if the consultant is perceived as a neutral third party. But the responsible agency officials must attend the meetings. There is no substitute for developing a relationship between the agency officials and the affected parties. Moreover, if the responsible officials are not prominently present, the public may interpret that to mean that the consultant is actually making the decisions about the EIS, and not the lead agency.

- **g. Money saving tips** Remember that money can be saved by using conference calls instead of meetings, tape-recording the meetings instead of hiring a stenographer, and finding out whether people want a meeting before announcing it.

**C. Pitfalls.**

We list here some of the problems that have been experienced in certain scoping cases, in order to enable others to avoid the same difficulties.

1. Closed meetings.
In response to informal advice from CEQ that holding separate meetings for agencies and the public would be permitted under the regulations and could be more productive, one agency scheduled a scoping meeting for the cooperating agencies same weeks in advance of the public meeting. Apparently, the lead agency felt that the views of the cooperating agencies would be more candidly expressed if the meeting were closed. In any event, several members of the public learned of the meeting and asked to be present. The lead agency acquiesced only after newspaper reporters were able to make a story out of the closed session. At the meeting, the members of the public were informed that they would not be allowed to speak, nor to record the proceedings. The ill feeling aroused by this chain of events may not be repaired for a long time. Instead, we would suggest the following possibilities:

- a. Although separate meetings for agencies and public groups may be more efficient, there is no magic to them. By all means, if someone insists on attending the agency meeting, let him. There is nothing as secret going on there as he may think there is if you refuse him admittance. Better yet, have your meeting of cooperating agencies after the public meeting. That may be the most logical time anyway, since only then can the scope of the EIS be decided upon and assignments made among the agencies. If it is well done, the public meeting will satisfy most people and show them that you are listening to them.
- b. Always permit recording. In fact, you should suggest it for public meetings. All parties will feel better if there is a record of the proceeding. There is no need for a stenographer, and tape is inexpensive. It may even be better then a typed transcript, because staff and decision-makers who did not attend the meeting can listen to the exchange and may learn a lot about public perceptions of the proposal.
- c. When people are admitted to a meeting, it makes no sense to refuse their requests to speak. However, you can legitimately limit their statements to the subject at hand-scoping. You do not have to permit some participants to waste the others' time if they refuse to focus on the impacts and alternatives for inclusion in the EIS. Having a tape of the proceedings could be useful after the meeting if there is some question that speakers were improperly silenced. But it takes an experienced moderator to handle a situation like this.
- d. The scoping stage is the time for building confidence and trust on all sides of a proposal, because this is the only time when there is a cannon enterprise. The attitudes formed at this stage can carry through the project review process. Certainly it is difficult for things to get better. So foster the good will as long as you can by listening to what is being said during scoping. It is possible that out of that dialogue may appear recommendations for changes and mitigation measures that can turn a controversial fight into an acceptable proposal.

2. Contacting interested groups.

Some problems have arisen in scoping where agencies failed to contact all the affected parties, such as industries or state and local governments. In one case, a panel was assembled to represent various interests in scoping an EIS on a wildlife-related program. The agency had an excellent format for the meeting, but the panel did not represent industries that would be affected by the program or interested state and local governments. As a result, the EIS may fail to reflect the issues of concern to these parties. Another agency reported to us that it failed to contact parties directly because staff feared that if they missed someone they would be accused of favoritism. Thus they relied on the issuance of press releases which were not effective. Many people who did not learn about the meetings in time sought additional meeting opportunities, which cost extra money and delayed the process. In our experience, the attempt to reach people is worth the effort. Even if you miss someone, it will be clear that you tried. You can enlist a few representatives of an interest
group to help you identify and contact others. Trade associations, chambers of commerce, local civic groups, and local and national conservation groups can spread the word to members.

3. Tiering.

Many people are not familiar with the way environmental impact statements can be "tiered" under the NEPA regulations, so that issues are examined in detail at the stage that decisions on them are being made. See Section 1508.28 of the regulations. For example, if a proposed program is under review, it is possible that site specific actions are not yet proposed. In such a case, these actions are not addressed in the EIS on the program, but are reserved for a later tier of analysis. If tiering is being used, this concept must be made clear at the outset of any scoping meeting, so that participants do not concentrate on issues that are not going to be addressed at this time. If you can specify when these other issues will be addressed it will be easier to convince people to focus on the matters at hand.

4. Scoping for unusual programs.

One interesting scoping case involved proposed changes in the Endangered Species Program. Among the impacts to be examined were the effects of this conservation program on user activities such as mining, hunting, and timber harvest, instead of the other way around. Because of this reverse twist in the impacts to be analyzed, some participants had difficulty focusing on useful issues. Apparently, if the subject of the EIS is unusual, it will be even harder than normal for scoping participants to grasp what is expected of them. In the case of the Endangered Species Program EIS, the agency planned an intensive 3 day scoping session, successfully involved the participants, and reached accord on several issues that would be important for the future implementation of the program. But the participants were unable to focus on impacts and program alternatives for the EIS. We suggest that if the intensive session had been broken up into 2 or 3 meetings separated by days or weeks, the participants might have been able to get used to the new way of thinking required, and thereby to participate more productively. Programmatic proposals are often harder to deal with in a scoping context than site specific projects. Thus extra care should be taken in explaining the goals of the proposal and in making the information available well in advance of any meetings.

D. Lead and Cooperating Agencies.

Some problems with scoping revolve around the relationship between lead and cooperating agencies. Some agencies are still uncomfortable with these roles. The NEPA regulations, and the 40 Questions and Answers about the NEPA Regulations 46 Fed. Reg. 18026, (March 23, 1981) describe in detail the way agencies are now asked to cooperate on environmental analyses. (See Questions 9, 14, and 30.) We will focus here on the early phase of that cooperation. It is important for the lead agency to be as specific as possible with the cooperating agencies. Tell them what you want them to contribute during scoping: environmental impacts and alternatives. Some agencies still do not understand the purpose of scoping. Be sure to contact and involve representatives of the cooperating agencies who are responsible for NEPA-related functions. The lead agency will need to contact staff of the cooperating agencies who can both help to identify issues and alternatives and commit resources to a study, agree to a schedule for EIS preparation, or approve a list of issues as sufficient. In some agencies that will be at the district or state office level (e.g., Corps of Engineers, Bureau of Land Management, and Soil Conservation Service) for all but exceptional cases. In other agencies you must go to regional offices for scoping comments and commitments (e.g., EPA, Fish and Wildlife Service, Water and Power Resources Service). In still others, the field offices do not have NEPA responsibilities or expertise and
you will deal directly with headquarters (e.g., Federal Energy Regulatory Commission, Interstate Commerce Commission). In all cases you are looking for the office that can give you the answers you need. So keep trying until you find the organizational level of the cooperating agency that can give you useful information and that has the authority to make commitments. As stated in 40 Questions and Answers about the NEPA Regulations, the lead agency has the ultimate responsibility for the content of the EIS, but if it leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. (46 Fed. Reg. 18030, Question 14b.) At the same time, the cooperating agency will be concerned that the EIS contain material sufficient to satisfy its decisionmaking needs. Thus, both agencies have a stake in producing a document of good quality. The cooperating agencies should be encouraged not only to participate in scoping but also to review the decisions made by the lead agency about what to include in the EIS. Lead agencies should allow any information needed by a cooperating agency to be included, and any issues of concern to the cooperating agency should be covered, but it usually will have to be at the expense of the cooperating agency. Cooperating agencies have at least as great a need as the general public for advance information on a proposal before any scoping takes place. Agencies have reported to us that information from the lead agency is often too sketchy or comes too late for informed participation. Lead agencies must clearly explain to all cooperating agencies what the proposed action is conceived to be at this time, and what present alternatives and issues the lead agency sees, before expecting other agencies to devote time and money to a scoping session. Informal contacts among the agencies before scoping gets underway are valuable to establish what the cooperating agencies will need for productive scoping to take place. Some agencies will be called upon to be cooperators more frequently than others, and they may lack the resources to respond to the numerous requests. The NEPA regulations permit agencies without jurisdiction by law (i.e., no approval authority over the proposal) to decline the cooperating agency role. (Section 1501.6(c)). But agencies that do have jurisdiction by law cannot opt out entirely and may have to reduce their cooperating effort devoted to each EIS. (See Section 1501.6(c) and 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18030, Question 14a.) Thus, cooperators would be greatly aided by a priority list from the lead agency showing which proposals most need their help. This will lead to a more efficient allocation of resources. Some cooperating agencies are still holding back at the scoping stage in order to retain a critical position for later in the process. 'They either avoid the scoping sessions or fail to contribute, and then raise objections in comments on the draft EIS. We cannot emphasize enough that the whole point of scoping is to avoid this situation. As we stated in 40 Questions and Answers about the NEPA Regulations, "if the new alternative [or other issue] was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the [lead] agency." (46 Fed. Reg. 18035, Question 29b.)

### III. Advice for Public Participants

Scoping is a new opportunity for you to enter the earliest phase of the decisionmaking process on proposals that affect you. Through this process you have access to public officials before decisions are made and the right to explain your objections and concerns. But this opportunity carries with it a new responsibility. No longer may individuals hang back until the process is almost complete and then spring forth with a significant issue or alternative that might have been raised earlier. You are now part of the review process, and your role is to inform the responsible agencies of the potential impacts that should be studied, the problems a proposal may cause that you foresee, and the alternatives and mitigating measures that offer promise. As noted above, and in 40 Questions and Answers, no longer will a comment raised for the first time after the draft EIS is finished be accorded the same serious consideration it would otherwise have merited if the issue had been raised during scoping. Thus you have a responsibility to come forward early with known issues. In

return, you get the chance to meet the responsible officials and to make the case for your alternative before they are committed to a course of action. To a surprising degree this avenue has been found to yield satisfactory results. There's no guarantee, of course, but when the alternative you suggest is really better, it is often hard for a decisionmaker to resist. There are several problems that commonly arise that public participants should be aware of:

**A. Public input is often only negative**

The optimal timing of scoping within the NEPA process is difficult to judge. On the one hand, as explained above (Section II.B.1.), if it is attempted too early, the agency cannot explain what it has in mind and informed participation will be impossible. On the other, if it is delayed, the public may find that significant decisions are already made, and their comments may be discounted or will be too late to change the project. Sane agencies have found themselves in a tactical cross-fire when public criticism arises before they can even define their proposal sufficiently to see whether they have a worthwhile plan. Understandably, they would be reluctant after such an experience to invite public criticism early in the planning process through open scoping. But it is in your interest to encourage agencies to come out with proposals in the early stage because that enhances the possibility of your comments being used. Thus public participants in scoping should reduce the emotion level wherever possible and use the opportunity to make thoughtful, rational presentations on impacts and alternatives. Polarizing over issues too early hurts all parties. If agencies get positive and useful public responses from the scoping process, they will more frequently come forward with proposals early enough so that they can be materially improved by your suggestions.

**B. Issues are too broad**

The issues that participants tend to identify during scoping are much too broad to be useful for analytical purposes. For example, "cultural impacts" - what does this mean? 'What precisely are the impacts that should be examined? When the EIS preparers encounter a comment as vague as this they will have to make their own judgment about what you meant, and you may find that your issues are not covered. Thus, you should refine the broad general topics, and specify which issues need evaluation and analysis.

**C. Impacts are not identified**

Similarly, people (including agency staff) frequently identify "causes" as issues but fail to identify the principal "effects" that the EIS should evaluate in depth. For example, oil and gas development is a cause of many impacts. Simply listing this generic category is of little help. You must go beyond the obvious causes to the specific effects that are of concern. If you want scoping to be seen as more than just another public meeting, you will need to put in extra work.

**IV. Brief Points For Applicants.**

Scoping can be an invaluable part of your early project planning. Your main interest is in getting a proposal through the review process. This interest is best advanced by finding out early where the problems with the proposal are, who the affected parties are, and where accommodations can be made. Scoping is an ideal meeting place for all the interest groups if you proposal are, who the affected parties are, and where accommodations can be made. Scoping is an ideal meeting place for all the interest groups if you have not already contacted them. In several cases, we found that the compromises made at this stage allowed a project to move efficiently through the permitting process virtually unopposed. The NEPA
regulations place an affirmative obligation on agencies to "provide for cases where actions are planned by private applicants" so that designated staff are available to consult with the applicants, to advise applicants of information that will be required during review, and to insure that the NEPA process commences at the earliest possible time. (Section 1501.2(d)). This section of the regulations is intended to ensure that environmental factors are considered at an early stage in the applicant's planning process. (See 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18028, Questions 8 and 9.) Applicants should take advantage of this requirement in the regulations by approaching the agencies early to consult on alternatives, mitigation requirements, and the agency's information needs. This early contact with the agency can facilitate a prompt initiation of the scoping process in cases where an EIS will be prepared. You will need to furnish sufficient information about your proposal to enable the lead agency to formulate a coherent presentation for cooperating agencies and the public. But don't wait until your choices are all made and the alternatives have been eliminated. (Section 1506.1). During scoping, be sure to attend any of the public meetings unless the agency is dividing groups by interest affiliation. You will be able to answer any questions about the proposal, and even more important, you will be able to hear the objections raised, and find out what the real concerns of the public are. This is, of course, vital information for future negotiations with the affected parties.
GUIDANCE REGARDING NEPA REGULATIONS

40 CFR Part 1500

MEMORANDUM

For: Heads of Federal Agencies

From: A. Alan Hill, Chairman, Council on Environmental Quality

Re: Guidance Regarding NEPA Regulations

The Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) were issued on November 29, 1978. These regulations became effective for, and binding upon, most federal agencies on July 30, 1979, and for all remaining federal agencies on November 30, 1979.

As part of the Council's NEPA oversight responsibilities it solicited through an August 14, 1981, notice in the Federal Register public and agency comments regarding a series of questions that were developed to provide information on the manner in which federal agencies were implementing the CEQ regulations. On July 12, 1982, the Council announced the availability of a document summarizing the comments received from the public and other agencies and also identifying issue areas which the Council intended to review. On August 12, 1982, the Council held a public meeting to address those issues and hear any other comments which the public or other interested agencies might have about the NEPA process. The issues addressed in this guidance were identified during this process.

There are many ways in which agencies can meet their responsibilities under NEPA and the 1978 regulations. The purpose of this document is to provide the Council's guidance on various ways to carry out activities under the regulations.

Scoping

The Council on Environmental Quality (CEQ) regulations direct federal agencies which have made a decision to prepare an environmental impact statement to engage in a public scoping process. Public hearings or meetings, although often held, are not required; instead the manner in which public input will be sought is left to the discretion of the agency.

The purpose of this process is to determine the scope of the EIS so that preparation of the document can be effectively managed. Scoping is intended to ensure that problems are identified early and properly studied, that issues of little significance do not consume time and effort, that the draft EIS is thorough and balanced, and that delays occasioned by an inadequate draft EIS are avoided. The scoping process should identify the public and agency concerns; clearly define the environmental issues and alternatives to be examined in the EIS including the elimination of nonsignificant issues; identify related issues which originate from separate legislation, regulation, or Executive Order (e.g. historic preservation or endangered species concerns); and identify state and local agency requirements which must be addressed. An effective scoping process can help reduce unnecessary paperwork and time delays in preparing
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and processing the EIS by clearly identifying all relevant procedural requirements.

In April 1981, the Council issued a "Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping" on the subject of Scoping Guidance. The purpose of this guidance was to give agencies suggestions as to how to more effectively carry out the CEQ scoping requirement. The availability of this document was announced in the Federal Register at 46 FR 25461. It is still available upon request from the CEQ General Counsel's office.

The concept of lead agency (§1508.16) and cooperating agency (§1508.5) can be used effectively to help manage the scoping process and prepare the environmental impact statement. The lead agency should identify the potential cooperating agencies. It is incumbent upon the lead agency to identify any agency which may ultimately be involved in the proposed action, including any subsequent permitting actions. Once cooperating agencies have been identified they have specific responsibility under the NEPA regulations (40 CFR 1501.6). Among other things cooperating agencies have responsibilities to participate in the scoping process and to help identify issues which are germane to any subsequent action it must take on the proposed action. The ultimate goal of this combined agency effort is to produce an EIS which in addition to fulfilling the basic intent of NEPA, also encompasses to the maximum extent possible all the environmental and public involvement requirements of state and federal laws, Executive Orders, and administrative policies of the involved agencies. Examples of these requirements include the Fish and Wildlife Coordination Act, the Clean Air Act, the Endangered Species Act, the National Historic Preservation Act, the Wild and Scenic Rivers Act, the Farmland Protection Policy Act, Executive Order 11990 (Protection of Wetlands), and Executive Order 11998 (Floodplain Management).

It is emphasized that cooperating agencies have the responsibility and obligation under the CEQ regulations to participate in the scoping process. Early involvement leads to early identification of significant issues, better decisionmaking, and avoidance of possible legal challenges. Agencies with "jurisdiction by law" must accept designation as a cooperating agency if requested (40 CFR 1501.6).

One of the functions of scoping is to identify the public involvement/public hearing procedures of all appropriate state and federal agencies that will ultimately act upon the proposed action. To the maximum extent possible, such procedures should be integrated into the EIS process so that joint public meetings and hearings can be conducted. Conducting joint meetings and hearings eliminates duplication and should significantly reduce the time and cost of processing an EIS and any subsequent approvals. The end result will be a more informed public cognizant of all facets of the proposed action.

It is important that the lead agency establish a process to properly manage scoping. In appropriate situations the lead agency should consider designating a project coordinator and forming an interagency project review team. The project coordinator would be the key person in monitoring time schedules and responding to any problems which may arise in both scoping and preparing the EIS. The project review team would be established early in scoping and maintained throughout the process of preparing the EIS. This review team would include state and local agency representatives. The review team would meet periodically to ensure that the EIS is complete, concise, and prepared in a timely manner.

A project review team has been used effectively on many projects. Some of the more important functions this review team can serve include: (1) A source of information, (2)
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a coordination mechanism, and (3) a professional review group. As an information source, the review team can identify all federal, state, and local environmental requirements, agency public meeting and hearing procedures, concerned citizen groups, data needs and sources of existing information, and the significant issues and reasonable alternatives for detailed analysis, excluding the non-significant issues. As a coordination mechanism, the team can ensure the rapid distribution of appropriate information or environmental studies, and can reduce the time required for formal consultation on a number of issues (e.g., endangered species or historic preservation). As a professional review group the team can assist in establishing and monitoring a tight time schedule for preparing the EIS by identifying critical points in the process, discussing and recommending solutions to the lead agency as problems arise, advising whether a requested analysis or information item is relevant to the issues under consideration, and providing timely and substantive review comments on any preliminary reports or analyses that may be prepared during the process. The presence of professionals from all scientific disciplines which have a significant role in the proposed action could greatly enhance the value of the team.

The Council recognizes that there may be some problems with the review team concept such as limited agency travel funds and the amount of work necessary to coordinate and prepare for the periodic team meetings. However, the potential benefits of the team concept are significant and the Council encourages agencies to consider utilizing interdisciplinary project review teams to aid in EIS preparation. A regularly scheduled meeting time and location should reduce coordination problems. In some instances, meetings can be arranged so that many projects are discussed at each session. The benefits of the concept are obvious: timely and effective preparation of the EIS, early identification and resolution of any problems which may arise, and elimination, or at least reduction of, the need for additional environmental studies subsequent to the approval of the EIS.

Since the key purpose of scoping is to identify the issues and alternatives for consideration, the scoping process should "end" once the issues and alternatives to be addressed in the EIS have been clearly identified. Normally this would occur during the final stages of preparing the draft EIS and before it is officially circulated for public and agency review.

The Council encourages the lead agency to notify the public of the results of the scoping process to ensure that all issues have been identified. The lead agency should document the results of the scoping process in its administrative record.

The NEPA regulations place a new and significant responsibility on agencies and the public alike during the scoping process to identify all significant issues and reasonable alternatives to be addressed in the EIS. Most significantly, the Council has found that scoping is an extremely valuable aid to better decisionmaking. Thorough scoping may also have the effect of reducing the frequency with which proposed actions are challenged in court on the basis of an inadequate EIS. Through the techniques identified in this guidance, the lead agency will be able to document that an open public involvement process was conducted, that all reasonable alternatives were identified, that significant issues were identified and non-significant issues eliminated, and that the environmental public involvement requirements of all agencies were met, to the extent possible, in a single "one-stop" process.

Categorical Exclusions

Section 1507 of the CEQ regulations directs federal agencies when establishing implementing procedures to identify those actions which experience has indicated will not have a significant environmental effect and to categorically exclude them from NEPA review. In our August 1981 request for public comments, we asked the question "Have categorical exclusions been adequately identified and defined?".

The responses the Council received indicated that there was considerable belief that categorical exclusions were not adequately identified and defined. A number of commentators indicated that agencies had not identified all categories of actions that meet the categorical exclusion definition (§1508.4) or that agencies were overly restrictive in their interpretations of categorical exclusions. Concerns were expressed that agencies were requiring [48 FR 34265] too much documentation for projects that were not major federal actions with significant effects and also that agency procedures to add categories of actions to their existing lists of categorical exclusions were too cumbersome.

The National Environmental Policy Act and the CEQ regulations are concerned primarily with those "major federal actions significantly affecting the quality of the human environment" (42 U.S.C. 4332). Accordingly, agency procedures, resources, and efforts should focus on determining whether the proposed federal action is a major federal action significantly affecting the quality of the human environment. If the answer to this question is yes, an environmental impact statement must be prepared. If there is insufficient information to answer the question, an environmental assessment is needed to assist the agency in determining if the environmental impacts are significant and require an EIS. If the assessment shows that the impacts are not significant, the agency must prepare a finding of no significant impact. Further stages of this federal action may be excluded from requirements to prepare NEPA documents.

The CEQ regulations were issued in 1978 and most agency implementing regulations and procedures were issued shortly thereafter. In recognition of the experience with the NEPA process that agencies have had since the CEQ regulations were issued, the Council believes that it is appropriate for agencies to examine their procedures to insure that the NEPA process utilizes this additional knowledge and experience. Accordingly, the Council strongly encourages agencies to re-examine their environmental procedures and specifically those portions of the procedures where "categorical exclusions" are discussed to determine if revisions are appropriate. The specific issues which the Council is concerned about are (1) the use of detailed lists of specific activities for categorical exclusions, (2) the excessive use of environmental assessments/findings of no significant impact and (3) excessive documentation.

The Council has noted some agencies have developed lists of specific activities which qualify as categorical exclusions. The Council believes that if this approach is applied narrowly it will not provide the agency with sufficient flexibility to make decisions on a project-by-project basis with full consideration to the issues and impacts that are unique to a specific project. 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.

The Council also encourages agencies to examine the manner in which they use the
environmental assessment process in relation to their process for identifying projects that meet the categorical exclusion definition. A report(1) to the Council indicated that some agencies have a very high ratio of findings of no significant impact to environmental assessments each year while producing only a handful of EIS's. Agencies should examine their decisionmaking process to ascertain if some of these actions do not, in fact, fall within the categorical exclusion definition, or, conversely, if they deserve full EIS treatment.

As previously noted, the Council received a number of comments that agencies require an excessive amount of environmental documentation for projects that meet the categorical exclusion definition. 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 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.

Categorical exclusions promulgated by an agency should be reviewed by the Council at the draft stage. After reviewing comments received during the review period and prior to publication in final form, the Council will determine whether the categorical exclusions are consistent with the NEPA regulations.

Adoption Procedures

During the recent effort undertaken by the Council to review the current NEPA regulations, several participants indicated federal agencies were not utilizing the adoption procedures as authorized by the CEQ regulations. The concept of adoption was incorporated into the Council's NEPA Regulations (40 CFR 1506.3) to reduce duplicative EISs prepared by Federal agencies. The experiences gained during the 1970's revealed situations in which two or more agencies had an action relating to the same project; however, the timing of the actions was different. In the early years of NEPA implementation, agencies independently approached their activities and decisions. This procedure lent itself to two or even three EISs on the same project. In response to this situation the CEQ regulations authorized agencies, in certain instances, to adopt environmental impact statements prepared by other agencies.

In general terms, the regulations recognize three possible situations in which adoption is appropriate. One is where the federal agency participated in the process as a cooperating agency. (40 CFR 1506.3(c)). In this case, the cooperating agency may adopt a final EIS and simply issue its record of decision.(2) However, the cooperating agency must independently review the EIS and determine that its own NEPA procedures have been satisfied.

A second case concerns the federal agency which was not a cooperating agency, but is, nevertheless, undertaking an activity which was the subject of an EIS. (40 CFR 1506.3(h)). This situation would arise because an agency did not anticipate that it would be involved in a project which was the subject of another agency's EIS. In this instance where the proposed action is substantially the same as that action described in the EIS, the agency may adopt the EIS and recirculate (file with EPA and distribute to agencies and the public) it as a final EIS. However, the agency must independently review the EIS to determine that it is current and that its own NEPA procedures have been satisfied. When recirculating the final EIS the agency should provide information which identifies what federal action is involved.

The third situation is one in which the proposed action is not substantially the same as that covered by the EIS. In this case, any agency may adopt an EIS or a portion thereof by circulating the EIS as a draft or as a portion of the agency's draft and preparing a final EIS. (40 CFR 1506.3(a)). Repetitious analysis and time consuming data collection can be easily eliminated utilizing this procedure.

The CEQ regulations specifically address the question of adoption only in terms of preparing EIS's. However, the objectives that underlie this portion of the regulations -- i.e., reducing delays and eliminating duplication -- apply with equal force to the issue of adopting other environmental documents. Consequently, the Council encourages agencies to put in place a mechanism for [48 FR 34266] adopting environmental assessments prepared by other agencies. Under such procedures the agency could adopt the environmental assessment and prepare a Finding of No Significant Impact based on that assessment. In doing so, the agency should be guided by several principles:

- First, when an agency adopts such an analysis it must independently evaluate the information contained therein and take full responsibility for its scope and content.
- Second, if the proposed action meets the criteria set out in 40 CFR 1501.4(e)(2), a Finding of No Significant Impact would be published for 30 days of public review before a final determination is made by the agency on whether to prepare an environmental impact statement.

Contracting Provisions

Section 1506.5(c) of the NEPA regulations contains the basic rules for agencies which choose to have an environmental impact statement prepared by a contractor. That section requires the lead or cooperating agency to select the contractor, to furnish guidance and to participate in the preparation of the environmental impact statement. The regulation requires contractors who are employed to prepare an environmental impact statement to sign a disclosure statement stating that they have no financial or other interest in the outcome of the project. The responsible federal official must independently evaluate the statement prior to its approval and take responsibility for its scope and contents.

During the recent evaluation of comments regarding agency implementation of the NEPA process, the Council became aware of confusion and criticism about the provisions of Section 1506.5(c). It appears that a great deal of misunderstanding exists regarding the interpretation of the conflict of interest provision. There is also some feeling that the conflict of interest provision should be completely eliminated.(3)

Applicability of §1506.5(c)

This provision is only applicable when a federal lead agency determines that it needs contractor assistance in preparing an EIS. Under such circumstances, the lead agency or a cooperating agency should select the contractor to prepare the EIS.(4)

This provision does not apply when the lead agency is preparing the EIS based on information provided by a private applicant. In this situation, the private applicant can obtain its information from any source. Such sources could include a contractor hired...
by the private applicant to do environmental, engineering, or other studies necessary to provide sufficient information to the lead agency to prepare an EIS. The agency must independently evaluate the information and is responsible for its accuracy.

**Conflict of Interest Provisions**

The purpose of the disclosure statement requirement is to avoid situations in which the contractor preparing the environmental impact statement has an interest in the outcome of the proposal. Avoidance of this situation should, in the Council's opinion, ensure a better and more defensible statement for the federal agencies. This requirement also serves to assure the public that the analysis in the environmental impact statement has been prepared free of subjective, self-serving research and analysis.

Some persons believe these restrictions are motivated by undue and unwarranted suspicion about the bias of contractors. The Council is aware that many contractors would conduct their studies in a professional and unbiased manner. However, the Council has the responsibility of overseeing the administration of the National Environmental Policy Act in a manner most consistent with the statute's directives and the public's expectations of sound government. The legal responsibilities for carrying out NEPA's objectives rest solely with federal agencies. Thus, if any delegation of work is to occur, it should be arranged to be performed in as objective a manner as possible.

Preparation of environmental impact statements by parties who would suffer financial losses if, for example, a "no action" alternative were selected, could easily lead to a public perception of bias. It is important to maintain the public's faith in the integrity of the EIS process, and avoidance of conflicts in the preparation of environmental impact statements is an important means of achieving this goal.

The Council has discovered that some agencies have been interpreting the conflicts provision in an overly burdensome manner. In some instances, multidisciplinary firms are being excluded from environmental impact statements preparation contracts because of links to a parent company which has design and/or construction capabilities. Some qualified contractors are not bidding on environmental impact statement contracts because of fears that their firm may be excluded from future design or construction contracts. Agencies have also applied the selection and disclosure provisions to project proponents who wish to have their own contractor for providing environmental information. The result of these misunderstandings has been reduced competition in bidding for EIS preparation contracts, unnecessary delays in selecting a contractor and preparing the EIS, and confusion and resentment about the requirement. The Council believes that a better understanding of the scope of §1506.5(c) by agencies, contractors and project proponents will eliminate these problems.

Section 1506.5(c) prohibits a person or entity entering into a contract with a federal agency to prepare an EIS when that party has at that time and during the life of the contract pecuniary or other interests in the outcomes of the proposal. Thus, a firm which has an agreement to prepare an EIS for a construction project cannot, at the same time, have an agreement to perform the construction, nor could it be the owner of the construction site. However, if there are no such separate interests or arrangements, and if the contract for EIS preparation does not contain any incentive clauses or guarantees of any future work on the project, it is doubtful that an inherent conflict of interest will exist. Further, §1506.5(c) does not prevent an applicant from submitting information to an agency. The lead federal agency should evaluate potential conflicts of
interest prior to entering into any contract for the preparation of environmental documents.

Selection of Alternatives in Licensing and Permitting Situations

Numerous comments have been received questioning an agency's obligation, under the National Environmental Policy Act, to evaluate alternatives to a proposed action developed by an applicant for a federal permit or license. This concern arises from a belief that projects conceived and developed by private parties should not be questioned or second-guessed by the government. There has been discussion of developing two standards to determining the range of alternatives to be evaluated: The "traditional" standard for projects which are initiated and developed by a Federal agency, and a second standard of evaluating only those alternatives presented by an applicant for a permit or license.

Neither NEPA nor the CEQ regulations make a distinction between actions initiated by a Federal agency and by applicants. Early NEPA case law, while emphasizing the need for a rigorous examination of alternatives, did [48 FR 34267] not specifically address this issue. In 1981, the Council addressed the question in its document, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations". The answer indicated that the emphasis in determining the scope of alternatives should be on what is "reasonable". The Council said that, "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."

Since issuance of that guidance, the Council has continued to receive requests for further clarification of this question. Additional interest has been generated by a recent appellate court decision. Roosevelt Campobello International Park Commission v. E.P.A. (6) dealt with EPA's decision of whether to grant a permit under the National Pollutant Discharge Elimination System to a company proposing a refinery and deep-water terminal in Maine. The court discussed both the criteria used by EPA in its selecting of alternative sites to evaluate, and the substantive standard used to evaluate the sites. The court determined that EPA's choice of alternative sites was "focused by the primary objectives of the permit applicant . . ." and that EPA had limited its consideration of sites to only those sites which were considered feasible, given the applicant's stated goals. The court found that EPA's criteria for selection of alternative sites was sufficient to meet its NEPA responsibilities.

This decision is in keeping with the concept that an agency's responsibilities to examine alternative sites has always been "bounded by some notion of feasibility" to avoid NEPA from becoming "an exercise in frivolous boilerplate".(7 ) NEPA has never been interpreted to require examination of purely conjectural possibilities whose implementation is deemed remote and speculative. Rather, the agency's duty is to consider "alternatives as they exist and are likely to exist."(8 ) In the Roosevelt Campobello case, for example, EPA examined three alternative sites and two alternative modifications of the project at the preferred alternative site. Other factors to be developed during the scoping process -- comments received from the public, other government agencies and institutions, and development of the agency's own environmental data -- should certainly be incorporated into the decision of which alternatives to seriously evaluate in the EIS. There is, however, no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives.
Tiering

Tiering of environmental impact statements refers to the process of addressing a broad, general program, policy or proposal in an initial environmental impact statement (EIS), and analyzing a narrower site-specific proposal, related to the initial program, plan or policy in a subsequent EIS. The concept of tiering was promulgated in the 1978 CEQ regulations; the preceding CEQ guidelines had not addressed the concept. The Council's intent in formalizing the tiering concept was to encourage agencies, "to eliminate repetitive discussions and to focus on the actual issues ripe for decisions at each level of environmental review."(9)

Despite these intentions, the Council perceives that the concept of tiering has caused a certain amount of confusion and uncertainty among individuals involved in the NEPA process. This confusion is by no means universal; indeed, approximately half of those commenting in response to our question about tiering (10 ) indicated that tiering is effective and should be used more frequently. Approximately one-third of the commentators responded that they had no experience with tiering upon which to base their comments. The remaining commentators were critical of tiering. Some commentators believed that tiering added an additional layer of paperwork to the process and encouraged, rather than discouraged, duplication. Some commentators thought that the inclusion of tiering in the CEQ regulations added an extra legal requirement to the NEPA process. Other commentators said that an initial EIS could be prepared when issues were too broad to analyze properly for any meaningful consideration. Some commentators believed that the concept was simply not applicable to the types of projects with which they worked; others were concerned about the need to supplement a tiered EIS. Finally, some who responded to our inquiry questioned the courts' acceptance of tiered EISs.

The Council believes that misunderstanding of tiering and its place in the NEPA process is the cause of much of this criticism. Tiering, of course, is by no means the best way to handle all proposals which are subject to NEPA analysis and documentation. The regulations do not require tiering; rather, they authorize its use when an agency determines it is appropriate. It is an option for an agency to use when the nature of the proposal lends itself to tiered EIS(s).

Tiering does not add an additional legal requirement to the NEPA process. An environmental impact statement is required for proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. In the context of NEPA, "major Federal actions" include adoption of official policy, formal plans, and programs as well as approval of specific projects, such as construction activities in a particular location or approval of permits to an outside applicant. Thus, where a Federal agency adopts a formal plan which will be executed throughout a particular region, and later proposes a specific activity to implement that plan in the same region, both actions need to be analyzed under NEPA to determine whether they are major actions which will significantly affect the environment. If the answer is yes in both cases, both actions will be subject to the EIS requirement, whether tiering is used or not. The agency then has one of two alternatives: Either preparation of two environmental impact statements, with the second repeating much of the analysis and information found in the first environmental impact statement, or tiering the two documents. If tiering is utilized, the site-specific EIS contains a summary of the issues discussed in the first statement and the agency will incorporate by reference discussions from the first statement. Thus, the second, or site-specific statement, would focus primarily on the issues relevant to the specific proposal, and
would not duplicate material found in the first EIS. It is difficult to understand, given this scenario, how tiering can be criticized for adding an unnecessary layer to the NEPA process; rather, it is intended to streamline the existing process.

The Council agrees with commentators who stated that there are stages in the development of a proposal for a program, plan or policy when the issues are too broad to lend themselves to meaningful analysis in the framework of an EIS. The CEQ regulations specifically define a "proposal" as existing at, "that stage in the development of an action when an agency subject to [NEPA] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing the goal and the effects can be meaningfully evaluated." (11) Tiering is not intended to force an agency to prepare an EIS before this stage is reached; rather, it is a technique to be used once meaningful analysis can [48 FR 34268] be performed. An EIS is not required before that stage in the development of a proposal, whether tiering is used or not.

The Council also realizes that tiering is not well suited to all agency programs. Again, this is why tiering has been established as an option for the agency to use, as opposed to a requirement.

A supplemental EIS is required when an agency makes substantial changes in the proposed action relevant to environmental concerns, or when there are significant new circumstances or information relevant to environmental concerns bearing on the proposed action, and is optional when an agency otherwise determines to supplement an EIS. (12) The standard for supplementing an EIS is not changed by the use of tiering; there will no doubt be occasions when a supplement is needed, but the use of tiering should reduce the number of those occasions.

Finally, some commentators raised the question of courts' acceptability of tiering. This concern is understandable, given several cases which have reversed agency decisions in regard to a particular programmatic EIS. However, these decisions have never invalidated the concept of tiering, as stated in the CEQ regulations and discussed above. Indeed, the courts recognized the usefulness of the tiering approach in case law before the promulgation of the tiering regulation. Rather, the problems appear when an agency determines not to prepare a site-specific EIS based on the fact that a programmatic EIS was prepared. In this situation, the courts carefully examine the analysis contained in the programmatic EIS. A court may or may not find that the programmatic EIS contains appropriate analysis of impacts and alternatives to meet the adequacy test for the site-specific proposal. A recent decision by the Ninth Circuit Court of Appeals (13) invalidated an attempt by the Forest Service to make a determination regarding wilderness and non-wilderness designations on the basis of a programmatic EIS for this reason. However, it should be stressed that this and other decisions are not a repudiation of the tiering concept. In these instances, in fact, tiering has not been used; rather, the agencies have attempted to rely exclusively on programmatic or "first level" EISs which did not have site-specific information. No court has found that the tiering process as provided for in the CEQ regulations is an improper manner of implementing the NEPA process.

In summary, the Council believes that tiering can be a useful method of reducing paperwork and duplication when used carefully for appropriate types of plans, programs and policies which will later be translated into site-specific projects. Tiering should not be viewed as an additional substantive requirement, but rather a means of accomplishing the NEPA requirements in an efficient manner as possible.
Footnotes


2. Records of decision must be prepared by each agency responsible for making a decision, and cannot be adopted by another agency.

3. The Council also received requests for guidance on effective management of the third-party environmental impact statement approach. However, the Council determined that further study regarding the policies behind this technique is warranted, and plans to undertake that task in the future.

4. There is no bar against the agency considering candidates suggested by the applicant, although the Federal agency must retain its independence. If the applicant is seen as having a major role in the selection of the contractor, contractors may feel the need to please both the agency and the applicant. An applicant's suggestion, if any, to the agency regarding the choice of contractors should be one of many factors involved in the selection process.


6. 684 F.2d 1041 (1st Cir. 1982).


10. "Is tiering being used to minimizes repetition in an environmental assessment and in environmental impact statements?", 46 FR 41131, August 14, 1981.

11. 40 CFR 1508.23 (emphasis added).

12. 40 CFR 1502.9(c).


EXECUTIVE OFFICE OF THE PRESIDENT

Council on Environmental Quality

AGENCY: Council on Environmental Quality, Executive Office of the President

ACTION: Information only--Memorandum to Heads of Federal Departments and Agencies Regarding Pollution Prevention and the National Environmental Policy Act

SUMMARY: This memorandum provides guidance to the federal agencies on incorporating pollution prevention principles, techniques, and mechanisms into their planning and decisionmaking processes and evaluating and reporting those efforts in documents prepared pursuant to the National Environmental Policy Act.


SUPPLEMENTARY INFORMATION:

MEMORANDUM

TO: Heads of Federal Departments and Agencies

FROM: Michael R. Deland

SUBJECT: Pollution Prevention and the National Environmental Policy Act

DATE: January 12, 1993

Introduction

Although substantial improvements in environmental quality have been made in the last 20 years by focusing federal energies and federal dollars on pollution abatement and on cleaning up pollution once it has occurred, achieving similar improvements in the future will require that polluters and regulators focus more of their efforts on pollution prevention. For example, reducing non-point source pollution--such as runoff from agricultural lands and urban roadways--and addressing cross-media environmental problems--such as the solid waste disposal problem posed by the sludge created in the abatement of air and water pollution--may not be possible with "end-of-the-pipe" solutions. Pollution prevention techniques seek to reduce the amount and/or toxicity of pollutants being generated. In addition, such techniques promote increased efficiency in the use of raw materials and in conservation of natural resources and can be a more cost-effective means of controlling pollution than does direct regulation. Many strategies have been developed and used to reduce pollution and protect resources, including using fewer toxic inputs, redesigning products, altering manufacturing and maintenance processes, and conserving energy.

This memorandum seeks to encourage all federal departments and agencies, in furtherance of their responsibilities under the National Environmental Policy Act (NEPA), to incorporate pollution prevention principles, techniques, and mechanisms into their planning and decisionmaking processes and to evaluate and report those efforts, as appropriate, in documents prepared pursuant to NEPA.
Background

NEPA provides a longstanding umbrella for a renewed emphasis on pollution prevention in all federal activities. Indeed, NEPA’s very purpose is "to promote efforts which will prevent or eliminate damage to the environment...." 42 USC § 4321.

Section 101 of NEPA contains Congress' express recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment" and declaration of the policy of the federal government "to use all practicable means and measures...to create and maintain conditions under which man and nature can exist in productive harmony...." 42 USC § 4331(a). In order to carry out this environmental policy, Congress required all agencies of the federal government to act to preserve, protect, and enhance the environment. See 42 USC § 4331(b).

Further, Section 102 of NEPA requires the federal agencies to document the consideration of environmental values in their decisionmaking in "detailed statements" known as environmental impact statements (EIS). 42 USC § 4332(2)(C)). As the United States Supreme Court has noted, the "sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences." Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

The very premise of NEPA's policy goals, and the thrust for implementation of those goals in the federal government through the EIS process, is to avoid, minimize, or compensate for adverse environmental impacts before an action is taken. Virtually the entire structure of NEPA compliance has been designed by CEQ with the goal of preventing, eliminating, or minimizing environmental degradation. Thus, compliance with the goals and procedural requirements of NEPA, thoughtfully and fully implemented, can contribute to the reduction of pollution from federal projects, and from projects funded, licensed, or approved by federal agencies.

Defining Pollution Prevention

CEQ defines and uses the term "pollution prevention" broadly. In keeping with NEPA and the CEQ regulations implementing the procedural provisions of the statute, CEQ is not seeking to limit agency discretion in choosing a particular course of action, but rather is providing direction on the incorporation of pollution prevention considerations into agency planning and decisionmaking.

"Pollution prevention" as used in this guidance includes, and is not limited to, reducing or eliminating hazardous or other polluting inputs, which can contribute to both point and non-point source pollution; modifying manufacturing, maintenance, or other industrial practices; modifying product designs; recycling (especially in-process, closed loop recycling); preventing the disposal and transfer of pollution from one media to another; and increasing energy efficiency and conservation. Pollution prevention can be implemented at any stage--input, use or generation, and treatment--and may involve any technique--process modification, waste stream segregation, inventory control, good housekeeping or best management practices, employee training, recycling, and substitution. Indeed, any reasonable mechanism which successfully avoids, prevents, or reduces pollutant discharges or emissions other than by the traditional method of treating pollution at the discharge end of a pipe or a stack should, for purposes of this guidance, be considered pollution prevention.

Federal Agency Responsibilities

Pursuant to the policy goals found in NEPA Section 101 and the procedural requirements
found in NEPA Section 102 and in the CEQ regulations, the federal departments and agencies should take every opportunity to include pollution prevention considerations in the early planning and decisionmaking processes for their actions, and, where appropriate, should document those considerations in any EISs or environmental assessments (EA) prepared for those actions. In this context, federal actions encompass policies and projects initiated by a federal agency itself, as well as activities initiated by a non-federal entity which need federal funding or approval. Federal agencies are encouraged to consult EPA’s Pollution Prevention Information Clearinghouse which can serve as a source of innovative ideas for reducing pollution.

1. Federal Policies, Projects, and Procurements

The federal government develops and implements a wide variety of policies, legislation, rules, and regulations; designs, constructs, and operates its own facilities; owns and manages millions of acres of public lands; and has a substantial role as a purchaser and consumer of commercial goods and services -- all of these activities provide tremendous opportunities for pollution prevention which the federal agencies should grasp to the fullest extent practicable. Indeed, some agencies have already begun their own creative pollution prevention initiatives:

**Land Management**

The United States Forest Service has instituted best management practices on several national forests. These practices include leaving slash and downed logs in harvest units, maintaining wide buffer zones around streams, and encouraging biological diversity by mimicking historic burn patterns and other natural processes in timber sale design and layout. The beneficial effects have been a reduction in erosion, creation of fish and wildlife habitat, and the elimination of the need to burn debris after logging -- in other words, a reduction of air and water pollution.

The National Park Service and the Bureau of Reclamation have implemented integrated pest management programs which minimize or eliminate the use of pesticides. In addition, in some parks storm water runoffs from parking lots have been eliminated by replacing asphalt with the use of a "geo-block" system (interlocking concrete blocks with openings for grass plantings). The lot is mowed as a lawn but has the structural strength to support vehicles.

The Tennessee Valley Authority (TVA) has developed a transmission line right-of-way maintenance program which requires buffer zones around sensitive areas for herbicide applications and use of herbicides which have soil retention properties which allow less frequent treatment and better control. TVA is also testing whole tree chipping to clear rights-of-way in a single pass application, allowing for construction vehicle access but reducing the need for access roads with the nonpoint source pollution associated with leveling, drainage, or compaction. In addition, TVA is using more steel transmission line poles to replace traditional wooden poles which have been treated with chemicals.

For construction projects it undertakes, the Department of Veterans Affairs discusses in NEPA documents and implements pollution prevention measures such as oil separation in storm water drainage of parking structures, soil erosion and sedimentation controls, and the use of recycled asphalt.

**Office Programs**

Many agencies, including the Department of Agriculture's Economic Research Service and Soil Conservation Service, Department of the Army, Department of the Interior, Consumer Product Safety Commission, and Tennessee Valley Authority, have implemented pollution

prevention initiatives in their daily office activities. These initiatives embrace recycling programs covering items such as paper products (e.g., white paper, newsprint, cardboard), aluminum, waste oil, batteries, tires, and scrap metal; procurement and use of "environmentally safe" products and products with recycled material content (e.g., batteries, tires, cement mixed with fly ash and recycled oil, plastic picnic tables); purchase and use of alternative-fueled vehicles in agency fleets; and encouragement of carpooling with employee education programs and locator assistance.

In planning the relocation of its headquarters, the Consumer Product Safety Commission (CPSC) is considering only buildings located within walking distance of the subway system as possible sites. By conveniently siting its headquarters facility, CPSC expects to triple the number of employees relying on public transportation for commuting and to substantially increase the number of agency visitors using public transportation for attendance at agency meetings or events.

**Waste Reduction**

The Department of Energy (DOE) has instituted an aggressive waste minimization program which has produced substantial results. DOE's nuclear facilities have reduced the sizes of radiological control areas in order to reduce low-level radioactive waste. Other facilities have scrap metal segregation programs which reduce solid waste and allow useable material to be sold and recycled. DOE facilities also are replacing solvents and cleaners containing hazardous materials with less or non-toxic materials.

The Department of the Army has a similar waste reduction program and is vigorously pursuing source reduction changes to industrial processes to eliminate toxic chemical usage that ultimately generates hazardous wastes. The Army's program includes material substitution techniques as well as alternative application technologies. For example, in an EIS and subsequent record of decision for proposed actions on Kwajalein Atoll, the Army committed to segregate solvents from waste oils in the Kwajalein power plant which will prevent continual contamination of large quantities of used engine oil with solvents. Oil recycling equipment will also be installed on power plant diesel generators allowing reuse of waste oil.

The Federal Aviation Administration (FAA) has also implemented a waste minimization program designed to eliminate or reduce the amount and toxicity of wastes generated by all National Airspace System facilities. This program includes using chemical life extenders and recycling additives to reduce the quantity and frequency of wastes generated at FAA facilities and providing chlorofluorocarbon (CFC) recycling equipment to each sector in the FAA to that CFCs used in industrial chillers, refrigeration equipment, and air conditioning units can be recaptured, recycled, and reused.

**Inventory Control**

DOE is improving procurement and inventory control of chemicals and control of materials entering radiologically controlled areas. This can minimize or prevent non-radioactive waste from entering a radioactive waste stream, thus reducing the amount of low-level waste needing disposal.

In two laboratories operated by the Consumer Product Safety Commission, pollution prevention is being practiced by limiting quantities of potentially hazardous materials on hand.

The Tennessee Valley Authority's nuclear program has established a chemical traffic control program to control the use and disposal of hazardous materials. As a result of the program,
hazardous materials are being replaced by less hazardous alternatives and use of hazardous chemicals and products has been reduced by 66%.

2. Federal Approvals

In addition to initiating their own policies and projects, federal agencies provide funding in the form of loans, contracts, and grants and/or issue licenses, permits, and other approvals for projects initiated by private parties and state and local government agencies. As with their own projects and consistent with their statutory authorities, federal agencies could urge private applicants to include pollution prevention considerations into the siting, design, construction, and operation of privately owned and operated projects. These considerations could then be included in the NEPA documentation prepared for the federally-funded or federally-approved project, and any pollution prevention commitments made by the applicant would be monitored and enforced by the agency. Thus, using their existing regulatory authority, federal agencies can effectively promote pollution prevention throughout the private sector. Below are some existing examples of incorporation of pollution prevention into federal approvals:

The Nuclear Regulatory Commission has required licensees to perform mitigation measures during nuclear power plant construction. These measures include controlling drainage by means of ditches, berms, and sedimentation basins; prompt revegetation to control erosion; and stockpiling and reusing topsoil. Similarly, mitigation measures required during the construction of transmission facilities include the removal of vegetation by cutting and trimming rather than bulldozing and avoiding multiple stream crossings, wet areas, and areas with steep slopes and highly erodible soils. The mitigation conditions in licenses serve to prevent pollution from soil erosion and to minimize waste from construction.

In the implementation of its programs, the Department of Agriculture encourages farmers to follow management practices designed to reduce the environmental impacts of farming. Such practices include using biological pest controls and integrated pest management to reduce the toxicity and application of pesticides, controlling nutrient loadings by installing buffer strips around streams and replacing inorganic fertilizers with animal manures, and reducing soil erosion through modified tillage and irrigation practices. Further, encouraging the construction of structures such as waste storage pits, terraces, irrigation water conveyances or pipelines, and lined or grassed waterways reduces runoff and percolation of chemicals into the groundwater.

The Department of Transportation's Maritime Administration is conducting research on a Shipboard Piloting Expert System. If installed on vessels, this system would provide a navigation and pilotage assistance capability which would instantly provide warnings to a ship master or pilot of pending hazards and recommended changes in vessel heading to circumvent the hazard. The system could prevent tanker collisions or groundings which cause catastrophic releases of pollutants.

The Department of the Interior's Minerals Management Service (MMS) prepares EISs which examine the effects of potential outer continental shelf (OCS) oil exploration on the environment and the various mitigation measures that may be needed to minimize such effects. Some pollution prevention measures which are analyzed in these EISs and which have been adopted for specific lease sales include measures designed to minimize the effects of drilling fluids discharge, waste disposal, oil spills, and air emissions. For example, MMS requires OCS operations to use curbs, gutters, drip pans, and drains on drilling platforms and rig decks to collect contaminants such as oil which may be recycled.

**Incorporating Pollution Prevention into NEPA Documents**
NEPA and the CEQ regulations establish a mechanism for building environmental considerations into federal decisionmaking. Specifically, the regulations require federal agencies to "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." 40 CFR § 1501.2. This mechanism can be used to incorporate pollution prevention in the early planning stages of a proposal.

In addition, prior to preparation of an EIS, the federal agency proposing the action is required to conduct a scoping process during which the public and other federal agencies are able to participate in discussions concerning the scope of issues to be addressed in the EIS. See 40 CFR § 1501.7. Including pollution prevention as an issue in the scoping process would encourage those outside the federal agency to provide insights into pollution prevention technologies which might be available for use in connection with the proposal or its possible alternatives.

Pollution prevention should also be an important component of mitigation of the adverse impacts of a federal action. To the extent practicable, pollution prevention considerations should be included in the proposed action and in the reasonable alternatives to the proposal, and should be addressed in the environmental consequences section of the EIS. See 40 CFR §§ 1502.14(f), 1502.16(h), and 1508.20.

Finally, when an agency reaches a decision on an action for which an EIS was completed, a public record of decision must be prepared which provides information on the alternatives considered and the factors weighed in the decisionmaking process. Specifically, the agency must state whether all practicable means to avoid or minimize environmental harm were adopted, and if not, why they were not. A monitoring and enforcement program must be adopted if appropriate for mitigation. See 40 CFR § 1505.2(c). These requirements for the record of decision and for monitoring and enforcement could be an effective means to inform the public of the extent to which pollution prevention is included in a decision and to outline how pollution prevention measures will be implemented.

A discussion of pollution prevention may also be appropriate in an EA. While an EA is designed to be a brief discussion of the environmental impacts of a particular proposal, the preparer could also include suitable pollution prevention techniques as a means to lessen any adverse impacts identified. See 40 CFR § 1508.9. Pollution prevention measures which contribute to an agency's finding of no significant impact must be carried out by the agency or made part of a permit or funding determination.

**Conclusion**

Pollution prevention can provide both environmental and economic benefits, and CEQ encourages federal agencies to consider pollution prevention principles in their planning and decisionmaking processes in accordance with the policy goals of NEPA Section 101 and to include such considerations in documents prepared pursuant to NEPA Section 102, as appropriate. In its role as a regulator, a policymaker, a manager of federal lands, a grantor of federal funds, a consumer, and an operator of federal facilities which can create pollution, the federal government is in a position to help lead the nation's efforts to prevent pollution before it is created. The federal agencies should act now to develop and incorporate pollution prevention considerations in the full range of their activities.

David B. Struhs
For a discussion of such strategies and activities, see the Council on Environmental Quality's 20th Environmental Quality report, at 215-257 (1989); 21st Environmental Quality report, at 79-133 (1990); and 22nd Environmental Quality report, at 151-158 (1991). It should be noted that EPA, in accordance with the Pollution Prevention Act of 1990 (Pub. L. No. 101-508, §§ 6601 et seq.), uses a different definition, one which describes pollution prevention in terms of source reduction and other practices which reduce or eliminate the creation of pollutants through increased efficiency in the use of raw materials, energy, water, or other resources or the protection of natural resources by conservation. "Source reduction" is defined as any practice which reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment prior to recycling, treatment, or disposal and which reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants. Under Section 309 of the Clean Air Act (42 USC § 7609), EPA is directed to review and comment on all major federal actions, including construction projects, proposed legislation, and proposed regulations. In addition, the Pollution Prevention Act of 1990 directs EPA to encourage source reduction practices in other federal agencies. EPA is using this authority to identify opportunities for pollution prevention in the federal agencies and to suggest how pollution prevention concepts can be addressed by the agencies in their EISs and incorporated into the wide range of government activities. As a guidance document, this memorandum does not impose any new legal requirements on the agencies and does not require any changes to be made to any existing agency environmental regulations.
The purpose of this guidance is to clarify the applicability of the National Environmental Policy Act (NEPA) to proposed federal actions in the United States, including its territories and possessions, that may have transboundary effects extending across the border and affecting another country's environment. While the guidance arises in the context of negotiations undertaken with the governments of Mexico and Canada to develop an agreement on transboundary environmental impact assessment in North America, the guidance pertains to all federal agency actions that are normally subject to NEPA, whether covered by an international agreement or not.

It is important to state at the outset the matters to which this guidance is addressed and those to which it is not. This guidance does not expand the range of actions to which NEPA currently applies. An action that does not otherwise fall under NEPA would not now fall under NEPA by virtue of this guidance. Nor does this guidance apply NEPA to so-called "extraterritorial actions"; that is, U.S. actions that take place in another country or otherwise outside the jurisdiction of the United States. The guidance pertains only to those proposed actions currently covered by NEPA that take place within the United States and its territories, and it does not change the applicability of NEPA law, regulations or case law to those actions. Finally, the guidance is consistent with long-standing principles of international law.

NEPA LAW AND POLICY
NEPA declares a national policy that encourages productive and enjoyable harmony between human beings and their environment, promotes efforts which will prevent or eliminate damage to the environment and biosphere, stimulates the health and welfare of human beings, and enriches the understanding of ecological systems. Section 102(1) of NEPA “authorizes and directs that, to the fullest extent possible . . . . the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [the] Act.” NEPA’s explicit statement of policies calls for the federal government “to use all practical means and measures . . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . .” In addition, Congress directed federal agencies to “use all practical means . . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . . attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” Section 102(2)(C) requires federal agencies to assess the environmental impacts of and alternatives to proposed major federal actions significantly affecting the quality of the human environment. Congress also recognized the “worldwide and long-range character of environmental problems” in NEPA and directed agencies to assist other countries in anticipating and preventing a decline in the quality of the world environment.

Neither NEPA nor the Council on Environmental Quality’s (CEQ) regulations implementing the procedural provisions of NEPA define agencies’ obligations to analyze effects of actions by administrative boundaries. Rather, the entire body of NEPA law directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, regardless of where those impacts might occur. Agencies must analyze indirect effects, which are caused by the action, are later in time or farther removed in distance, but are still reasonably foreseeable, including growth-inducing effects and related effects on the ecosystem, as well as cumulative effects. Case law interpreting NEPA has reinforced the need to analyze impacts regardless of geographic boundaries within the United States, and has also assumed that NEPA requires analysis of major federal actions that take place entirely outside of the United States but could have environmental effects within the United States.

Courts that have addressed impacts across the United States’ borders have assumed that the same rule of law applies in a transboundary context. In Swinomish Tribal Community v. Federal Energy Regulatory Commission, Canadian intervenors were allowed to challenge the adequacy of an environmental impact statement (EIS) prepared by FERC in connection with its approval of an amendment to the City of Seattle’s license that permitted raising the height of the Ross Dam on the Skagit River in Washington State. Assuming that NEPA required consideration of Canadian impacts, the court concluded that the report had taken the requisite “hard look” at Canadian impacts. Similarly, in Wilderness Society v.
Morton, the court granted intervenor status to Canadian environmental organizations that were challenging the adequacy of the trans-Alaska pipeline EIS. The court granted intervenor status because it found that there was a reasonable possibility that oil spill damage could significantly affect Canadian resources, and that Canadian interests were not adequately represented by other parties in the case.

In sum, based on legal and policy considerations, CEQ has determined that agencies must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States.

PRACTICAL CONSIDERATIONS

CEQ notes that many proposed federal actions will not have transboundary effects, and cautions agencies against creating boilerplate sections in NEPA analyses to address this issue. Rather, federal agencies should use the scoping process to identify those actions that may have transboundary environmental effects and determine at that point their information needs, if any, for such analyses. Agencies should be particularly alert to actions that may affect migratory species, air quality, watersheds, and other components of the natural ecosystem that cross borders, as well as to interrelated social and economic effects. Should such potential impacts be identified, agencies may rely on available professional sources of information and should contact agencies in the affected country with relevant expertise.

Agencies have expressed concern about the availability of information that would be adequate to comply with NEPA standards that have been developed through the CEQ regulations and through judicial decisions. Agencies do have a responsibility to undertake a reasonable search for relevant, current information associated with an identified potential effect. However, the courts have adopted a “rule of reason” to judge an agency's actions in this respect, and do not require agencies to discuss “remote and highly speculative consequences”. Furthermore, CEQ’s regulation at 40 CFR 1502.22 dealing with incomplete or unavailable information sets forth clear steps to evaluating effects in the context of an EIS when information is unobtainable. Additionally, in the context of international agreements, the parties may set forth a specific process for obtaining information from the affected country which could then be relied upon in most circumstances to satisfy agencies' responsibility to undertake a reasonable search for information.

Agencies have also pointed out that certain federal actions that may cause transboundary effects do not, under U.S. law, require compliance with Sections 102(2)(C) and 102(2)(E) of NEPA. Such actions include actions that are statutorily exempted from NEPA, Presidential actions, and individual actions for which procedural compliance with NEPA is excused or modified by virtue of the CEQ regulations and various judicial doctrines interpreting NEPA. Nothing in this guidance changes the agencies' ability to rely on those rules and doctrines.
INTERNATIONAL LAW

It has been customary law since the 1905 Trail Smelter Arbitration that no nation may undertake acts on its territory that will harm the territory of another state\(^2\). This rule of customary law has been recognized as binding in Principle 21 of the Stockholm Declaration on the Human Environment and Principle 2 of the 1992 Rio Declaration on Environment and Development. This concept, along with the duty to give notice to others to avoid or avert such harm, is incorporated into numerous treaty obligations undertaken by the United States. Analysis of transboundary impacts of federal agency actions that occur in the United States is an appropriate step towards implementing those principles.

CONCLUSION

NEPA requires agencies to include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States. Such effects are best identified during the scoping stage, and should be analyzed to the best of the agency’s ability using reasonably available information. Such analysis should be included in the EA or EIS prepared for the proposed action.

1 The negotiations were authorized in Section 10.7 of the North American Agreement on Environmental Cooperation, which is a side agreement to the North American Free Trade Agreement. The guidance is also relevant to the ECE Convention on Environmental Impact Assessment in a Transboundary Context, signed in Espoo, Finland in February, 1991, but not yet in force.

2 For example, NEPA does apply to actions undertaken by the National Science Foundation in the Antarctica. Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993).

3 42 USC 4321.

4 42 USC 4332(1).

5 42 USC 4331(a).

6 42 USC 4331(b)(3).

7 42 USC 4332(2)(C).

8 42 USC 4332(2)(F).

9 40 CFR 1508.8(b).

10 40 CFR 1508.7.

11 See, for example, Sierra Club v. U.S. Forest Service, 46 F.3d 835 (8th Cir. 1995); Resources Ltd., Inc. v. Robertson, 35 F.3d 1300 and 8 F.3d 1394 (9th Cir. 1993); Natural Resources Defense Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988); County of Josephine v. Watt, 539 F.Supp. 696 (N.D. Cal. 1982).

627 F.2d 499 (D.C. Cir. 1980).

463 F.2d 1261 (D.C. Cir. 1972).

40 CFR 1501.7. Scoping is a process for determining the scope of the issues to be addressed and the parties that need to be involved in that process prior to writing the environmental analyses.

It is a well accepted rule that under NEPA, social and economic impacts by themselves do not require preparation of an EIS. 40 CFR 1508.14.

Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974). See also, Northern Alaska Environmental Center v. Lujan, 961 F.2d 886, 890 (9th Cir. 1992); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992); San Luis Obispo Mothers for Peace v. N.R.C., 751 F.2d 1287, 1300 (D.C. Cir. 1984); Scientists Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

See Preamble to Amendment of 40 CFR 1502.22, deleting prior requirement for “worst case analysis” at 51 Federal Register 15625, April 25, 1986, for a detailed explanation of this regulation.

For example, agencies may contact CEQ for approval of alternative arrangements for compliance with NEPA in the case of emergencies. 40 CFR 1506.11.

For example, courts have recognized that NEPA does not require an agency to make public information that is otherwise properly classified information for national security reasons, Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981).

Trail Smelter Arbitration, U.S. v. Canada, 3 UN Rep. Int'l Arbit. Awards 1911 (1941). The case involved a smelter in British Columbia that was causing environmental harm in the state of Washington. The decision held that “under principles of International Law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is described by clear and convincing injury.” Id. at 1965. Also see the American Law Institute’s Restatement of the Foreign Relations Law of the United States 3d, Section 601, (“State obligations with respect to environment of other States and the common environment”).
MEMORANDUM FOR THE HEADS OF FEDERAL AGENCIES

January 30, 2002

FROM: JAMES CONNAUGHTON, Chair
SUBJECT: COOPERATING AGENCIES IN IMPLEMENTING THE PROCEDURAL REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

The purpose of this Memorandum is to ensure that all Federal agencies are actively considering designation of Federal and non-federal cooperating agencies in the preparation of analyses and documentation required by the National Environmental Policy Act (NEPA), and to ensure that Federal agencies actively participate as cooperating agencies in other agency’s NEPA processes. The CEQ regulations addressing cooperating agencies status (40 C.F.R. §§ 1501.6 & 1508.5) implement the NEPA mandate that Federal agencies responsible for preparing NEPA analyses and documentation do so "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. (42 U.S.C. §§ 4331(a), 4332(2)). Despite previous memoranda and guidance from CEQ, some agencies remain reluctant to engage other Federal and non-federal agencies as a cooperating agency. In addition, some Federal agencies remain reluctant to assume the role of a cooperating agency, resulting in an inconsistent implementation of NEPA.

Studies regarding the efficiency, effectiveness, and value of NEPA analyses conclude that stakeholder involvement is important in ensuring decisionmakers have the environmental information necessary to make informed and timely decisions efficiently. Cooperating agency status is a major component of agency stakeholder involvement that neither enlarges nor diminishes the decisionmaking authority of any agency involved in the NEPA process. This memo does not expand requirements or responsibilities beyond those found in current laws and regulations, nor does it require an agency to provide financial assistance to a cooperating agency.

The benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with other Federal, State, Tribal and local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra- and intergovernmental trust (e.g., partnerships at the community level) and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies’ ability to adopt environmental documents. It is incumbent on Federal agency officials to identify as early as practicable in the environmental planning process those Federal, State, Tribal and local government agencies that have jurisdiction by law and special expertise with respect to all reasonable alternatives or significant environmental, social or economic impacts associated with a proposed action that requires NEPA analysis.

The Federal agency responsible for the NEPA analysis should determine whether such agencies are interested and appear capable of assuming the responsibilities of becoming a cooperating agency under 40 C.F.R. § 1501.6. Whenever invited Federal, State, Tribal and local agencies elect not to become cooperating agencies, they should still be considered for inclusion in interdisciplinary teams engaged in the NEPA process and on distribution lists for review and comment on the NEPA documents. Federal
agencies declining to accept cooperating agency status in whole or in part are obligated to respond to the request and provide a copy of their response to the Council. (40 C.F.R. § 1501.6(c)).

In order to assure that the NEPA process proceeds efficiently, agencies responsible for NEPA analysis are urged to set time limits, identify milestones, assign responsibilities for analysis and documentation, specify the scope and detail of the cooperating agency’s contribution, and establish other appropriate ground-rules addressing issues such as availability of pre-decisional information. Agencies are encouraged in appropriate cases to consider documenting their expectations, roles and responsibilities (e.g., Memorandum of Agreement or correspondence). Establishing such a relationship neither creates a requirement nor constitutes a presumption that a lead agency provides financial assistance to a cooperating agency.

Once cooperating agency status has been extended and accepted, circumstances may arise when it is appropriate for either the lead or cooperating agency to consider ending cooperating agency status. This Memorandum provides factors to consider when deciding whether to invite, accept or end cooperating agency status. These factors are neither intended to be all-inclusive nor a rote test. Each determination should be made on a case-by-case basis considering all relevant information and factors, including requirements imposed on State, Tribal and local governments by their governing statutes and authorities. We rely upon you to ensure the reasoned use of agency discretion and to articulate and document the bases for extending, declining or ending cooperating agency status. The basis and determination should be included in the administrative record.

CEQ regulations do not explicitly discuss cooperating agencies in the context of Environmental Assessments (EAs) because of the expectation that EAs will normally be brief, concise documents that would not warrant use of formal cooperating agency status. However, agencies do at times – particularly in the context of integrating compliance with other environmental review laws – develop EAs of greater length and complexity than those required under the CEQ regulations. While we continue to be concerned about needlessly lengthy EAs (that may, at times, indicate the need to prepare an Environmental Impact Statement (EIS)), we recognize that there are times when cooperating agencies will be useful in the context of EAs. For this reason, this guidance is recommended for preparing EAs. However, this guidance does not change the basic distinction between EISs and EAs set forth in the regulations or prior guidance.

To measure our progress in addressing the issue of cooperating agency status, by October 31, 2002 agencies of the Federal government responsible for preparing NEPA analyses (e.g., the lead agency) shall provide the first bi-annual report regarding all EISs and EAs begun during the six-month period between March 1, 2002 and August 31, 2002. This is a periodic reporting requirement with the next report covering the September 2002 – February 2003 period due on April 30, 2003. For EISs, the report shall identify: the title; potential cooperating agencies; agencies invited to participate as cooperating agencies; agencies that requested cooperating agency status; agencies which accepted cooperating agency status; agencies whose cooperating agency status ended; and the current status of the EIS. A sample reporting form is at attachment 2. For EAs, the report shall provide the number of EAs and those involving cooperating agency(s) as described in attachment 2. States, Tribes, and units of local governments that have received authority by Federal law to assume the responsibilities for preparing NEPA analyses are encouraged to comply with these reporting requirements.

If you have any questions concerning this memorandum, please contact

June 24, 2005

MEMORANDUM

FROM: JAMES L. CONNAUGHTON
CHAIRMAN

TO: HEADS OF FEDERAL AGENCIES

RE: GUIDANCE ON THE CONSIDERATION OF PAST ACTIONS IN CUMULATIVE EFFECTS ANALYSIS

I. Introduction

In this Memorandum, the Council on Environmental Quality (CEQ) provides guidance on the extent to which agencies of the Federal government are required to analyze the environmental effects of past actions when they describe the cumulative environmental effect of a proposed action 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, 40 C.F.R. parts 1500-1508. CEQ's interpretation of NEPA is entitled to deference. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

II. Guidance

The environmental analysis required under NEPA is forward-looking, in that it focuses on the potential impacts of the proposed action that an agency is considering. Thus, review of past actions is required to the extent that this review informs agency decisionmaking regarding the proposed action. This can occur in two ways:

First, the effects of past actions may warrant consideration in the analysis of the cumulative effects of a proposal for agency action. CEQ interprets NEPA and CEQ's NEPA regulations on cumulative effects as requiring analysis and a concise description of the identifiable present effects of past actions to the extent that they are relevant and useful in analyzing whether the reasonably foreseeable effects of the agency proposal for action and its alternatives may have a continuing, additive and significant relationship to those effects. In determining what information is necessary for a cumulative effects analysis, agencies should use scoping to focus on the extent to which information is "relevant to reasonably foreseeable significant adverse impacts," is "essential to a reasoned choice among alternatives," and can be obtained without exorbitant cost. 40 CFR 1502.22. Based on scoping, agencies have discretion to determine whether, and to what extent, information about the specific nature, design, or present effects of a past action is useful for the agency's analysis of the effects of a proposal for agency action and its reasonable alternatives.
Agencies are not required to list or analyze the effects of individual past actions unless such information is necessary to describe the cumulative effect of all past actions combined. Agencies retain substantial discretion as to the extent of such inquiry and the appropriate level of explanation. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77 (1989). Generally, agencies can conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions without delving into the historical details of individual past actions.

Second, experience with and information about past direct and indirect effects of individual past actions may also be useful in illuminating or predicting the direct and indirect effects of a proposed action. However, these effects of past actions may have no cumulative relationship to the effects of the proposed action. Therefore, agencies should clearly distinguish analysis of direct and indirect effects based on information about past actions from a cumulative effects analysis of past actions.

III. Discussion

The CEQ regulations for the implementation of NEPA define cumulative effects consistent with the Supreme Court’s reading of NEPA in *Kleppe v. Sierra Club*, 427 U.S. 390, 413-414 (1976). “Cumulative impact” is defined in CEQ’s NEPA regulations 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 . . .” 40 CFR 1508.7. CEQ interprets this regulation as referring only to the cumulative impact of the direct and indirect effects of the proposed action and its alternatives when added to the aggregate effects of past, present, and reasonably foreseeable future actions.

Agencies should be guided in their cumulative effects analysis by the scoping process, in which agencies identify the scope and “significant” issues to be addressed in an environmental impact statement. 40 CFR 1500.1(b), 1500.4(g), 1501.7, 1508.25. In the context of scoping, agencies typically decide the extent to which “it is reasonable to anticipate a cumulatively significant impact on the environment.” 40 CFR 1508.27(b)(7). Agencies should ensure that their NEPA process produces environmental information that is useful to decisionmakers and the public by reducing the “accumulation of extraneous background data” and by “emphasizing real environmental issues and alternatives.” 40 CFR 1500.2(b). Accordingly, the NEPA process requires agencies to identify “the significant environmental issues deserving study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement” at an early stage of agency planning. 40 CFR 15001.1(d). The Supreme Court has also emphasized that agencies may properly limit the scope of their cumulative effects analysis based on practical considerations. *Kleppe*, 427 U.S at 414. The CEQ regulations provide for explicit documentation of such practical considerations when there is incomplete or unavailable information that is relevant to reasonably foreseeable significant adverse impacts. 40 CFR 1502.22. The extent and form of the information needed to analyze appropriately the cumulative effects of a proposed action and alternatives under NEPA varies widely and must be determined by the federal agency proposing the action on a case-by-case basis.

The analysis of cumulative effects begins with consideration of the direct and indirect effects on the environment that are expected or likely to result from the alternative proposals for
agency action. Agencies then look for present effects of past actions that are, in the judgment of the agency, relevant and useful because they have a significant cause-and-effect relationship with the direct and indirect effects of the proposal for agency action and its alternatives. CEQ regulations do not require the consideration of the individual effects of all past actions to determine the present effects of past actions. Once the agency has identified those present effects of past actions that warrant consideration, the agency assesses the extent that the effects of the proposal for agency action or its alternatives will add to, modify, or mitigate those effects. The final analysis documents an agency assessment of the cumulative effects of the actions considered (including past, present, and reasonably foreseeable future actions) on the affected environment.

With respect to past actions, during the scoping process and subsequent preparation of the analysis, the agency must determine what information regarding past actions is useful and relevant to the required analysis of cumulative effects. Cataloging past actions and specific information about the direct and indirect effects of their design and implementation could in some contexts be useful to predict the cumulative effects of the proposal. The CEQ regulations, however, do not require agencies to catalogue or exhaustively list and analyze all individual past actions. Simply because information about past actions may be available or obtained with reasonable effort does not mean that it is relevant and necessary to inform decisionmaking.

IV. Tools for NEPA Practitioners

a. Scoping:

It is not practical to analyze how the cumulative effects of an action interact with the universe; the analysis of environmental effects must focus on the aggregate effects of past, present and reasonably foreseeable future actions that are truly meaningful. Thus, analysts must narrow the focus of the cumulative effects analysis to effects of significance to the proposal for agency action and its alternatives, based on thorough scoping. A specific objective of scoping is to save time in the overall process by helping to ensure that draft statements adequately address the effects of the proposed action and alternatives that should be addressed. See Scoping Guidance (CEQ 1981) (http://ceq.eh.doe.gov/nepa/regs/guidance.html). Scoping provides the agency the opportunity to focus in on those cumulative effects that may be significant. The scope of the cumulative impact analysis is related to the magnitude of the environmental impacts of the proposed action. Proposed actions of limited scope typically do not require as comprehensive an assessment of cumulative impacts as proposed actions that have significant environmental impacts over a large area. Proposed actions that are typically finalized with a finding of no significant impact usually involve only a limited cumulative impact assessment to confirm that the effects of the proposed action do not reach a point of significant environmental impacts. Except in extraordinary circumstances, proposed actions that are categorically excluded from NEPA analysis do not involve cumulative impact analyses.

b. Incomplete and Unavailable Information:

The purpose of 40 CFR 1502.22 is to disclose the fact of incomplete or unavailable information, to acquire information if it is “relevant to reasonably foreseeable significant adverse impacts” and “essential to a reasoned choice among alternatives,” and to advance decision-making.
even in the absence of all information regarding reasonably foreseeable effects. The focus of this provision is, first and foremost, on “significant adverse impacts.” The agency must find that the incomplete information is relevant to a “reasonably foreseeable” and “significant” impact before the agency is required to comply with 40 CFR 1502.22. If the incomplete cumulative effects information meets that threshold, the agency must consider the “overall costs” of obtaining the information. 40 CFR 1502.22(a). The term “overall costs” encompasses financial costs and other costs such as costs in terms of time (delay), program and personnel commitments. The requirement to determine if the “overall costs” of obtaining information is exorbitant should not be interpreted as a requirement to weigh the cost of obtaining the information against the severity of the effects, or to perform a cost-benefit analysis. Rather, the agency must assess overall costs in light of agency environmental program needs.

c. Programmatic Evaluations

In geographic settings where several Federal actions are likely to have effects on the same environmental resources it may be advisable for the lead Federal agencies to cooperate to provide historical or other baseline information relating to the resources. This can be done either through a programmatic NEPA analysis or can be done separately, such as through a joint inventory or planning study. The results can then be incorporated by reference into NEPA documents prepared for specific Federal actions so long as the programmatic analysis or study is reasonably available to the interested public.

d. Environmental Management Systems:

Agencies are encouraged at their discretion to consider whether programmatic coordination of cumulative effects analysis can be assisted through implementation of environmental management systems (EMS). See Executive Order 13148, 65 Fed. Reg. 24,595 (April 21, 2000); Memorandum from the Chairman of CEQ and the Director of the Office of Management and Budget to heads of all Federal agencies (http://www.whitehouse.gov/ceq/memoranda01.html). Pursuant to Executive Order 13148, agencies that choose to use an EMS to improve their cumulative analysis may find that the EMS can be designed and implemented to more efficiently meet NEPA requirements, improve public participation in the NEPA process, and provide a framework for cumulative effects analysis and adaptive management. By managing information collection on an ongoing basis, an EMS can provide a more systematic approach to agencies’ identification and management of environmental conditions and obligations. Agencies can use an EMS to confirm assumptions, track performance, and increase confidence in their assessment of cumulative environmental effects.

d. Direct and Indirect Effects:

In some cases, based on scoping, information about the effects of past actions that were similar to the proposed action may be useful in describing the possible effects of the proposed action. In these circumstances, agencies should consider using available information about the effects of individual past actions that help illuminate or predict the direct or indirect effects of the proposed action and its alternatives. Agencies should clearly distinguish their use of past experience in direct and indirect effects analysis from their cumulative effects analysis.
Request for Public Comment on Bilateral Textile Consultations With the Government of Turkey on Category 342/642


On May 27, 1987, the United States Government, under Article 3 of the Arrangement Regarding International Trade in Textiles and in accordance with section 204 of the Agricultural Act of 1986, requested the Government of Turkey to enter into consultations concerning exports to the United States of certain cotton and man-made fiber textile products, produced or manufactured in Turkey.

The purpose of this notice is to advise that, if no solution is agreed upon in consultations with Turkey, the Committee for the Implementation of Textile Agreements may later establish limits for the entry and withdrawal from warehouse for consumption of cotton and man-made fiber skirts in Category 342/642, produced or manufactured in Turkey and exported to the United States during the twelve-month period which began on May 27, 1987 and extends through May 26, 1988 at a level of 119,560 dozen.

A summary market statement for this category follows this notice.

Anyone wishing to comment or provide data or information regarding the treatment of this category is invited to submit such comments or information in ten copies to Mr. Ronald S. Levin, Acting Chairman, Committee for the Implementation of Textile Agreements, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230. Because the exact timing of the consultations is not yet certain, comments should be submitted promptly. Comments or information submitted in response to this notice will be available for public inspection in the Office of Textiles and Apparel, Room 3100, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, DC, and may be obtained upon request.

Further comment may be invited regarding particular comments or information received from the public which the Committee for the Implementation of Textile Agreements considers appropriate for further consideration.

The solicitation of comments regarding any aspect of the agreement or the implementation thereof is not a waiver in any respect of the exemption contained in 3 U.S.C. 353(a)(1) relating to matters which constitute "a foreign affairs function of the United States."

For information contact: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, Washington, DC 302-377-4212. For information on categories on which consultations have been requested call 302-377-9740.


Arthur Garett, Acting Chairman, Committee for the Implementation of Textile Agreements.

Market Statement

Category 342/642: Cotton and Man-Made Fiber Skirts; Turkey, May 1987

Summary and Conclusions

U.S. imports of Category 342/642 from Turkey were 119,560 dozen during the year ending February 1987, three times the 38,030 dozen imported a year earlier. During 1986, imports of Category 342/642 from Turkey reached 109,167 dozen compared to 31,350 dozen imported during 1985, a 92 percent increase. The market for Category 342/642 has been disrupted by imports. The sharp and substantial increase in imports from Turkey has contributed to this disruption. U.S. production and market share U.S. production of cotton and man-made fiber skirts declined five percent from 8,233 thousand dozen in 1985 to 7,805 thousand dozen in 1986. Comparison of government cuttings data for 1986 and 1985 indicates that 1986 production will be down four percent. The domestic manufacturers' share of this market fell from 75 percent in 1985 to 67 percent in 1986. The U.S. market share is expected to decrease further in 1986, to around 67 percent.


Duty Paid Value and U.S. Producer's Price

Approxiately 79 percent of Category 342/642 imports from Turkey during the year ending February 1987 entered under TSUSA numbers 864.5251—women's cotton woven skirts, not of corduroy, denim or velveteen, not ornamented; 864.5246—girls' cotton woven skirts, not of corduroy, denim or velveteen, not ornamented; and 864.3444 (formerly a part of 844.3446)—women's and girls' cotton knit skirts, not ornamented. TSUSA number 864.3262 alone represents 43 percent of Category 342/642 imports from Turkey.

These skirts entered the United States at landed duty-paid values below the U.S. producers' prices for comparable skirts.

COUNCIL ON ENVIRONMENTAL QUALITY

Implementation of National Environmental Policy Act; Council Recommendations

AGENCY: Council on Environmental Quality, Executive Office of the President.

ACTION: Information only. Recommendations of the Council on Environmental Quality regarding the proposed amendments to the Army Corps of Engineers' Procedures Implementing the National Environmental Policy Act.

SUMMARY: The Council on Environmental Quality's (CEQ) regulations for the Implementation of the National Environmental Policy Act (NEPA) includes procedures for referring to CEQ federal interagency disagreements concerning proposed major federal actions that might cause unsatisfactory environmental effects (40 CFR Part 1504).

On January 11, 1984, the U.S. Army Corps of Engineers published proposals for the Army NEPA procedures. On February 25, 1985, the Environmental Protection Agency referred the proposed amendments to CEQ. Following interagency negotiations, the matter was re-referred to CEQ by Administrator Thomas on December 11, 1986.

After extensive study of the proposed amendments to the Army regulations, including participation from all...
interested agencies and members of the public. CEQ has concluded its examination of the proposed amendments and has reached a consensus on findings and recommendations about the issues raised in the referral. To summarize those findings and recommendations:

The Army's current regulation addressing the scope of analysis can "federalize" "private or state or local" projects over which "Army" has "control or responsibility." CEQ finds that Army's proposal to amend this regulation is generally within reasonable, implementing agency discretion and that policy and management considerations favor amending the regulation to provide formal and consistent guidance to Army field personnel.

However, CEQ offers comments and recommendations to improve the usefulness of the Appendix B guidance to District Commanders charged with determining the scope of analysis. With respect to the amended regulation on purpose and need, CEQ finds that the proposal is adequate, but recommends that additional language be included in the amendment to the effect that the agency must, in all cases, exercise independent judgment regarding the public purpose and need of the proposal.

When preparing an environmental assessment, there is no legal requirement to include a specific reference to "water dependent activities" under the section 404(b)(1) guidelines in the Army's NEPA procedures. However, CEQ recommends that in the spirit of consistency with the CEQ regulations and as sound management policy, specifically to reduce duplication and paperwork and to increase efficient compliance with both NEPA and the Clean Water Act, the Army's procedures retain the requirement to integrate into the environmental impact analysis the alternatives to non-water dependent activities under section 404(b)(1).

CEQ finds that the Army's proposed regulation concerning page limits to be premature in that the Army has not presented any evidence demonstrating that there has been a conscious effort to abide by the CEQ page limit recommendations. CEQ recommends that the Army attempt concerted compliance with the CEQ regulation before proposing a reduced page limit length.

Dated: June 8, 1987.
A. Alan Hill
Chairman.
COUNCIL ON ENVIRONMENTAL QUALITY

Findings and Recommendations on Referral From U.S. Environmental Protection Agency Concerning Proposed Amendments to U.S. Army Corps of Engineers Procedures for Implementing the National Environmental Policy Act

Introduction

Section 309 of the Clean Air Act and the Council on Environmental Quality's (CEQ) regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA) direct the Administrator of the Environmental Protection Agency (EPA) to review and comment upon the environmental impacts of federal activities, including proposed regulations published by a department or agency. If, upon 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. (40 CFR 1504.1(b))

On January 11, 1984, the U.S. Army Corps of Engineers (Army) published proposed amendments to the Army NEPA procedures. On March 12, 1984, EPA submitted written comments to the Army pursuant to section 309 of the Clean Air Act. After several months of discussion between EPA and the Army, the Army transmitted draft final regulations to CEQ on January 28, 1985. The EPA determined that the proposed regulations were "unsatisfactory" and on February 25, 1985, referred the proposed amended regulations to the Council of Environmental Quality.

In his original letter referring the matter to CEQ, Administrator Lee Thomas stated that Army's proposal would have an adverse effect on EPA's program to review significant environmental impacts of proposed federal actions, and its ability to prevent unacceptable adverse effects of dredge and fill discharges under section 404 of the Clean Water Act. On April 15, 1986, after several extensions of time at the request of the Army, the Army responded to EPA's referral, stating that its latest proposal indicated a good faith effort to reach a compromise with EPA and was well within the range of reasonable agency discretion.

At the request of Army, CEQ returned the referral on May 1, 1986, to EPA for further negotiation by the referring and lead agencies. (40 CFR 1504.3[a])

However, further negotiations between Army and EPA were unsuccessful, and the disagreement was resubmitted to CEQ by EPA on December 11, 1986. In that letter, Administrator Thomas stated that:

"... EPA and [Army] continued working to resolve issues in the referral. We appreciated the opportunity to negotiate on the proposed regulatory language, but regret that there are outstanding unresolved substantive concerns which must be addressed."

"We see at a stage in this effort where the opportunity to initiate the Council's Sunshine Act authority... would help to expedite a mutually satisfactory resolution to the outstanding issues. The potential environmental consequences of these issues are so significant as to warrant comment from interested parties from outside of the lead and referring agencies."

Letter from the Honorable Lee M. Thomas, Administrator of Environmental Protection Agency to the Honorable A. Alan Hill, Chairman, Council on Environmental Quality, December 11, 1986.

CEQ commenced its consideration of this referral by announcing a series of Sunshine Act meetings to facilitate the participation of outside parties. On January 8, 1987, CEQ held a meeting, open to the public, for the purpose of being briefed by the CEQ-General Counsel on the issues raised in the referral. On January 12, 1987, CEQ held a second meeting, open to the public, to hear from the representatives of the Army, EPA, and other federal agencies regarding the issues raised in the referral. At a third meeting, held on February 5, 1987, members of the public had an opportunity to present views on the issues raised in the referral to CEQ. Finally, written comments were received by CEQ from December 23, 1986 to February 11, 1987. The Council carefully appreciates receiving the diverse views of all interested parties. The Council has made copies of information presented to it available to all interested parties.

Major Issues and Standard of Review

To facilitate its review, CEQ has identified four major issues in dispute: (1) Scope of analysis, or "small federal action" issue; (2) purpose and need; (3) analysis of alternatives in environmental assessments; and (4) page limits on environmental impact statements. These findings and recommendations will address each of these issues.

The issues raised in this referral contain elements of both law and policy. CEQ has arrived at its findings of law by considering the requirements of NEPA, the directives of Executive Order 11514,
as amended by Executive Order 11991 (Protection and Enhancement of Environmental Quality), and the CEQ regulations implementing the procedural provisions of NEPA. Further, CEQ has evaluated the issues in light of relevant case law and in light of the "rule of reason" as expressed in those cases.

CEQ's recommendations regarding the referral issues reflect both NEPA policy considerations and this Administration's policies towards regulatory reform, as well as CEQ's concern for efficient management of the NEPA process. CEQ is also opponent of the directive to the Army from the Presidential Task Force on Regulatory Relief, which states that:

"The Army will also adjust its own regulations to reduce substantially the time it currently takes to prepare Environmental Impact Statements and other documents required by the National Environmental Policy Act ("NEPA")." Regulatory Reform at the Army Regulatory Program Under Section 402 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, p. 3, transmitted by letter from Christopher Davis, Executive Director, Presidential Task Force on Regulatory Relief, to the Honorable William R. Fleming, Assistant Secretary of the Army (Civil Works), May 7, 1982.

There should be no confusion on the part of a federal agency as to what the goals of regulatory relief really are. It is not an exercise in relieving the Army or any other federal agency from fulfilling its procedural responsibilities under NEPA. The goal of regulatory relief is to relieve the private sector of governmental-induced and imposed regulatory burdens, delays, and expense that exceed what is clearly required by law. CEQ also notes that, at this time, it is not reviewing the proposed regulations for minor, technical changes. Each review will take place after the proposed revisions to the Army's regulations are submitted to CEQ under 40 CFR 1507.3(a) of the CEQ NEPA regulations for review for conformity with NEPA and the CEQ regulations.

Findings and Recommendations

1. Scope of Analysis:

Abstract

The Army's current regulation addressing the scope of analysis can be "federalize" private or state or local projects over which, absent one Army permit, the federal government has neither control or responsibility. CEQ finds that Army's proposal to amend this regulation is generally within reasonable, implementing agency discretion and that policy and management considerations favor amending the regulation to provide formal and consistent guidance to Corps field personnel.

However, CEQ offers comments and recommendations to improve the usefulness of the Appendix B guidance to District Engineers charged with determining the scope of analysis.

The issue before us is the Army's guidance to its District Commanders for determining the scope of analysis of impacts and alternatives for purposes of NEPA compliance when the proposed federal action is an Army Corps of Engineers permit. Generally speaking, the permit actions subject to this guidance and address fill permits under section 404 of the Clean Water Act and section 10 permits under the Rivers and Harbors Act of 1899.

The current Army regulation reads, in relevant part:

"The EA [Environmental Assessment] shall be a brief document (should normally not exceed 15 pages) primarily focusing on whether or not the entire project subject to the permit requirement could have significant effects on the environment . . . ." (For example, where a utility company is applying for a permit to construct an outfall pipe from a proposed power plant, the EA must assess the direct and indirect and environmental effects and alternatives of the entire plant) 36 CFR Part 200, Appendix B, Section 8(a).

The proposed Army regulation reads:

"Scope and Analysis"

"(1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district commander should establish the scope of the NEPA document (e.g., the EA or EIS [Environmental Impact Statement]) to address the impacts of the specific activity requiring a Department of the Army permit and portions of the entire project over which the district commander has sufficient control and responsibility for the environmental review.

"(2) The district commander is considered to have control and responsibility for portions of the project beyond the limits of the Army Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action."

"(3) For those regulated activities which comprise merely a link in a transportation or utility transmission project, the scope of analysis should address the specific activity requiring a Department of the Army permit and any other portion of the project that is within the control or responsibility of the [Army] Corps of Engineers. . . ." 36 CFR Part 200, Appendix B, Section 7(b).

The Army's current regulation addressing the scope of analysis can "federalize" private or state or local projects over which, absent one Army permit, the federal government has neither control or responsibility. The Army has regarded the current regulation as overly expensive, and, indeed, has implemented it by employing a rule of reason and common sense. The federal courts have also evaluated the proper scope of analysis by examining the facts of a particular case. Thus, in WinnebaBo Tribe of Nebraska v. Ray, 621 F.2d 269 (9th Cir. 1980), cert. denied, 450 U.S. 936 (1980), the United States Court of Appeals for the Eighth Circuit determined that an EA prepared by the Army for a Section 10 permit under the Rivers and Harbors Act for a river-crossing portion of a proposed transmission line need not examine the impacts of and alternatives to the entire transmission line. In that case, the river-crossing portion of the line was approximately 1.25 miles out of 67 miles. Given the facts surrounding the construction of that particular transmission line (for example, no direct or indirect federal funding for the project), the court found that the Army did not have such sufficient control and responsibility over the entire project that nonfederal segments had to be included in the environmental assessment.

In Save the Bay, Inc. v. Corps of Engineers, 610 F.2d 322 (5th Cir.), cert. denied, 449 U.S. 900 (1980), the United States Court of Appeals for the Fifth Circuit upheld the Army's determination that the issuance of permits for installation of an effluent pipeline in navigable waters to serve a chemical manufacturing plant was not a major federal action significantly affecting the quality of the human environment, and thus did not require an EIS, even though the fact that the pipeline was to serve would have major impact upon the surrounding counties. This case has been frequently cited as support for the Army's current proposal. However, the court noted that it was not expressing an opinion as to the proper scope of an EIS should one have been necessary; rather, it was holding that the permit granting of the Army Corps of Engineers approval was not a major federal action as defined by NEPA. This should not necessarily be the case. The Army has reduced the number of EISs...
considerably and no appellate court has overturned the Army guidance based on the above two cases. Further, the type of action which was the subject of the Save the Bay case is now included with the Corps' system of nationwide permits and is categorically excluded from NEPA review. It is also important to note that no decision in any court has held that implementation of the current Army regulation is improper, inappropriate, or illegal.

Given this history of the implementation of the current Army regulation, the question has been asked—whether change this regulation at all? A key issue is whether the implementation—as opposed to the letter—of Army's current implementing procedures has been fair and reasonable and has not been unduly burdensome. While such an argument has some appeal, CEQ finds that the Army's procedure is not a reasonable implementing agency discretion and that policy and management considerations favor amending the regulation to provide fair and consistent guidance to the Army's field personnel.

However, CEQ offers the following comments and recommendations to improve the effectiveness of the Appendix B guidance to District Commanders charged with determining whether the scope of analysis would be confined to the direct, indirect and cumulative effects of (1) the Army's permit action only, or (2) the Army's action and all the portions of the currently proposed project having federal involvement or, (3) the entire project. In general, this will be determined by the degree of federal control and responsibility based on the facts and circumstances of each individual case. The proposed amendment enumerates four factors to be considered in making this determination. While these factors appear to be helpful in determining the extent of those actions within the Army's control and responsibility, they do not seem to us to be as useful in determining the extent of cumulative federal involvement. Also, they appear to envision only two opposite poles of federal involvement: those portions requiring the Army's permit and the entire project. Surely there will be cases that fall somewhere in between. It strikes us that the District Commander's determinations would be made more accurately and more consistently if a process were followed to explicitly take into account the extent of cumulative federal control and responsibility which may (depending on the facts in each case) extend beyond the Army's own control and responsibility to that of other federal agencies involved in the project. Once that "scope of action" is determined, the entire project's cumulative federal control and responsibility is determined by the Army to be sufficiently great, then the direct, indirect, and cumulative effects of such federal action would be subject to any NEPA or permit of NEPA compliance.

Specifically, CEQ offers the following comments on the specific factors proposed in the Army's Appendix B guidance:

(i) Whether the regulated activity comprises "merely a link" in a corridor type project (e.g., a transmission line or utility transmission project), CEQ finds that this factor is consistent with NEPA case law and recommends retention of this factor.

(ii) Whether there are alternatives available to the applicant that would not require an Army permit. CEQ observes that this factor is inappropriately narrow. There is no compelling reason why the existence of an alternative to the proposed action will not be considered in determining the applicability of NEPA.

(iii) Whether there are aspects of the water quality in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity. CEQ finds that this factor is consistent with NEPA and NEPA case law and proposes purposes of clarification. CEQ recommends adding specific examples to illustrate the application of this factor.

(iv) The extent to which the entire project will be within the Army's jurisdiction. This factor is consistent with the requirement determining the Army's control and responsibility for a proposed action. However, it does not adequately address the extent of the cumulative federal control and responsibility for the proposed action.

CEQ is particularly concerned that the process of determining the scope of analysis helps create the NEPA analysis is not appropriately segmented, See Sierra Club v. Marsh, 768 F.2d 988 (1st Cir. 1985). Therefore, CEQ recommends development of an additional factor. The following language is offered as a suggestion. In its proposed revision, ultimately reviewed by CEQ, the Army is free to adopt this language, to amend it, or to propose a substitute that addresses the determination of cumulative federal control and responsibility.

Suggested Language:

(v) The extent of cumulative federal control and responsibility.

a. The district commander is further considered to have control and responsibility for portions of the project beyond the limits of the Corps' jurisdiction where the cumulative federal involvement of the Army Corps and other agencies is sufficient to grant legal control over the additional portions of the project. These are cases where the environmental consequences of the additional portions of the project are sufficiently significant and the need for federal assistance not including funding assistance solely in the form of general revenue sharing funds, with no federal agency control over the subsequent use of such funds, and not including political or administrative civil or criminal enforcement actions.

b. In determining whether sufficient cumulative federal involvement exists to expand the scope of NEPA review, the district commander should consider whether other federal agencies are required to take federal action under 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.), the Executive Order 11990, Protection of Wetlands, 42 U.S.C. 4332 (1977), and other environmental review laws and executive orders.

In recommending such a process, CEQ is not suggesting that the Army Corps of Engineers should be the lead agency in each of these cases. That would be determined as it is under current procedures implementing CEQ's lead agency regulations. Rather, CEQ is reiterating that the environmental review that is required for a proposed federal action which involves several federal actions should be conducted in a cohesive manner within the procedural framework of the NEPA process.

Additionally, CEQ recommends that the Army's procedures include the scope of analysis for cumulative impacts and alternatives in the NEPA process is the same as the scope of analysis for purposes of analyzing the benefits of a proposal. See 40 CFR 1502.28: Sierra Club v. Sigler, 898 F.2d 957 (5th Cir. 1990).
The issue before us is how the purpose and need for a project is defined by the Army when preparing an EA or EIS for a federally permitted action.

The current Army procedures state that this section of the EIS:

"shall briefly recognize that every applicant has both an applicant’s purpose and need and a public purpose and need. These may be the same when the applicant is a governmental body or agency, in most instances when an EIS is required and the applicant is not a governmental body or agency, the applicant is a manner of the private sector engaged in providing a good or service for profit. At the same time, the applicant is requesting a permit to perform work which, if approved, is considered in the public interest (i.e., provides a public benefit). This public benefit shall be stated in as broad, generic terms as possible. For example, the need for a water intake structure requiring an Army Corps permit as part of a fossil fuel power plant shall be stated as needed for energy and not be limited to the need for cooling water. In a similar way, the need for boring near canals or near mines, etc., shall be expressed as the need for water and not as the need for recreation near water." 33 C.F.R. Part 230, Appendix B, Section 11(b)(4).

The proposed Army regulation reads, in relevant part:

"If the scope of analysis for the NEPA document covers only the proposed specific activity requiring a Department of the Army permit, then the underlying purpose and need for that specific activity should be stated. (For example, the purpose and need for the pipe to obtain cooling water from the river for the electric generating plant.) If the scope of the analysis covers a more extensive project, only part of which may require an Army permit, then the underlying purpose and need for the entire project should be stated. (For example, the purpose and need for the electric generating plant is stated on the 43rd Annual Report of the National Park Service. Normally, the applicant should be encouraged to provide a statement of his proposed activity’s purpose and need from his perspective [for example, to construct an electric generating plant]. However, wherever the NEPA document’s scope of analysis renders it appropriate, the [Army] Corps also should consider and address that activity’s underlying purpose and need from a public interest perspective [by use that same example, “to meet the public’s need for electric energy”].) 33 C.F.R. Part 230, Appendix B, section 2(b)(4).

The CEQ regulation reads:

1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in preparing the alternatives including the proposed action. CEQ regulation thus makes no distinction between a private and public "purpose and need." On the one hand, the very fact that a particular project requires the issuance of a federal permit necessarily implies a degree of federal review and responsibility from the public interest perspective. On the other hand, a reasonable evaluation of the proposed action and alternatives must include a thorough understanding of the applicant’s purpose and need. NEPA case law has interpreted this requirement to consider both public and private purpose and need. Courts have stressed the need to consider the objectives of the permit applicant. Roosevelt Campobello International Park Com’n v. EPA, 664 F.2d 1041 (11th Cir. 1982), but have also emphasized the requirement for the agency to exercise independent judgment as to the appropriate articulation of objective purpose and need. City of Angooll v. Hodel, 803 F.2d 1916 (9th Cir. 1986). Petition for cert. filed, 56 U.S.L.W. 3763 (U.S. April 10, 1987) (No. 86–1627). Courts have cautioned against blindly accepting only the applicant’s statement of purpose and need, both for purposes of public interest review and for formulation of alternatives in the NEPA process. Abouin v. Fornell, 807 F.2d 633 (7th Cir. 1986).

The proposed regulation is an effort to achieve consideration of both the applicant’s and the public’s purpose and need by instructing the District Commander to normally focus on the applicant’s purpose and need, as articulated by the applicant, but to consider and express the activity’s purpose and need from a public interest perspective “whenever the NEPA document’s scope of analysis renders it appropriate.” CEQ finds that the proposed regulation is generally adequate and consistent with the proposed approach to the scope of analysis. CEQ recommends that additional language be added to the proposed regulation to the effect that the agency must, in all cases, exercise independent judgment regarding the objective purpose and need of the proposal.

3. Analysis of Alternatives in Environmental Assessments.

Abstract

There is no legal requirement to include a specific reference to “water dependent activities” under the Section 404(b)(1) guidelines to the Army’s NEPA procedures. However, CEQ recommends that in the spirit of consistency with the CEQ regulations and as sound management policy specifically to reduce duplication and paperwork and to increase efficient compliance with both NEPA and the Clean Water Act, the Army’s procedures retain the requirement to integrate into the environmental impact analysis the alternatives to nonwater dependent activities under Section 404(b)(1). The issue before us is the determination of when the Army must examine alternatives in an EA. The current Army regulation reads:

"a. Environmental Assessment (EA). The district engineer shall prepare an EA as soon as practicable after all relevant information has been made available to the district engineer (i.e., after the comment period for the public notice announcing receipt of the permit application has expired) and prior to preparation of the Findings of Fact (FOF). The EA shall include a discussion of reasonable alternatives. However, when the EA confirms that the impact of the applicant’s proposal is not significant, there are no ‘unresolved conflicts concerning alternative uses of available resources’ (Section 102(2)(E) of NEPA), and the proposed action is a water dependent activity, the EA need not include discussion of alternatives to the proposal. In other cases the EA must address all the alternatives that go before the ultimate decision maker. This discussion will include both direct and indirect environmental effects and alternatives of the entire project. The EA shall conclude with a FONSI (See 40 C.F.R. 1508.13) or a determination that an EIS is required.” 33 C.F.R. Part 230, Appendix B, Section 6(e).

The proposed Army regulation reads:

“EA/FONSI Document. (See 40 C.F.R. 1506.1 and 1506.13 for definition.) a. Environmental Assessment (EA) and Findings of No Significant Impact (FONSI). The district commander should complete an EA as soon as practicable after all relevant information is available (i.e., after the comment period for the public notice of the permit application has expired) and prior to completion of the statement of finding (SOF). The EA shall normally be combined with other required documents (EA/404(b)(1)/ FONSI). When the EA confirms that the impact of the applicant’s proposal is not significant and there are no unresolved conflicts concerning alternative uses of available resources . . . (Section 102(2)(E) of NEPA), the EA need not include a discussion of alternatives. Note: The above rule would not preclude the district commander from considering alternatives not discussed in the EA during the course of the public interest review for the permit application if that would be appropriate. In all other cases where the district commander determines that there are unresolved conflicts concerning alternative uses of available resources, the EA shall include a discussion of
reasonable alternatives which are to be considered by the ultimate decision-maker. The decision options available to the [Army] Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with conditions, or deny the permit. "Appropriate conditions" may include project modifications within the scope of established permit conditioning policy (Sec. 33 CFR 230.4). The decision option to deny the permit results in the "no action" alternative (i.e., no construction requiring an Army Corps permit). The combined document normally should not exceed 15 pages and shall conclude with PONS (See 40 CFR 1508.15) or a determination that an EIS is required. The district commander may delegate the signing of a combined document. Should the EA demonstrate that an EIS is necessary, the district commander shall follow the procedure described in paragraph 8 of this appendix. In those cases where it is obvious an EIS is required, an EA is not required.

EPA objects to the deletion, in the proposed Army regulation, of the requirement that alternatives be evaluated in an EA; if the proposal is not "water dependent" within the meaning of EPA's guidelines for section 404 permits under the Clean Water Act. The Army's argument for deleting this reference in the alternatives section is that neither NEPA nor the CEQ implementing regulations include any reference to "water dependency," and therefore, the Army NEPA regulations need not include such a reference. While this is literally a true statement, it does not reach the entire issue. The requirement to analyze alternatives which are not water dependent actions remains a requirement of the section 404 permit program. Under Army's current procedural regulations, the section 404(b)(1) alternatives analysis is intertwined with the alternatives analysis of the EA process. In fact, the section 404(b)(1) guidelines themselves state that in most cases, NEPA documents will provide the information for the evaluation of alternatives under those guidelines, 40 CFR 230.10(4). Under those guidelines:

"(3) Where the activity associated with a discharge which is proposed for a special aquatic site . . . does not require access or proximity to or sitting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent") practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

"(4) For actions subject to NEPA, where the [Army] Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental [Army] NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines . . . ." 40 CFR 230.12(e)(3) and (4).

CEQ's NEPA regulation, "Environmental review and consultation requirements," states:


Still another CEQ NEPA regulation entitled "Combining documents" states:

"Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork." 40 CFR 1506.4.

CEQ finds that there is no legal requirement to include a specific reference to "water dependent activities" under the section 404(b)(1) guidelines in the Army's NEPA procedures. However, CEQ recommends that in the spirit of consistency with the CEQ regulations and as sound management policy, specifically to reduce duplication and paperwork and to increase efficient compliance with both NEPA and the Clean Water Act, that the Army's procedures retain the requirement to integrate into the environmental impact analysis the alternatives to non-water dependent activities under section 404(b)(1).

With respect to alternatives analysis in general, CEQ reiterates its earlier guidance that the alternatives to be analyzed must always be reasonable alternatives, "bound by some notion of 'feasibility' to avoid NEPA from becoming 'an exercise in frivolous boilerplate.'" "Guidance Regarding NEPA Regulations, Memorandum from Chairman A. Alan Hill to Heads of Federal Agencies, 48 FR 32463 (1983), quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978).

4. Page Limits on Environmental Impact Statements

Abstract

CEQ finds that the Army's proposed regulation to be premature in that the Army has not presented any evidence demonstrating that there has been a conscious effort to comply by the CEQ page limit recommendations. CEQ recommends that the Army attempt concerted compliance with the CEQ regulation before proposing a reduced page limit length.

The issue before us is the length of an EIS to insure adequate analysis of impacts and alternatives. The current Army regulations do not specify page limits for EIS(e).

The proposed Army regulations state that:

"... a 50-page text would, in most cases, be adequate to discuss succinctly the relevant NEPA issues and to meet legal and technical requirements. To the extent practicable, and consistent with producing a legally and technically adequate EIS, district commanders will make all reasonable efforts to limit the text to a concise, readable length of 50 pages." 33 CFR 230.13.

The CEQ regulations state that the text of final EISs should normally be less than 150 pages and for proposals of unusual scope or complexity, should normally be less than 300 pages. 40 CFR 1502.2.

CEQ finds the Army's proposed regulation to be premature in that the Army has not presented any evidence demonstrating that there has been a conscious effort to abide by the CEQ page limit recommendations. CEQ recommends that the Army attempt concerted compliance with the CEQ regulation before proposing a reduced page limit length.

Dated: June 8, 1987.

A. Alan Hill,
Chairman.

William L. Mills,
Member.

Jacqueline S. Schaffer,
Member.

Footnotes

1. Under the CEQ referral regulations, if the lead agency requests more time and gives agencies that the matter will not go forward in the interim, the Council may grant an extension. 40 CFR 1504.3(6). Under this provision CEQ granted the Army nine extensions of time, in the period from February 23, 1985, to April 12, 1986.

2. CEQ referral regulations provide that the Council may, (among other options), "(d)etermine that the issue should be further negotiated by the referring lead agency and is not appropriate for Council consideration until one or more heads of agencies reports to the Council that the agencies' disagreements are irreconcilable." 40 CFR 1504.3(6). The referral was returned to EPA and the Army under this provision.

3. CEQ received 87 written comments during this period.

5. In Colorado River Indian Tribes v. Marsh, 430 F. Supp. 1426 (C.D. Cal. 1985), the district court did discuss, and express disagreement with, the decision in Doe v. Loughead, 250 F.2d 985 (D.C. Cir. 1957) (per curiam), to the extent that it perceived that those decisions distinguished between “major federal action” and “direct action.” Specifically, the DOE regulations, however, state that “in major instances, but does not have a major impact on the United States Code.” 49 CFR 1505.18. Neither the court in Colorado River Indian Tribes nor Winnebago discussed this rule, and the Army does not challenge this rule.

In any event, the court in Colorado River Indian Tribes did find that an EIS was required prior to issuance of an Army permit for placement of riprap for stabilization of shore banks on the site of a proposed residential and commercial development. The court rested its holding on an agency’s responsibility under NEPA to assess the direct, indirect, and cumulative effects of a proposed action. In that case, the court determined that the Army had improperly limited its analysis to the direct effects of the Army permit.

The scope of analysis in this rule addresses the extent to which the proposed action is identified as a major federal action for purposes of compliance with NEPA. Modification of the regulations addressing scope of analysis does not affect the requirement to evaluate impacts. Once the scope of analysis is determined, the agency must then assess the direct, indirect, and cumulative effects of the proposed action. See 40 CFR 1505.18. 1505.7, and 1505.8.


7. To the extent that this factor rests on the holding in Doe v. Loughead, it should be noted that the Court of Appeals did not hold that the subject federal action was a condition precedent to private action in order for preparation of an EIS to be required. Rather, the court found that the overall federal involvement in the proposed action was insufficient to “federalize” the entire project. See 40 CFR 1505.18 (definition of “major federal action”).

[FR Doc. 87-13438 Filed 6-11-87; 8:45 am]
BILLING CODE 3150-01-M

DEPARTMENT OF DEFENSE
Office of the Secretary

Strategic Defense Initiative Advisory Committee; Meeting

ACTION: Notice of advisory Committee meetings.


The mission of the Subcommittee is to provide the SDI Advisory Committee an independent analysis and assessment of the plans and approaches for the ground based free electron laser technology integration experiment. At the meeting on June 22-24, 1987 the subcommittee will discuss status of laser research and management issues.

In accordance with section 10(c) of the Federal Advisory Committee Act, Pub. L. 92-463, as amended (5 U.S.C., App II, (1982)), it has been determined that this SDI Advisory Subcommittee meeting, concerns matters listed in 5 U.S.C. 552b(c)(1) (1982), and that accordingly this meeting will be closed to the public.

Patricia H. Means,
OSD Federal Register Liaison Officer,
Department of Defense.

June 8, 1987.

[FR Doc. 87-13438 Filed 6-11-87; 8:45 am]
BILLING CODE 3150-01-M

Membership of the DoD Inspector General (IG) Performance Review Board

AGENCY: Department of Defense, Inspector General (IG).

ACTION: Notice of membership of the DoD IG Performance Review Board.

SUMMARY: This notice announces the appointment of the members of the Performance Review Board (PRB) of the Inspector General. The publication of the PRB membership is required by 5 U.S.C. 4314(c)(4). The Performance Review Board provides fair and impartial review of Senior Executive Service performance appraisals and makes recommendations regarding performance and performance awards to the Inspector General.

EFFECTIVE DATE: July 1, 1987.


SUPPLEMENTAL INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), the enclosed are names of executives who have been appointed to serve as members of the Performance Review Board. They will serve one year renewable term effective on July 1, 1987.

Linda M. Lawson,
Alternate OSD Federal Register Liaison Officer, Department of Defense

June 8, 1987.

Terry L. Brendlinger
Charles L. Cjopla
James H. Curry
Michael E. Eberhardt
John W. Fawcett
Daniel R. Foley
William K. Keese
Richard D. Lieberman
Robert J. Lieberman
Jack L. Montgomery
Donald E. Reed
Richard T. Russ
William F. Thomas
Richard W. Townley
Stephen A. Trodden
Bertrand G. Truxell

Department of the Navy

Chief of Naval Operations, Executive Panel Advisory Committee; Closed Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (5 U.S.C. app.), notice is hereby given that the Chief of Naval Operations (CNO) Executive Panel Advisory Committee Pacific Basin Task Force will meet June 30-July 1, 1987, from 9 a.m. to 5 p.m. each day, at 4401 Ford Avenue, Alexandria, Virginia. All sessions will be closed to the public.

The purpose of this meeting is to examine the broad policy issues related to maritime aspects in the Pacific. The entire agenda for the meeting will consist of discussions of key issues related to United States national security interests and naval strategies in the Pacific and related intelligence.

These matters constitute classified information that is specifically authorized by Executive order to be kept secret in the interest of national defense and is, in fact, properly classified pursuant to such Executive order. Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of the meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(1) of Title 5, United States Code.

For further information concerning this meeting, contact Lieutenant Paul G. Butler, Executive Secretary of the CNO Executive Panel Advisory Committee, 4401 Ford Avenue, Room 601, Alexandria, Virginia 22302-0208. Phone (703) 756-1205.
EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N.W.
WASHINGTON, DC 20006

August 11, 1980

MEMORANDUM FOR HEADS OF AGENCIES

SUBJECT: Prime and Unique Agricultural Lands and the National Environmental Policy Act (NEPA)

The accompanying memorandum on Analysis of Impacts on Prime or Unique Agricultural Lands in Implementing the National Environmental Policy Act was developed in cooperation with the Department of Agriculture. It updates and supersedes the Council's previous memorandum on this subject of August 1976.

In order to review agency progress or problems in implementing this memorandum the Council will request periodic reports from federal agencies as part of our ongoing oversight of agency implementation of NEPA and the Council's regulations. At this time we would appreciate receiving from your agency by November 1, 1980, the following information:

- identification and brief summary of existing or proposed agency policies, regulations and other directives specifically intended to preserve or mitigate the effects of agency actions on prime or unique agricultural lands, including criteria or methodology used in assessing these impacts.

- identification of specific impact statements and, to the extent possible, other documents prepared from October 1, 1979 to October 1, 1980 covering actions deemed likely to have significant direct or indirect effects on prime or unique agricultural lands.

- the name of the policy-level official responsible for agricultural land policies in your agency, and the name of the staff-level official in your agency's NEPA office who will be responsible for carrying out the actions discussed in this memorandum.

GUS SPETH
Chairman
Prime and Unique Agricultural Lands and the National Environmental Policy Act (NEPA)

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North Dakota Land Use Comm.

Mr. Wayne D. Testerman
State Executive Director
Agricultural Stabilization and
PART 657 - PRIME AND UNIQUE FARMLANDS

Subpart A - Important Farmlands Inventory

657.5 Identification of important farmlands.

Section 657.5 Identification of important farmlands.

a. Prime farmlands.

1. General. Prime farmland is land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops, and is also available for these uses (the land could be cropland, pastureland, rangeland, forest land, or other land, but not urban built-up land or water). It has the soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops when treated and managed, including water management, according to acceptable farming methods. In general, prime farmlands have an adequate and dependable water supply from precipitation or irrigation, a favorable temperature and growing season, acceptable acidity or alkalinity, acceptable salt and sodium content, and few or no rocks. They are permeable to water and air. Prime farmlands are not excessively erodible or saturated with water for a long period of time, and they either do not flood frequently or are protected from flooding. Examples of soils that qualify as prime farmland are
Prime and Unique Agricultural Lands and the National Environmental Policy Act (NEPA)

Palouse silt loam, 0 to 7 percent slopes; Brookston silty clay loam, drained; and Tama silty clay loam, 0 to 5 percent slopes.


i. The soils have:

A. Aquic, udic, ustic, or xeric moisture regimes and sufficient available water capacity within a depth of 40 inches (1 meter), or in the root zone (root zone is the part of the soil that is penetrated or can be penetrated by plant roots) if the root zone is less than 40 inches deep, to produce the commonly grown cultivated crops (cultivated crops include, but are not limited to, grain, forage, fiber, oilseed, sugar beets, sugarcane, vegetables, tobacco, orchard, vineyard, and bush fruit crops) adapted to the region in 7 or more years out of 10; or

B. Xeric or astic moisture regimes in which the available water capacity is limited, but the area has a developed irrigation water supply that is dependable (a dependable water supply is one in which enough water is available for irrigation in 8 out of 10 years for the crops commonly grown) and of adequate quality; or,

C. Aridic or torric moisture regimes and the area has a developed irrigation water supply that is dependable and of adequate quality; and,

ii. The soils have a temperature regime that is frigid, mesic, thermic, or hyperthermic (pergelic and cryic regimes are excluded). These are soils that, at a depth of 23 inches (50 cm), have a mean annual temperature higher than 32 F (0 C). In addition, the mean summer temperature at this depth in soils with an O horizon is higher than 47 F (8 C); in soils that have no O horizon, the mean summer temperature is higher than 59 F (15 C); and,

iii. The soils have a pH between 4.5 and 8.4 in all horizons within a depth of 40 inches (1 meter) or in the root zone if the root zone is less than 43 inches deep; and,

iv. The soils either have no water table or have a water table that is maintained at a sufficient depth during the cropping season to allow cultivated crops common to the area to be grown; and,

v. The soils can be managed so that, in all horizons within a depth of 45 inches (1 meter) or in the root zone if the root zone is less than 49 inches deep, during part of each year the conductivity of the saturation extract is less than 4 mmhos/cm and the exchangeable sodium percentage (ESP) is less than 15; and,

vi. The soils are not flooded frequently during the growing season (less often than once in 2 years); and,

vii. The product of K (erodibility factor) x percent slope is less than 2.0, and the product of I (soils erodibility) x C (climatic factor) does not exceed 60; and

viii. The soils have a permeability rate of at least 8.06 inch (0.15 cm) per hour in the upper 20 inches (50 cm) and the mean annual soil temperature at a depth of 20 inches (50 cm) is less than 59’ F (15’ C); the permeability rate is not a limiting factor if the mean annual soil temperature is 59 F (15 C) or higher; and,

ix. Less than 10 percent of the surface layer (upper 6 inches) in these soils consists of rock fragment: coarser than 3 inches (7.6 cm),

b. Unique farmland.

1. General. Unique farmland is land other than prime farmland that is used for the production of specific high value food and fiber crops. It has the special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality and/or high yields of a specific crop when treated and managed according to acceptable farming methods. Examples of such crops are citrus, tree nuts, olives, cranberries, fruit, and vegetables.

2. Specific characteristics of unique farmland.

   i. Is used for a specific high-value food or fiber crop.

ii. Has a moisture supply that is adequate for the specific crop. The supply is from stored moisture, precipitation, or a developed irrigation system.

iii. Combines favorable factors of soil quality, growing season, temperature, humidity, air drainage, elevation, aspect, or other conditions, such as nearness to market, that favor the growth of a specific food or fiber crop.

c. Additional farmland of statewide importance. This is land, in addition to prime and unique farmlands, that is of statewide importance for the production of food, feed, fiber, forage, and oilseed crops. Criteria for defining and delineating this land are to be determined by the appropriate State agency or agencies. Generally, additional farmlands of statewide importance include those that are nearly prime farmland and that economically produce high yields of crops when treated and managed according to acceptable farming methods. Some may produce as high a yield as prime farmlands if conditions are favorable. In some States, additional farmlands of statewide importance may include tracts of land that have been designated for agriculture by State law.

d. Additional farmland of local importance. In some local areas there is concern for certain additional farmlands for the production of food, feed, fiber, forage, and oilseed crops, even though these lands are not identified as having national or statewide importance. Where appropriate, these lands are to be identified by the local agency or agencies concerned. In places, additional farmlands of local importance may include tracts of land that have been designated for agriculture by local ordinance.
November 23, 2010

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: NANCY H. SUTLEY
Chair

SUBJECT: Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act

The Council on Environmental Quality (CEQ) is issuing this guidance for Federal departments and agencies on how to establish, apply, and revise 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 (CEQ Regulations), 40 CFR Parts 1500-1508. This guidance explains the requirements of NEPA and the CEQ Regulations, describes CEQ policies, and recommends procedures for agencies to use to ensure that their use of categorical exclusions is consistent with applicable law and regulations. The guidance is based on NEPA, the CEQ Regulations, legal precedent and agency NEPA experience and practice. It describes:

- How to establish or revise a categorical exclusion;

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1 The Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (CEQ Regulations), available on www.nepa.gov at ceq.hhs.gov/ceq_regulations/regulations.html. This guidance applies only to categorical exclusions established by Federal agencies in accordance with section 1507.3 of the CEQ Regulations, 40 CFR § 1507.3. It does not address categorical exclusion established by statute, as their use is governed by the terms of the specific legislation and subsequent interpretation by the agencies charged with the implementation of that statute and NEPA requirements. CEQ encourages agencies to apply their extraordinary circumstances to categorical exclusions established by statute when the statute is silent as to the use and application of extraordinary circumstances.

2 This guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. The use of non-mandatory language such as “guidance,” “recommend,” “may,” “should,” and “can,” is intended to describe CEQ policies and recommendations. The use of mandatory terminology such as “must” and “required” is intended to describe controlling requirements under the terms of NEPA and the CEQ regulations, but this document does not establish legally binding requirements in and of itself.
• How to use public involvement and documentation to help define and substantiate a proposed categorical exclusion;
• How to apply an established categorical exclusion, and determine when to prepare documentation and involve the public; and
• How to conduct periodic reviews of categorical exclusions to assure their continued appropriate use and usefulness.

This guidance is designed to afford Federal agencies flexibility in developing and implementing categorical exclusions, while ensuring that categorical exclusions are administered to further the purposes of NEPA and the CEQ Regulations.4

I. INTRODUCTION

The CEQ Regulations provide basic requirements for establishing and using categorical exclusions. Section 1508.4 of the CEQ Regulations defines a “categorical exclusion” as

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.5

Categories of actions for which exclusions are established can be limited by their terms. Furthermore, the application of a categorical exclusion can be limited by “extraordinary circumstances.” Extraordinary circumstances are factors or circumstances in which a normally excluded action may have a significant environmental effect that then requires further analysis in an environmental assessment (EA) or an environmental impact statement (EIS).6

Categorical exclusions are not exemptions or waivers of NEPA review; they are simply one type of NEPA review. To establish a categorical exclusion, agencies determine whether a proposed activity is one that, on the basis of past experience, normally does not require further environmental review. Once established, categorical exclusions provide an efficient tool to complete the NEPA environmental review process for proposals that normally do not require more resource-intensive EAs or EISs. The use of categorical exclusions can reduce paperwork

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3 The term “public” in this guidance refers to any individuals, groups, entities or agencies external to the Federal agency analyzing the proposed categorical exclusion or proposed activity.

4 40 CFR § 1507.1 (noting that CEQ Regulations intend to allow each agency flexibility in adapting its NEPA implementing procedures to requirements of other applicable laws).

5 Id. at § 1508.4.

6 Id.
and delay, so that EAs or EISs are targeted toward proposed actions that truly have the potential to cause significant environmental effects.\(^7\)

When determining whether to use a categorical exclusion for a proposed activity, a Federal agency must carefully review the description of the proposed action to ensure that it fits within the category of actions described in the categorical exclusion. Next, the agency must consider the specific circumstances associated with the proposed activity, to rule out any extraordinary circumstances that might give rise to significant environmental effects requiring further analysis and documentation in an EA or an EIS.\(^8\) In other words, when evaluating whether to apply a categorical exclusion to a proposed activity, an agency must consider the specific circumstances associated with the activity and may not end its review based solely on the determination that the activity fits within the description of the categorical exclusion; rather, the agency must also consider whether there are extraordinary circumstances that would warrant further NEPA review. Even if a proposed activity fits within the definition of a categorical exclusion and does not raise extraordinary circumstances, the CEQ Regulations make clear that an agency can, at its discretion, decide "to prepare an environmental assessment . . . in order to assist agency planning and decisionmaking."\(^9\)

Since Federal agencies began using categorical exclusions in the late 1970s, the number and scope of categorically-excluded activities have expanded significantly. Today, categorical exclusions are the most frequently employed method of complying with NEPA, underscoring the need for this guidance on the promulgation and use of categorical exclusions.\(^10\) Appropriate reliance on categorical exclusions provides a reasonable, proportionate, and effective analysis for many proposed actions, helping agencies reduce paperwork and delay. If used inappropriately, categorical exclusions can thwart NEPA's environmental stewardship goals, by compromising the quality and transparency of agency environmental review and decisionmaking, as well as compromising the opportunity for meaningful public participation and review.

II. ESTABLISHING AND REVISING CATEGORICAL EXCLUSIONS

A. Conditions Warranting New or Revised Categorical Exclusions

\(^7\) See id. at §§ 1500.4(p) (recommending use of categorical exclusions as a tool to reduce paperwork), 1500.5(k) (recommending categorical exclusions as a tool to reduce delay).

\(^8\) 40 CFR § 1508.4 (requiring Federal agencies to adopt procedures to ensure that categorical exclusions are not applied to proposed actions involving extraordinary circumstances that might have significant environmental effects).

\(^9\) 40 CFR § 1501.3(b).

Federal agencies may establish a new or revised categorical exclusion in a variety of circumstances. For example, an agency may determine that a class of actions—such as payroll processing, data collection, conducting surveys, or installing an electronic security system in a facility—can be categorically excluded because it is not expected to have significant individual or cumulative environmental effects. As discussed further in Section III.A.1, below, agencies may also identify potential new categorical exclusions after the agencies have performed NEPA reviews of a class of proposed actions and found that, when implemented, the actions resulted in no significant environmental impacts. Other categories of actions may become appropriate for categorical exclusions as a result of mission changes. When agencies acquire new responsibilities through legislation or administrative restructuring, they should propose new categorical exclusions after they, or other agencies, gain sufficient experience with the new activities to make a reasoned determination that any resulting environmental impacts are not significant.\(^\text{11}\)

Agencies sometimes employ “tiering” to incorporate findings from NEPA environmental reviews that address broad programs or issues into reviews that subsequently deal with more specific and focused proposed actions.\(^\text{12}\) Agencies may rely on tiering to make predicate findings about environmental impacts when establishing a categorical exclusion. To the extent that mitigation commitments developed during the broader review become an integral part of the basis for subsequently excluding a proposed category of actions, care must be taken to ensure that those commitments are clearly presented as required design elements in the description of the category of actions being considered for a categorical exclusion.

If actions in a proposed categorical exclusion are found to have potentially significant environmental effects, an agency can abandon the proposed categorical exclusion, or revise it to eliminate the potential for significant impacts. This can be done by: (1) limiting or removing activities included in the categorical exclusion; (2) placing additional constraints on the categorical exclusion’s applicability; or (3) revising or identifying additional applicable extraordinary circumstances. When an agency revises an extraordinary circumstance, it should make sure that the revised version clearly identifies the circumstances when further environmental evaluation in an EA or an EIS is warranted.

B. The Text of the Categorical Exclusion

In prior guidance, CEQ has generally addressed the crafting of categorical exclusions, encouraging agencies to “consider broadly defined criteria which characterize types of actions that, based on the agency’s experience, do not cause significant environmental effects,” and to “offer several examples of activities frequently performed by that agency’s personnel which

\(^\text{11}\) When legislative or administrative action creates a new agency or restructures an existing agency, the agency should determine if its decisionmaking processes have changed and ensure that its NEPA implementing procedures align the NEPA review and other environmental planning processes with agency decisionmaking.

\(^\text{12}\) 40 CFR §§ 1502.4(d), 1502.20, 1508.28.
would normally fall in these categories." CEQ's prior guidance also urges agencies to consider whether the cumulative effects of multiple small actions "would cause sufficient environmental impact to take the actions out of the categorically-excluded class." This guidance expands on CEQ's earlier guidance, by advising agencies that the text of a proposed new or revised categorical exclusion should clearly define the eligible category of actions, as well as any physical, temporal, or environmental factors that would constrain its use.

Some activities may be variable in their environmental effects, such that they can only be categorically excluded in certain regions, at certain times of the year, or within a certain frequency. For example, because the status and sensitivity of environmental resources varies across the nation or by time of year (e.g., in accordance with a protected species' breeding season), it may be appropriate to limit the geographic applicability of a categorical exclusion to a specific region or environmental setting. Similarly, it may be appropriate to limit the frequency with which a categorical exclusion is used in a particular area. Categorical exclusions for activities with variable impacts must be carefully described to limit their application to circumstances where the activity has been shown not to have significant individual or cumulative environmental effects. Those limits may be spatial (restricting the extent of the proposed action by distance or area); temporal (restricting the proposed action during certain seasons or nesting periods in a particular setting); or numeric (limiting the number of proposed actions that can be categorically excluded in a given area or timeframe). Federal agencies that identify these constraints can better ensure that a categorical exclusion is neither too broadly nor too narrowly defined.

When developing a new or revised categorical exclusion, Federal agencies must be sure the proposed category captures the entire proposed action. Categorical exclusions should not be established or used for a segment or an interdependent part of a larger proposed action. The actions included in the category of actions described in the categorical exclusion must be stand-alone actions that have independent utility. Agencies are also encouraged to provide representative examples of the types of activities covered in the text of the categorical exclusion, especially for broad categorical exclusions. These examples will provide further clarity and transparency regarding the types of actions covered by the categorical exclusion.

C. Extraordinary Circumstances

Extraordinary circumstances are appropriately understood as those factors or circumstances that help a Federal agency identify situations or environmental settings that may require an otherwise categorically-excludable action to be further analyzed in an EA or an EIS. Often these factors are similar to those used to evaluate intensity for purposes of determining

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14 Id.
significance pursuant to section 1508.27(b) of the CEQ Regulations.\textsuperscript{15} For example, several agencies list as extraordinary circumstances the potential effects of protected species or habitat, or on historic properties listed or eligible for listing in the National Register of Historic Places.

When proposing new or revised categorical exclusions, Federal agencies should consider the extraordinary circumstances described in their NEPA procedures to ensure that they adequately account for those situations and settings in which a proposed categorical exclusion should not be applied. An extraordinary circumstance requires the agency to determine how to proceed with the NEPA review. For example, the presence of a factor, such as a threatened or endangered species or a historic resource, could be an extraordinary circumstance, which, depending on the structure of the agency's NEPA implementing procedures, could either cause the agency to prepare an EA or an EIS, or cause the agency to consider whether the proposed action's impacts on that factor require additional analysis in an EA or an EIS. In other situations, the extraordinary circumstance could be defined to include both the presence of the factor and the impact on that factor. Either way, agency NEPA implementing procedures should clearly describe the manner in which an agency applies extraordinary circumstances and the circumstances under which additional analysis in an EA or an EIS is warranted.

Agencies should review their existing extraordinary circumstances concurrently with the review of their categorical exclusions. If an agency's existing extraordinary circumstances do not provide sufficient parameters to limit a proposed new or revised categorical exclusion to actions that do not have the potential for significant environmental effects, the agency should identify and propose additional extraordinary circumstances or revise those that will apply to the proposed categorical exclusion. If extensive extraordinary circumstances are needed to limit a proposed categorical exclusion, the agency should also consider whether the proposed categorical exclusion itself is appropriate. Any new or revised extraordinary circumstances must be issued together with the new or revised categorical exclusion in draft form and then in final form according to the procedures described in Section IV.

III. SUBSTANTIATING A NEW OR REVISED CATEGORICAL EXCLUSION

Substantiating a new or revised categorical exclusion is basic to good decisionmaking. It serves as the agency's own administrative record of the underlying reasoning for the categorical exclusion. A key issue confronting Federal agencies is how to substantiate a determination that a proposed new or revised categorical exclusion describes a category of actions that do not individually or cumulatively have a significant effect on the human environment.\textsuperscript{16} Provided below are methods agencies can use to gather and evaluate information to substantiate proposed new or revised categorical exclusions.

A. Gathering Information to Substantiate a Categorical Exclusion

\textsuperscript{15} Id. at § 1508.27(b).

\textsuperscript{16} See id. at §§ 1508.7, 1508.8, 1508.27.
The amount of information required to substantiate a categorical exclusion depends on the type of activities included in the proposed category of actions. Actions that are reasonably expected to have little impact (for example, conducting surveys or purchasing small amounts of office supplies consistent with applicable acquisition and environmental standards) should not require extensive supporting information.\(^{17}\) For actions that do not obviously lack significant environmental effects, agencies must gather sufficient information to support establishing a new or revised categorical exclusion. An agency can substantiate a categorical exclusion using the sources of information described below, either alone or in combination.\(^{18}\)

1. Previously Implemented Actions

An agency’s assessment of the environmental effects of previously implemented or ongoing actions is an important source of information to substantiate a categorical exclusion. Such assessment allows the agency’s experience with implementation and operating procedures to be taken into account in developing the proposed categorical exclusion.

Agencies can obtain useful substantiating information by monitoring and/or otherwise evaluating the effects of implemented actions that were analyzed in EAs that consistently supported Findings of No Significant Impact. If the evaluation of the implemented action validates the environmental effects (or lack thereof) predicted in the EA, this provides strong support for a proposed categorical exclusion. Care must be taken to ensure that any mitigation measures developed during the EA process are an integral component of the actions considered for inclusion in a proposed categorical exclusion.

Implemented actions analyzed in an EIS can also be a useful source of substantiating information if the implemented action has independent utility to the agency, separate and apart from the broader action analyzed in the EIS. The EIS must specifically address the environmental effects of the independent proposed action and determine that those effects are not

\(^{17}\) Agencies should still consider the environmental effects of actions that are taken on a large scale. Agency-wide procurement and personnel actions could have cumulative impacts. For example, purchasing paper with higher recycled content uses less natural resources and will have lesser environmental impacts. See “Federal Leadership in Environmental, Energy, and Economic Performance,” Exec. Order No. 13514, 74 Fed. Reg. 52,117 (Oct. 8, 2009).

\(^{18}\) 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 categorical exclusion. See Information Quality Act, Pub. L. No. 106-554, section 515 (2000), 114 Stat. §§ 2763, 2763A-153 (codified at 44 U.S.C. § 3516 (2001)); see also “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Republication,” 60 Fed. Reg. 8,452 (Feb. 22, 2002), available at www.whitehouse.gov/omb/infereg/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.
significant. For example, when a discrete, independent action is analyzed in an EIS as part of a broad management action, an evaluation of the actual effects of that discrete action may support a proposed categorical exclusion for the discrete action. As with actions previously analyzed in EAs, predicted effects (or lack thereof) should be validated through monitoring or other corroborating evidence.

Agencies can also identify or substantiate new categorical exclusions and extraordinary circumstances by using auditing and implementation data gathered in accordance with an Environmental Management System or other systems that track environmental performance and the effects of particular actions taken to attain that performance.\(^\text{19}\)

Agencies should also consider appropriate monitoring or other evaluation of the environmental effects of their categorically-excluded actions, to inform periodic reviews of existing categorical exclusions, as discussed in Section VI, below.

2. Impact Demonstration Projects

When Federal agencies lack experience with a particular category of actions that is being considered for a proposed categorical exclusion, they may undertake impact demonstration projects to assess the environmental effects of those actions. As part of a demonstration project, the Federal agency should monitor the actual environmental effects of the proposed action during and after implementation. The NEPA documentation prepared for impact demonstration projects should explain how the monitoring and analysis results will be used to evaluate the merits of a proposed categorical exclusion. When designing impact demonstration projects, an agency must ensure that the action being evaluated accurately represents the scope, the operational context, and the environmental context of the entire category of actions that will be described in the proposed categorical exclusion. For example, if the proposed categorical exclusion would be used in regions or areas of the country with different environmental settings, a series of impact demonstration projects may be needed in those areas where the categorical exclusion would be used.

3. Information from Professional Staff, Expert Opinions, and Scientific Analyses

A Federal agency may rely on the expertise, experience, and judgment of its professional staff as well as outside experts to assess the potential environmental effects of applying proposed categorical exclusions, provided that the experts have 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 experts' credentials (e.g., education, training, certifications, years of related experience).

experience) and describe how the experts arrived at their conclusions.

Scientific analyses are another good source of information to substantiate a new or revised categorical exclusion. 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 experience relevant to the environmental effects of the actions that would be included in the proposed categorical exclusion. Peer-reviewed findings may be especially useful to support an agency’s scientific analysis, but agencies may also consult professional opinions, reports, and research findings that have not been formally peer-reviewed. Scientific information that has not been externally peer-reviewed may require additional scrutiny and evaluation by the agency. In all cases, findings must be based on high-quality, accurate technical and scientific information.20

4. Benchmarking Other Agencies’ Experiences

A federal agency cannot rely on another agency’s categorical exclusion to support a decision not to prepare an EA or an EIS for its own actions. An agency may, however, substantiate a categorical exclusion of its own based on another agency’s experience with a comparable categorical exclusion and the administrative record developed when the other agency’s categorical exclusion was established. Federal agencies can also substantiate categorical exclusions by benchmarking, or drawing support, from private and public entities that have experience with the actions covered in a proposed categorical exclusion, such as state and local agencies, Tribes, academic and professional institutions, and other Federal agencies.

When determining whether it is appropriate to rely on another entity’s experience, an agency must demonstrate that the benchmarked actions are comparable to the actions in a proposed categorical exclusion. The agency can demonstrate this based on: (1) characteristics of the actions; (2) methods of implementing the actions; (3) frequency of the actions; (4) applicable standard operating procedures or implementing guidance (including extraordinary circumstances); and (5) timing and context, including the environmental settings in which the actions take place.

B. Evaluating the Information Supporting Categorical Exclusions

After gathering substantiating information and determining that the category of actions in the proposed categorical exclusion does not normally result in individually or cumulatively significant environmental effects, a Federal agency should develop findings that demonstrate how it made its determination. These findings should account for similarities and differences between the proposed categorical exclusion and the substantiating information. The findings should describe the method and criteria the agency used to assess the environmental effects of the proposed categorical exclusion. These findings, and the relevant substantiating information, should be maintained in an administrative record that will support: benchmarking by other agencies (as discussed in Section III.A.4, above); applying the categorical exclusions (as discussed in Section V.A, below); and periodically reviewing the continued viability of the

categorical exclusion (as discussed in Section VI, below). These findings should also be made available to the public, at least in preliminary form, as part of the process of seeking public input on the establishment of new or revised categorical exclusions, though the final findings may be revised based on new information received from the public and other sources.

IV. PROCEDURES FOR ESTABLISHING A NEW OR REVISED CATEGORICAL EXCLUSION

Pursuant to section 1507.3(a) of the CEQ Regulations, Federal agencies are required to consult with the public and with CEQ whenever they amend their NEPA procedures, including when they establish new or revised categorical exclusions. An agency can only adopt new or revised NEPA implementing procedures after the public has had notice and an opportunity to comment, and after CEQ has issued a determination that the procedures are in conformity with NEPA and the CEQ regulations. Accordingly, an agency’s process for establishing a new or revised categorical exclusion should include the following steps:

- Draft the proposed categorical exclusion based on the agency’s experience and substantiating information;
- Consult with CEQ on the proposed categorical exclusion;
- Consult with other Federal agencies that conduct similar activities to coordinate with their current procedures, especially for programs requesting similar information from members of the public (e.g., applicants);
- Publish a notice of the proposed categorical exclusion in the Federal Register for public review and comment;
- Consider public comments;
- Consult with CEQ on the public comments received and the proposed final categorical exclusion to obtain CEQ’s written determination of conformity with NEPA and the CEQ Regulations;
- Publish the final categorical exclusion in the Federal Register;
- File the categorical exclusion with CEQ; and
- Make the categorical exclusion readily available to the public through the agency’s website and/or other means.

A. Consultation with CEQ

The CEQ Regulations require agencies to consult with CEQ prior to publishing their proposed NEPA procedures in the Federal Register for public comment. Agencies are encouraged to involve CEQ as early as possible in the process and to enlist CEQ’s expertise and assistance with interagency coordination to make the process as efficient as possible. 21

21 40 CFR § 1507.3(a) (requiring agencies with similar programs to consult with one another and with CEQ to coordinate their procedures).
Following the public comment period, the Federal agency must consider the comments received and consult again with CEQ to discuss substantive comments and how they will be addressed. CEQ shall complete its review within thirty (30) days of receiving the final text of the agency’s proposed categorical exclusion. For consultation to successfully conclude, CEQ must provide the agency with a written statement that the categorical exclusion was developed in conformity with NEPA and the CEQ Regulations. Finally, when the Federal agency publishes the final version of the categorical exclusion in the Federal Register and on its established agency website, the agency should notify CEQ of such publication so as to satisfy the requirements to file the final categorical exclusion with CEQ and to make the final categorical exclusion readily available to the public.22

B. Seeking Public Involvement when Establishing or Revising A Categorical Exclusion

Engaging the public in the environmental aspects of Federal decisionmaking is a key aspect of NEPA and the CEQ Regulations.23 At a minimum, the CEQ Regulations require Federal agencies to make any proposed amendments to their categorical exclusions available for public review and comment in the Federal Register,24 regardless of whether the categorical exclusions are promulgated as regulations through rulemaking, or issued as departmental directives or orders.25 To maximize the value of comments from interested parties, the agency’s Federal Register notice should:

- Describe the proposed activities covered by the categorical exclusion and provide the proposed text of the categorical exclusion;

22 Id.

23 National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C. § 4321 et seq.; see, e.g., 40 CFR § 1506.6(a) (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures); 40 CFR § 1507.3(a) (requiring each agency to consult with CEQ while developing its procedures and before publishing them in the Federal Register for comment; providing that an agency’s NEPA procedures shall be adopted only after an opportunity for public review; and providing that, once in effect, the procedures must be made readily available to the public).

24 See 40 CFR § 1507.3 (outlining procedural requirements for agencies to establish and revise their NEPA implementing regulations), 1506.6(a) (requiring agencies to involve the public in rulemaking, including public notice and an opportunity to comment).

25 NEPA and the CEQ Regulations do not require agency NEPA implementing procedures, of which categorical exclusions are a key component, to be promulgated as regulations through rulemaking. Agencies should ensure they comply with all appropriate agency requirements for issuing and revising their NEPA implementing procedures.
• Summarize the information in the agency’s administrative record that was used to substantiate the categorical exclusion, including an evaluation of the information and related findings;  
• Define all applicable terms;
• Describe the extraordinary circumstances that may limit the use of the categorical exclusion; and
• Describe the available means for submitting questions and comments about the proposed categorical exclusion (for example, email addresses, mailing addresses, website addresses, and names and phone numbers of agency points of contact).

When establishing or revising a categorical exclusion, agencies should also pursue additional opportunities for public involvement beyond publication in the Federal Register in cases where there is likely to be significant public interest and additional outreach would facilitate public input. The extent of public involvement can be tailored to the nature of the proposed categorical exclusion and the degree of expected public interest.

CEQ encourages Federal agencies to engage interested parties such as public interest groups, Federal NEPA contacts at other agencies, Tribal governments and agencies, and state and local governments and agencies. The purpose of this engagement is to share relevant data, information, and concerns. Agencies can involve the public by using the methods noted in section 1506.6 of the CEQ Regulations, as well as other public involvement techniques such as focus groups, e-mail exchanges, conference calls, and web-based forums.

CEQ also strongly encourages Federal agencies to post updates on their official websites whenever they issue Federal Register notices for new or revised categorical exclusions. An agency website may serve as the primary location where the public learns about agency NEPA implementing procedures and their use, and obtains efficient access to updates and supporting information. Therefore, agencies should ensure that their NEPA implementing procedures and any final revisions or amendments are easily accessed through the agency’s official website including when an agency is adding, deleting, or revising the categorical exclusions and/or the extraordinary circumstances in its NEPA implementing procedures.

V. APPLYING AN ESTABLISHED CATEGORICAL EXCLUSION

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26 This step is particularly beneficial when the agency determines that the public will view a potential impact as significant, as it provides the agency the opportunity to explain why it believes that impact to be presumptively insignificant. Whenever practicable, the agency should include a link to a website containing all the supporting information, evaluations, and findings. 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 consider using their regulatory development tools to assist in maintaining access to supporting information, such as establishing an online docket using www.regulations.gov.
When applying a categorical exclusion to a proposed action, Federal agencies face two key decisions: (1) whether to prepare documentation supporting their determination to use a categorical exclusion for a proposed action; and (2) whether public engagement and disclosure may be useful to inform determinations about using categorical exclusions.

A. When to Document Categorical Exclusion Determinations

In prior guidance, CEQ has “strongly discourage[d] procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded,” based on an expectation that “sufficient information will usually be available during the course of normal project development” to determine whether an EIS or an EA is needed.27 Moreover, “the agency’s administrative record (for the proposed action) will clearly document the basis for its decision.”28 This guidance modifies our prior guidance to the extent that it recognizes that each Federal agency should decide—and update its NEPA implementing procedures and guidance to indicate—whether any of its categorical exclusions warrant preparation of additional documentation.

Some activities, such as routine personnel actions or purchases of small amounts of supplies, may carry little risk of significant environmental effects, such that there is no practical need for, or benefit from, preparing additional documentation when applying a categorical exclusion to those activities. For those activities, the administrative record for establishing the categorical exclusion and any normal project development documentation may be considered sufficient.

For other activities, such as decisions to allow various stages of resource development after a programmatic environmental review, documentation may be appropriate to demonstrate that the proposed action comports with any limitations identified in prior NEPA analysis and that there are no potentially significant impacts expected as a result of extraordinary circumstances. In such cases, the documentation should address proposal-specific factors and show consideration of extraordinary circumstances with regard to the potential for localized impacts. It is up to agencies to decide whether to prepare separate NEPA documentation in such cases or to include this documentation in other project-specific documents that the agency is preparing.

In some cases, courts have required documentation to demonstrate that a Federal agency has considered the environmental effects associated with extraordinary circumstances.29

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28 Id.

29 See, e.g., California v. Norton, 311 F.3d 1162, 1175-78 (9th Cir. 2002).
Documenting the application of a categorical exclusion provides the agency the opportunity to demonstrate why its decision to use the categorical exclusion is entitled to deference.\textsuperscript{30}

Documentation may be necessary to comply with the requirements of other laws, regulations, and policies, such as the Endangered Species Act or the National Historic Preservation Act. When that is the case, all resource analyses and the results of any consultations or coordination should be incorporated by reference in the administrative record developed for the proposed action. Moreover, the nature and severity of the effect on resources subject to additional laws or regulations may be a reason for limiting the use of a categorical exclusion and therefore should, where appropriate, also be addressed in documentation showing how potential extraordinary circumstances were considered and addressed in the decision to use the categorical exclusion.

For those categorical exclusions for which an agency determines that documentation is appropriate, the documentation should cite the categorical exclusion being used and show that the agency determined that: (1) the proposed action fits within the category of actions described in the categorical exclusion; and (2) there are no extraordinary circumstances that would preclude the proposed action from being categorically excluded. The extent of the documentation should be tailored to the type of action involved, the potential for extraordinary circumstances and environmental effects, and any applicable requirements of other laws, regulations, and policies. If lengthy documentation is needed to address these aspects, an agency should consider whether it is appropriate to apply the categorical exclusion in that particular situation. In all circumstances, any documentation prepared for a categorical exclusion should be concise.

B. When to Seek Public Engagement and Disclosure

Most Federal agencies do not routinely notify the public when they use a categorical exclusion to meet their NEPA responsibilities. There are some circumstances, however, where the public may be able to provide an agency with valuable information, such as whether a proposal involves extraordinary circumstances or potentially significant cumulative impacts that can help the agency decide whether to apply a categorical exclusion. CEQ therefore encourages Federal agencies to determine—and specify in their NEPA implementing procedures—those circumstances in which the public should be engaged or notified before a categorical exclusion is used.

Agencies should utilize information technology to provide the public with access to information about the agency’s NEPA compliance. CEQ strongly recommends that agencies post key information about their NEPA procedures and implementation on a publicly available website. The website should include:

- The text of the categorical exclusions and applicable extraordinary circumstances;

\textsuperscript{30} The agency determination that an action is categorically excluded may itself be challenged under the Administrative Procedure Act, 5 U.S.C. § 501 et seq.
• A synopsis of the administrative record supporting the establishment of each categorical exclusion with information on how the public can access the entire administrative record;
• Those categorical exclusions which the agency determines are and are not likely to be of interest to the public; and
• Information on agencies' use of categorical exclusions for proposed actions, particularly in those situations where there is a high level of public interest in a proposed action.

Where an agency has documented a categorical exclusion, it should also consider posting that documentation online. For example, in 2009, the Department of Energy adopted a policy to post documented categorical exclusion determinations online. By adopting a similar policy, other agencies can significantly increase the quality and transparency of their decisionmaking when using categorical exclusions.

VI. PERIODIC REVIEW OF ESTABLISHED CATEGORICAL EXCLUSIONS

The CEQ Regulations direct Federal agencies to "continue to review their policies and procedures and in consultation with [CEQ] to revise them as necessary to ensure full compliance with the purposes and provisions of [NEPA]." Many agencies have categorical exclusions that were established many years ago. Some Federal agencies have internal procedures for identifying and revising categorical exclusions that no longer reflect current environmental circumstances, or current agency policies, procedures, programs, or mission. Where an agency's categorical exclusions have not been regularly reviewed, they should be reviewed by the agency as soon as possible.

There are several reasons why Federal agencies should periodically review their categorical exclusions. For example, a Federal agency may find that an existing categorical exclusion is not being used because the category of actions is too narrowly defined. In such cases, the agency should consider amending its NEPA implementing procedures to expand the description of the category of actions included in the categorical exclusion. An agency could also find that an existing categorical exclusion includes actions that raise the potential for significant environmental effects with some regularity. In those cases, the agency should determine whether to delete the categorical exclusion, or revise it to either limit the category of actions or expand the extraordinary circumstances that limit when the categorical exclusion can be used. Periodic review can also help agencies identify additional factors that should be included in their extraordinary circumstances and consider whether certain categorical exclusions should be documented.

31 Many agencies publish two lists of categorical exclusions: (1) those which typically do not raise public concerns due to the low risk of potential environmental effects, and (2) those more likely to raise public concerns.


33 40 CFR § 1507.3.
Agencies should exercise sound judgment about the appropriateness of categorically excluding activities in light of evolving or changing conditions that might present new or different environmental impacts or risks. The assumptions underlying the nature and impact of activities encompassed by a categorical exclusion may have changed over time. Different technological capacities of permitted activities may present very different risk or impact profiles. This issue was addressed in CEQ’s August 16, 2010 report reviewing the Department of the Interior’s Minerals Management Service’s application of NEPA to the permitting of deepwater oil and gas drilling.\textsuperscript{34}

Agencies should review their categorical exclusions on an established timeframe, beginning with the categorical exclusions that were established earliest and/or the categorical exclusions that may have the greatest potential for significant environmental impacts. This guidance recommends that agencies develop a process and timeline to periodically review their categorical exclusions (and extraordinary circumstances) to ensure that their categorical exclusions remain current and appropriate, and that those reviews should be conducted at least every seven years. A seven-year cycle allows the agencies to regularly review categorical exclusions to avoid the use of categorical exclusions that are outdated and no longer appropriate. If the agency believes that a different timeframe is appropriate, the agency should articulate a sound basis for that conclusion, explaining how the alternate timeframe will still allow the agency to avoid the use of categorical exclusions that are outdated and no longer appropriate. The agency should publish its process and time period, along with its articulation of a sound basis for periods over seven years, on the agency’s website and notify CEQ where on the website the review procedures are posted. We recognize that due to competing priorities, resource constraints, or for other reasons, agencies may not always be able to meet these time periods. The fact that a categorical exclusion has not been evaluated within the time established does not invalidate its use for NEPA compliance, as long as such use is consistent with the defined scope of the exclusion and has properly considered any potential extraordinary circumstances.

In establishing this review process, agencies should take into account factors including changed circumstances, how frequently the categorical exclusions are used, the extent to which resources and geographic areas are potentially affected, and the expected duration of impacts. The level of scrutiny and evaluation during the review process should be commensurate with a categorically-excluded activity’s potential to cause environmental impacts and the extent to which relevant circumstances have changed since it was issued or last reviewed. Some categorical exclusions, such as for routine purchases or contracting for office-related services,

may require minimal review. Other categorical exclusions may require a more thorough reassessment of scope, environmental effects, and extraordinary circumstances, such as when they are tiered to programmatic EAs or EISs that analyzed activities whose underlying circumstances have since changed.

To facilitate reviews, the Federal agency offices charged with overseeing their agency’s NEPA compliance should develop and maintain sufficient capacity to periodically review their existing categorical exclusions to ensure that the agency’s prediction of no significant impacts is borne out in practice. Agencies can efficiently assess changed circumstances by utilizing a variety of methods such as those recommended in Section III, above, for substantiating new or revised categorical exclusions. These methods include benchmarking, monitoring of previously implemented actions, and consultation with professional staff. The type and extent of monitoring and other information that should be considered in periodic reviews, as well as the particular entity or entities within the agency that would be responsible for gathering this information, will vary depending upon the nature of the actions and their anticipated effects. Consequently, agencies should utilize the expertise, experience, and judgment of agency professional staff when determining the appropriate type and extent of monitoring and other information to consider. This information will help the agency determine whether its categorical exclusions are used appropriately, or whether a categorical exclusion needs to be revised. Agencies can also use this information when they engage stakeholders in developing proposed revisions to categorical exclusions and extraordinary circumstances.

Agencies can also facilitate reviews by keeping records of their experiences with certain activities in a number of ways, including tracking information provided by agency field offices. In such cases, a Federal agency could conduct its periodic review of an established categorical exclusion by soliciting information from field offices about the observed 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, where appropriate, can also be incorporated into an agency’s procedures for conducting its oversight of ongoing projects and can be included as part of regular site visits to project areas.

Agencies can also conduct periodic review of existing categorical exclusions through broader program reviews. Program reviews can occur at various levels (for example, field office, division office, headquarters office) and on various scales (for example, 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 yield information relevant to categorical exclusions and may thus substitute for reviews specifically focused on categorical exclusions. However, the substantial flexibility that agencies have in how they structure their review

35 40 CFR § 1507.2.

procedures underscores the importance of ensuring that the review procedures are clear and transparent.

In working with agencies on reviewing their existing categorical exclusions, CEQ will look to the actual impacts from activities that have been subject to categorical exclusions, and will consider the extent and scope of agency monitoring and/or other substantiating evidence. As part of its oversight role and responsibilities under NEPA, CEQ will contact agencies following the release of this guidance to ascertain the status of their reviews of existing categorical exclusions. CEQ will make every effort to align its oversight with reviews being conducted by the agency and will begin with those agencies that are currently reassessing their categorical exclusions, as well as with agencies that are experiencing difficulties or facing challenges to their application of categorical exclusions.

Finally, it is important to note that the rationale and supporting information for establishing or documenting experience with using a categorical exclusion may be lost if an agency has inadequate procedures for recording, retrieving, and preserving documents and administrative records. Therefore, Federal agencies will benefit from a review of their current practices for maintaining and preserving such records. Measures to ensure future availability could include greater centralization of records, use of modern storage systems and improvements in the agency’s electronic and hard copy filing systems.37

VII. CONCLUSION

This guidance will help to guide CEQ and the agencies when an agency seeks to propose a new or revised categorical exclusion. It should also guide the agencies when categorical exclusions are used for proposed actions, when reviewing existing categorical exclusions, or when proposing new categorical exclusions. Questions regarding this guidance should be directed to the CEQ Associate Director for NEPA Oversight.

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37 Agencies should be mindful of their obligations to maintain and preserve agency records under the Federal Records Act for maintaining and preserving agency records. 44 U.S.C. § 3101 et seq.
Front cover photograph of John Heinz National Wildlife Refuge at Tinicum by John and Karen Hollingsworth

Front cover photograph of school bus and children by Sam Kittner.
ENVIRONMENTAL JUSTICE
Guidance Under the
National Environmental Policy Act

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I.

Introduction

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," provides that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." The Executive Order makes clear that its provisions apply fully to programs involving Native Americans.

In the memorandum to heads of departments and agencies that accompanied Executive Order 12898, the President specifically recognized the importance of procedures under the National Environmental Policy Act (NEPA) for identifying and addressing environmental justice concerns. The memorandum states that "each Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by [NEPA]." The memorandum particularly emphasizes the importance of NEPA's public participation process, directing that "each Federal agency shall provide opportunities for community input in the NEPA process." Agencies are further directed to "identify potential effects and mitigation measures in consultation with affected communities, and improve the accessibility of meetings, crucial documents, and notices."

The Council on Environmental Quality (CEQ) has oversight of the Federal government's compliance with Executive Order 12898 and NEPA. CEQ, in consultation with EPA and other affected agencies, has developed this guidance to further assist Federal agencies with their NEPA procedures so that environmental justice concerns are effectively identified and addressed. To the extent practicable and permitted by law, agencies may supplement this guidance with more specific procedures tailored to particular programs or activities of an individual department, agency, or office.


2 42 U.S.C. §4321 et seq.

3 Certain oversight functions in the Executive Order are delegated to the Deputy Assistant to the President for Environmental Policy. Following the merger of the White House Office on Environmental Policy with CEQ, the Chair of CEQ assumed those functions. The Environmental Protection Agency (EPA) has lead responsibility for implementation of the Executive Order as Chair of the Interagency Working Group (IWG) on Environmental Justice.
II.

Executive Order 12898 and the Presidential Memorandum

In addition to the general directive in Executive Order 12898 that each agency identify and address, as appropriate, "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations," there are several provisions of the Executive Order and a number of supporting documents to which agencies should refer when identifying and addressing environmental justice concerns in the NEPA process.

First, the Executive Order itself contains particular emphasis on four issues that are pertinent to the NEPA process:

- The Executive Order requires the development of agency-specific environmental justice strategies. Thus, agencies have developed and should periodically revise their strategies providing guidance concerning the types of programs, policies, and activities that may, or historically have, raised environmental justice concerns at the particular agency. These guidances may suggest possible approaches to addressing such concerns in the agency’s NEPA analyses, as appropriate.

- The Executive Order recognizes the importance of research, data collection, and analysis, particularly with respect to multiple and cumulative exposures to environmental hazards for low-income populations, minority populations, and Indian tribes. Thus, data on these exposure issues should be incorporated into NEPA analyses as appropriate.

- The Executive Order provides for agencies to collect, maintain, and analyze information on patterns of subsistence consumption of fish, vegetation, or wildlife. Where an agency action may affect fish, vegetation, or wildlife, that agency action may

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4 Executive Order No. 12898, 59 Fed. Reg. at 7630 (Section 1-101).
5 Id. at 7630 (Section 1-103).
6 Id. at 7631 (Section 3-3).
7 For further information on considering cumulative effects, see Considering Cumulative Effects Under The National Environmental Policy Act (Council on Environmental Quality, Executive Office of the President, Jan. 1997)
8 Id. at 7631 (Section 4-401).
also affect subsistence patterns of consumption and indicate the potential for disproportionately high and adverse human health or environmental effects on low-income populations, minority populations, and Indian tribes.

- The Executive Order requires agencies to work to ensure effective public participation and access to information. Thus, within its NEPA process and through other appropriate mechanisms, each Federal agency shall, "wherever practicable and appropriate, translate crucial public documents, notices and hearings, relating to human health or the environment for limited English speaking populations." In addition, each agency should work to "ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public."  

Second, the memorandum accompanying the Executive Order identifies four important ways to consider environmental justice under NEPA.

- Each Federal agency should analyze the environmental effects, including human health, economic, and social effects of Federal actions, including effects on minority populations, low-income populations, and Indian tribes, when such analysis is required by NEPA.  

- Mitigation measures identified as part of an environmental assessment (EA), a finding of no significant impact (FONSI), an environmental impact statement (EIS), or a record of decision (ROD), should, whenever feasible, address significant and adverse environmental effects of proposed federal actions on minority populations, low-income populations, and Indian tribes.  

- Each Federal agency must provide opportunities for effective community participation in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of public meetings, crucial documents, and notices.  

- Review of NEPA compliance (such as EPA's review under § 309 of the Clean Air Act)
must ensure that the lead agency preparing NEPA analyses and documentation has appropriately analyzed environmental effects on minority populations, low-income populations, or Indian tribes, including human health, social, and economic effects.\textsuperscript{14}

Third, the Interagency Working Group (IWG), established by the Executive Order to implement the order’s requirements, has developed guidance on key terms in the Executive Order. The guidance, reproduced as Appendix A, reflects a general consensus based on Federal agencies’ experience and understanding of the issues presented. Agencies should apply the guidance with flexibility, and may consider its terms a point of departure rather than conclusive direction in applying the terms of the Executive Order.

\textsuperscript{14} Id.
III.

Executive Order 12898 and NEPA

A. NEPA Generally

NEPA’s fundamental policy is to "encourage productive and enjoyable harmony between man and his environment."\(^{15}\) In the statute, 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."\(^{16}\) The following goals, set forth in NEPA, make clear that attainment of environmental justice is wholly consistent with the purposes and policies of NEPA\(^{17}\):

- to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings"\(^{18}\),

- to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences";\(^{19}\)

- to "preserve important historic, cultural, and natural aspects of our natural heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice"\(^{20}\), and

- to "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities."\(^{21}\)

These goals are promoted through the requirement that all agencies of the Federal government shall include in every recommendation or report on proposals for legislation and other

\(^{15}\) 42 U.S.C. § 4321.

\(^{16}\) 42 U.S.C. § 4331(c).

\(^{17}\) 42 U.S.C. § 4331(b).

\(^{18}\) 42 U.S.C. § 4331(b)(2).

\(^{19}\) 42 U.S.C. § 4331(b)(3).


\(^{21}\) 42 U.S.C. § 4331(b)(5).
major Federal actions significantly affecting the quality of the human environment, a "detailed statement by the responsible official" on: the environmental impacts of the proposed action; adverse environmental effects that cannot be avoided should the proposal be implemented; alternatives to the proposed action; the relationship between local, short-term uses of man's environment and long-term productivity; and any irreversible or irretrievable commitments of resources involved in the proposed action itself.22

Preparation of an EA may precede preparation of an EIS, to determine whether a proposed action may "significantly affect" the quality of the human environment. The EA either will support a finding of no significant impact (FONSI), or will document the need for an EIS. Agency procedure at each step of this process should be guided by the agency's own NEPA regulations and by the CEQ regulations found at 40 C.F.R. Parts 1500-1508.

B. Principles for Considering Environmental Justice under NEPA

Environmental justice issues may arise at any step of the NEPA process and agencies should consider these issues at each and every step of the process, as appropriate. Environmental justice issues encompass a broad range of impacts covered by NEPA, including impacts on the natural or physical environment and interrelated social, cultural and economic effects.23 In preparing an EIS or an EA, agencies must consider both impacts on the natural or physical environment and related social, cultural, and economic impacts.24 Environmental justice concerns may arise from impacts on the natural and physical environment, such as human health or ecological impacts on minority populations, low-income populations, and Indian tribes, or from related social or economic impacts.

1. General Principles

Agencies should recognize that the question of whether agency action raises environmental justice issues is highly sensitive to the history or circumstances of a particular community or population, the particular type of environmental or human health impact, and the nature of the proposed action itself. There is not a standard formula for how environmental justice issues should be identified or addressed. However, the following six principles provide general guidance.

22 42 U.S.C. § 4332(c).

23 The CEQ implementing regulations define "effects" or "impacts" to include "ecological...aesthetic, historic, cultural, economic, social or health, whether direct, indirect or cumulative." 40 C.F.R. 1508.8.

• Agencies should consider the composition of the affected area, to determine whether minority populations, low-income populations, or Indian tribes are present in the area affected by the proposed action, and if so whether there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or Indian tribes.

• Agencies should consider relevant public health data and industry data concerning the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards, to the extent such information is reasonably available. For example, data may suggest there are disproportionately high and adverse human health or environmental effects on a minority population, low-income population, or Indian tribe from the agency action. Agencies should consider these multiple, or cumulative effects, even if certain effects are not within the control or subject to the discretion of the agency proposing the action.

• Agencies should recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action. These factors should include the physical sensitivity of the community or population to particular impacts; the effect of any disruption on the community structure associated with the proposed action; and the nature and degree of impact on the physical and social structure of the community.

• Agencies should develop effective public participation strategies. Agencies should, as appropriate, acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation, and should incorporate active outreach to affected groups.

• Agencies should assure meaningful community representation in the process. Agencies should be aware of the diverse constituencies within any particular community when they seek community representation and should endeavor to have complete representation of the community as a whole. Agencies also should be aware that community participation must occur as early as possible if it is to be meaningful.

• Agencies should seek tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally-recognized tribes, and any treaty rights.

2. Additional Considerations

The preceding principles must be applied in light of these further considerations that are
pertinent to any analysis of environmental justice under NEPA.

- The Executive Order does not change the prevailing legal thresholds and statutory interpretations under NEPA and existing case law. For example, for an EIS to be required, there must be a sufficient impact on the physical or natural environment to be "significant" within the meaning of NEPA. Agency consideration of impacts on low-income populations, minority populations, or Indian tribes may lead to the identification of disproportionately high and adverse human health or environmental effects that are significant and that otherwise would be overlooked.\(^{25}\)

- Under NEPA, the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe does not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory. Rather, the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.

- Neither the Executive Order nor this guidance prescribes any specific format for examining environmental justice, such as designating a specific chapter or section in an EIS or EA on environmental justice issues. Agencies should integrate analyses of environmental justice concerns in an appropriate manner so as to be clear, concise, and comprehensible within the general format suggested by 40 C.F.R. § 1502.10.

### C. Considering Environmental Justice in Specific Phases of the NEPA Process

While appropriate consideration of environmental justice issues is highly dependent upon the particular facts and circumstances of the proposed action, the affected environment, and the affected populations, there are opportunities and strategies that are useful at particular stages of the NEPA process.

1. Scoping

During the scoping process, an agency should preliminarily determine whether

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\(^{25}\) Title VI of the Civil Rights Act of 1964, U.S.C. 2000d et seq., and agency implementing regulations, prohibit recipients of federal financial assistance from taking actions that discriminate on the basis of race, sex, color, national origin, or religion. If an agency is aware that a recipient of federal funds may be taking action that is causing a racially discriminatory impact, the agency should consider using Title VI as a means to prevent or eliminate that discrimination.
an area potentially affected by a proposed agency action may include low-income populations, minority populations, or Indian tribes, and seek input accordingly. When the scoping process is used to develop an EIS or EA, an agency should seek input from low income populations, minority populations, or Indian tribes as early in the process as information becomes available. Any such determination, as well as the basis for the determination, should be more substantively addressed in the appropriate NEPA documents and communicated as appropriate during the NEPA process.

If an agency identifies any potentially affected minority populations, low-income populations, or Indian tribes, the agency should develop a strategy for effective public involvement in the agency’s determination of the scope of the NEPA analysis. Customary agency practices for notifying the public of a proposed action and subsequent scoping and public events may be enhanced through better use of local resources, community and other nongovernmental organizations, and locally targeted media.

<table>
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<tr>
<th>Agencies should consider enhancing their outreach through the following means:</th>
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<tbody>
<tr>
<td>● Religious organizations (e.g., churches, temples, ministerial associations);</td>
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<td>● Newspapers, radio and other media, particularly media targeted to low-income populations, minority populations, or Indian tribes;</td>
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<td>● Civic associations;</td>
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<td>● Minority business associations;</td>
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<td>● Environmental and environmental justice organizations;</td>
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<td>● Legal aid providers;</td>
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<td>● Homeowners’, tenants’, and neighborhood watch groups;</td>
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<td>● Federal, state, local, and tribal governments;</td>
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<td>● Rural cooperatives;</td>
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<td>● Business and trade organizations;</td>
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<td>● Community and social service organizations;</td>
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<td>● Universities, colleges, vocational and other schools;</td>
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<td>● Labor organizations;</td>
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<td>● Local schools and libraries;</td>
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<td>● Senior citizens’ groups;</td>
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<td>● Public health agencies and clinics; and</td>
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<td>● The Internet and other electronic media.</td>
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26 For more information on scoping, see Memorandum from Nicolas C. Yost, Scoping Guidance (Council on Environmental Quality, Executive Office of the President, April 30, 1981).
The participation of diverse groups in the scoping process is necessary for full consideration of the potential environmental impacts of a proposed agency action and any alternatives. By discussing and informing the public of the emerging issues related to the proposed action, agencies may reduce misunderstandings, build cooperative working relationships, educate the public and decisionmakers, and avoid potential conflicts. Agencies should recognize that the identity of the relevant "public" may evolve during the process and may include different constituencies or groups of individuals at different stages of the NEPA process. This may also be the appropriate juncture to begin government-to-government consultation with affected Indian tribes and to seek their participation as cooperating agencies. For this participation to be meaningful, the public should have access to enough information so that it is well informed and can provide constructive input.

The following information may help inform the public during the scoping process:

- A description of the proposed action;
- An outline of the anticipated schedule for completing the NEPA process, with key milestones;
- An initial list of alternatives (including alternative sites, if possible) and potential impacts;
- An initial list of other existing or proposed actions, Federal and non-Federal, that may have cumulative impacts;
- Maps, drawings, and any other appropriate material or references;
- An agency point of contact;
- Timely notice of locations where comments will be received or public meetings held;
- Any telephone number or locations where further information can be obtained;
- Examples of past public comments on similar agency actions.

Thorough scoping is the foundation for the analytical process and provides an early opportunity for the public to participate in the design of alternatives for achieving the goals and objectives of the proposed agency action.
2. Public Participation

Early and meaningful public participation in the federal agency decision making process is a paramount goal of NEPA. CEQ's regulations require agencies to make diligent efforts to involve the public throughout the NEPA process. Participation of low-income populations, minority populations, or tribal populations may require adaptive or innovative approaches to overcome linguistic, institutional, cultural, economic, historical, or other potential barriers to effective participation in the decision-making processes of Federal agencies under customary NEPA procedures. These barriers may range from agency failure to provide translation of documents to the scheduling of meetings at times and in places that are not convenient to working families.

The following steps may be considered, as appropriate, in developing an innovative strategy for effective public participation:

- Coordination with individuals, institutions, or organizations in the affected community to educate the public about potential health and environmental impacts and enhance public involvement;
- Translation of major documents (or summaries thereof), provision of translators at meetings, or other efforts as appropriate to ensure that limited-English speakers potentially affected by a proposed action have an understanding of the proposed action and its potential impacts;
- Provision of opportunities for limited-English speaking members of the affected public to provide comments throughout the NEPA process;
- Provision of opportunities for public participation through means other than written communication, such as personal interviews or use of audio or video recording devices to capture oral comments;
- Use of periodic newsletters or summaries to provide updates on the NEPA process to keep the public informed;
- Use of different meeting sizes or formats, or variation on the type and number of media used, so that communications are tailored to the particular community or population;
- Circulation or creation of specialized materials that reflect the concerns and sensitivities of particular populations such as information about risks specific to subsistence consumers of fish, vegetation, or wildlife;
- Use of locations and facilities that are local, convenient, and accessible to the disabled, low-income and minority communities, and Indian tribes; and
- Assistance to hearing-impaired or sight-impaired individuals.
3. Determining the Affected Environment

In order to determine whether a proposed action is likely to have disproportionately high and adverse human health or environmental effects on low-income populations, minority populations, or Indian tribes, agencies should identify a geographic scale for which they will obtain demographic information on the potential impact area. Agencies may use demographic data available from the Bureau of the Census (BOC) to identify the composition of the potentially affected population. Geographic distribution by race, ethnicity, and income, as well as a delineation of tribal lands and resources, should be examined. Census data are available in published formats, and on CD-ROM available through the BOC. This data also is available from a number of local, college, and university libraries, and the World Wide Web. Agencies may also find that Federal, tribal, state and local health, environmental, and economic agencies have useful demographic information and studies, such as the Landview II system, which is used by the BOC to assist in utilizing data from a geographic information system (GIS). Landview II has proven to be a low-cost, readily available means of graphically accessing environmental justice data. These approaches already should be incorporated into current NEPA compliance.

Agencies should recognize that the impacts within minority populations, low-income populations, or Indian tribes may be different from impacts on the general population due to a community’s distinct cultural practices. For example, data on different patterns of living, such as subsistence fish, vegetation, or wildlife consumption and the use of well water in rural communities may be relevant to the analysis. Where a proposed agency action would not cause any adverse environmental impacts, and therefore would not cause any disproportionately high and adverse human health or environmental impacts, specific demographic analysis may not be warranted. Where environments of Indian tribes may be affected, agencies must consider pertinent treaty, statutory, or executive order rights and consult with tribal governments in a manner consistent with the government-to-government relationship.

4. Analysis

When a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe has been identified, agencies should analyze how environmental and health effects are distributed within the affected community. Displaying available data spatially, through a GIS, can provide the agency and the public with an effective visualization of the distribution of health and environmental impacts among demographic populations. This type of data should be analyzed in light of any additional qualitative or quantitative information gathered through the public participation process.
Where a potential environmental justice issue has been identified by an agency, the agency should state clearly in the EIS or EA whether, in light of all of the facts and circumstances, a disproportionately high and adverse human health or environmental impact on minority populations, low-income populations, or Indian tribe is likely to result from the proposed action and any alternatives. This statement should be supported by sufficient information for the public to understand the rationale for the conclusion. The underlying analysis should be presented as concisely as possible, using language that is understandable to the public and that minimizes use of acronyms or jargon.

5. Alternatives

Agencies should encourage the members of the communities that may suffer a disproportionately high and adverse human health or environmental effect from a proposed agency action to help develop and comment on possible alternatives to the proposed agency action as early as possible in the process.

Where an EIS is prepared, CEQ regulations require agencies to identify an environmentally preferable alternative in the record of decision (ROD).\(^{27}\) When the agency has identified a disproportionately high and adverse human health or environmental effect on low-income populations, minority populations, or Indian tribes from either the proposed action or alternatives, the distribution as well as the magnitude of the disproportionate impacts in these communities should be a factor in determining the environmentally preferable alternative. In weighing this factor, the agency should consider the views it has received from the affected communities, and the magnitude of environmental impacts associated with alternatives that have a less disproportionate and adverse effect on low-income populations, minority populations, or Indian tribes.

6. Record of Decision

When an agency reaches a decision on an action for which an EIS was prepared, a public record of decision (ROD) must be prepared that provides information on the alternatives considered and the factors weighed in the decision-making process. Disproportionately high and adverse human health or environmental effects on a low-income population, minority population, or Indian tribe should be among those factors explicitly discussed in the ROD, and should also be addressed in any discussion of whether all practicable means to avoid or minimize environmental and other interrelated effects were adopted. Where relevant, the agency should discuss how these issues are addressed.

\(^{27}\) 40 C.F.R. § 1505.2(b)
in any monitoring and enforcement program summarized in the ROD.\textsuperscript{28}

Dissemination of the information in the ROD may provide an effective means to inform the public of the extent to which environmental justice concerns were considered in the decision-making process, and where appropriate, whether the agency intends to mitigate any disproportionately high and adverse human health or environmental effects within the constraints of NEPA and other existing laws. In addition to translating crucial portions of the EIS where appropriate, agencies should provide translation, where practicable and appropriate, of the ROD in non-technical, plain language for limited-English speakers. Agencies should also consider translating documents into languages other than English where appropriate and practical.

7. Mitigation

Mitigation measures include steps to avoid, mitigate, minimize, rectify, reduce, or eliminate the impact associated with a proposed agency action.\textsuperscript{29} Throughout the process of public participation, agencies should elicit the views of the affected populations on measures to mitigate a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe and should carefully consider community views in developing and implementing mitigation strategies. Mitigation measures identified in an EIS or developed as part of a FONSI should reflect the needs and preferences of affected low-income populations, minority populations, or Indian tribes to the extent practicable.

D. Where no EIS or EA is prepared

There are certain circumstances in which the policies of NEPA apply, and a disproportionately high and adverse human health or environmental impact on low-income populations, minority populations, or Indian tribes may exist, but where the specific statutory requirement to prepare an EIS or EA does not apply. These circumstances may arise because of an exemption from the requirement, a categorical exclusion of specific activities by regulation, or a claim by an agency that another environmental statute establishes the “functional equivalent” of an EIS or EA. For example, neither an EIS nor an EA is prepared for certain hazardous waste facility permits.

In circumstances in which an EIS or EA will not be prepared and a disproportionately high and adverse human health or environmental impact on low-income

\textsuperscript{28} See 40 C.F.R. § 1505.2(c).
\textsuperscript{29} See 40 C.F.R. § 1508.20.
populations, minority populations, or Indian tribes may exist, agencies should augment their procedures as appropriate to ensure that the otherwise applicable process or procedure for a federal action addresses environmental justice concerns. Agencies should ensure that the goals for public participation outlined in this guidance are satisfied to the fullest extent possible. Agencies also should fully develop and consider alternatives to the proposed action whenever possible, as would be required by NEPA.
IV.

Regulatory Changes

Consistent with the obligation of all agencies to promote consideration of environmental justice under NEPA and in all of their programs and activities, agencies that promulgate or revise regulations, policies, and guidances under NEPA or under any other statutory scheme should consult with CEQ and EPA to ensure that the principles and approaches presented in this guidance are fully incorporated into any new or revised regulations, policies, and guidances.
V.

Effect of this Guidance

Agencies should apply, and comply with, this guidance prospectively. If an agency has made substantial investments in NEPA compliance, or public participation with respect to a particular agency action, prior to issuance of this guidance, the agency should ensure that application of this guidance does not result in additional delays or costs of compliance.

This guidance is intended to improve the internal management of the Executive Branch with respect to environmental justice under NEPA. The guidance interprets NEPA as implemented through the CEQ regulations in light of Executive Order 12898. It does not create any rights, benefits, or trust obligations, either substantive or procedural, enforceable by any person, or entity in any court against the United States, its agencies, its officers, or any other person.
APPENDIX A

GUIDANCE
FOR FEDERAL AGENCIES ON KEY TERMS IN
EXECUTIVE ORDER 12898

INTRODUCTION

Pursuant to Executive Order 12898 on Environmental Justice, Federal agencies are to make the achievement of environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations, low-income populations, and Indian tribes and allowing all portions of the population a meaningful opportunity to participate in the development of, compliance with, and enforcement of Federal laws, regulations, and policies affecting human health or the environment regardless of race, color, national origin, or income. To that end, set forth below is guidance for Federal agencies on key terms contained in Executive Order 12898.

This guidance is intended only to improve the internal management of the Executive Branch. It shall not be deemed to create any right, benefit, or trust obligation, either substantive or procedural, enforceable by any person, or entity in any court against the United States, its agencies, its officers, or any other person. Consequently, neither this Guidance nor the deliberative processes or products resulting from the implementation of this Guidance shall be treated as establishing standards or criteria that constitute any basis for review of the actions of the Executive Branch. Compliance with this Guidance shall not be justiciable in any proceeding for judicial review of Agency action.
Section 1-1. IMPLEMENTATION.

1-101. Agency Responsibilities. To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Marianas Islands.

**Low-income population:** Low-income populations in an affected area should be identified with the annual statistical poverty thresholds from the Bureau of the Census' Current Population Reports, Series P-60 on Income and Poverty. In identifying low-income populations, agencies may consider as a community either a group of individuals living in geographic proximity to one another, or a set of individuals (such as migrant workers or Native Americans), where either type of group experiences common conditions of environmental exposure or effect.

**Minority:** Individual(s) who are members of the following population groups: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic.

**Minority population:** Minority populations should be identified where either: (a) the minority population of the affected area exceeds 50 percent or (b) the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population or other appropriate unit of geographic analysis. In identifying minority communities, agencies may consider as a community either a group of individuals living in

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30 Executive Order provisions are in standard font. Guidance is in bold font.
geographic proximity to one another, or a geographically dispersed/transient set of individuals (such as migrant workers or Native American), where either type of group experiences common conditions of environmental exposure or effect. The selection of the appropriate unit of geographic analysis may be a governing body's jurisdiction, a neighborhood, census tract, or other similar unit that is to be chosen so as to not artificially dilute or inflate the affected minority population. A minority population also exists if there is more than one minority group present and the minority percentage, as calculated by aggregating all minority persons, meets one of the above-stated thresholds.

**Disproportionately high and adverse human health effects:** When determining whether human health effects are disproportionately high and adverse, agencies are to consider the following three factors to the extent practicable:

(a) Whether the health effects, which may be measured in risks and rates, are significant (as employed by NEPA), or above generally accepted norms. Adverse health effects may include bodily impairment, infirmity, illness, or death; and

(b) Whether the risk or rate of hazard exposure by a minority population, low-income population, or Indian tribe to an environmental hazard is significant (as employed by NEPA) and appreciably exceeds or is likely to appreciably exceed the risk or rate to the general population or other appropriate comparison group; and

(c) Whether health effects occur in a minority population, low-income population, or Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards.

**Disproportionately high and adverse environmental effects:** When determining whether environmental effects are disproportionately high and adverse, agencies are to consider the following three factors to the extent practicable:

(a) Whether there is or will be an impact on the natural or physical environment that significantly (as employed by NEPA) and adversely affects a minority population, low-income population, or Indian tribe. Such effects may include ecological, cultural, human health, economic, or social impacts on minority communities, low-income communities, or Indian tribes when those impacts are interrelated to impacts on the natural or physical environment; and
(b) Whether environmental effects are significant (as employed by NEPA) and are or may be having an adverse impact on minority populations, low-income populations, or Indian tribes that appreciably exceeds or is likely to appreciably exceed those on the general population or other appropriate comparison group; and

(c) Whether the environmental effects occur or would occur in a minority population, low-income population, or Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards.

1-102. Creation of an Interagency Working Group on Environmental Justice. (a) Within 3 months of the date of this order, the Administrator of the Environmental Protection Agency ("Administrator") or the Administrator's designee shall convene an interagency Federal Working Group on Environmental Justice ("Working Group"). The Working Group shall comprise the heads of the following executive agencies and offices, or their designees: (a) Department of Defense; (b) Department of Health and Human Services; (c) Department of Housing and Urban Development; (d) Department of Labor; (e) Department of Agriculture; (f) Department of Transportation; (g) Department of Justice; (h) Department of the Interior; (i) Department of Commerce; (j) Department of Energy; (k) Environmental Protection Agency; (l) Office of Management and Budget; (m) Office of Science and Technology Policy; (n) Office of the Deputy Assistant to the President for Environmental Policy; (o) Office of the Assistant to the President for Domestic Policy; (p) National Economic Council; (q) Council of Economic Advisers; and (r) such other Government officials as the President may designate. The Working Group shall report to the President through the Deputy Assistant to the President for Environmental Policy and the Assistant to the President for Domestic Policy.

(b) The Working Group shall:

(1) provide guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.

(2) coordinate with, provide guidance to, and serve as a clearinghouse for, each Federal agency as it develops an environmental justice strategy as required by section 1-103 of this order, in order to ensure that the administration, interpretation and enforcement of programs, activities and policies are undertaken in a consistent manner;

(3) assist in coordinating research by, and stimulating cooperation among, the Environmental Protection Agency, the Department of Health and Human Services, the
Department of Housing and Urban Development, and other agencies conducting research or other activities in accordance with section 3-3 of this order;

(4) assist in coordinating data collection, required by this order;

(5) examine existing data and studies on environmental justice;

(6) hold public meetings as required in section 5-502(d) of this order; and

(7) develop interagency model projects on environmental justice that evidence cooperation among Federal agencies.


(a) Except as provided in section 6-605 of this order, each Federal agency shall develop an agency-wide environmental justice strategy, as set forth in subsections (b)-(e) of this section that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The environmental justice strategy shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to, at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations. In addition, the environmental justice strategy shall include, where appropriate, a timetable for undertaking identified revisions and consideration of economic and social implications of the revisions.

Differential patterns of consumption of natural resources: The term "differential patterns of consumption of natural resources" relates to subsistence and differential patterns of subsistence, and means differences in rates and/or patterns of fish, water, vegetation and/or wildlife consumption among minority populations, low-income populations, or Indian tribes, as compared to the general population.

(b) Within 4 months of the date of this order, each Federal agency shall identify an internal administrative process for developing its environmental justice strategy, and shall inform this Working Group of the process.
(c) Within 6 months of the date of this order, each Federal agency shall provide the Working Group with an outline of its proposed environmental justice strategy.

(d) Within 10 months of the date of this order, each Federal agency shall provide the Working Group with its proposed environmental justice strategy.

(e) Within 12 months of the date of this order, each Federal agency shall finalize its environmental justice strategy and provide a copy and written description of its strategy to the Working Group. During the 12 month period from the date of this order, each Federal agency, as part of its environmental justice strategy, shall identify several specific projects that can be promptly undertaken to address particular concerns identified during the development of the proposed environmental justice strategy, and a schedule for implementing those projects.

(f) Within 24 months of the date of this order, each Federal agency shall report to the Working Group on its progress in implementing its agency-wide environmental justice strategy.

(g) Federal agencies shall provide additional periodic reports to the Working Group as requested by the Working Group.

1-104. Reports to the President. Within 14 months of the date of this order, the Working Group shall submit to the President, through the Office of the Deputy Assistant to the President for Environmental Policy and the Office of the Assistant to the President for Domestic Policy, a report that describes the implementation of this order, and includes the final environmental justice strategies described in section 1-103(e) of this order.

Sec. 2-2. FEDERAL AGENCY RESPONSIBILITIES FOR FEDERAL PROGRAMS.

Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.
Sec. 3-3. RESEARCH, DATA COLLECTION, AND ANALYSIS.

3-301. Human Health and Environmental Research and Analysis.

(a) Environmental human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies, including segments at high risk from environmental hazards, such as minority populations, low-income populations and workers who may be exposed to substantial environmental hazards.

**Environmental hazard and substantial environmental hazard:** For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "environmental hazard" means a chemical, biological, physical or radiological agent, situation or source that has the potential for deleterious effects to the environment and/or human health. Among the factors that may be important in defining a substantial environmental hazard are: the likelihood, seriousness, and magnitude of the impact.

(b) Environmental human health analyses, whenever practical and appropriate, shall identify multiple and cumulative exposures.

**Environmental Exposure:** For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "environmental exposure" means contact with a chemical (e.g., asbestos, radon), biological (e.g., Legionella), physical (e.g., noise), or radiological agent.

**Multiple Environmental Exposure:** For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "multiple environmental exposure" means exposure to any combination of two or more chemical, biological, physical or radiological agents (or two or more agents from two or more of these categories) from single or multiple sources that have the potential for deleterious effects to the environment and/or human health.

**Cumulative Environmental Exposure:** For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "cumulative environmental exposure" means exposure to one or more chemical, biological, physical, or radiological agents across environmental media (e.g., air, water, soil) from single or multiple sources, over time in one or more locations, that have the potential for deleterious effects to the environment and/or human health.
(c) Federal agencies shall provide minority populations and low-income populations the opportunity to comment on the development and design of research strategies undertaken pursuant to this order.

3-302. Human Health and Environmental Data Collection and Analysis. To the extent permitted by existing law, including the Privacy Act, as amended (5 U.S.C. § 552a):

(a) each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income. To the extent practical and appropriate, Federal agencies shall use this information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(b) In connection with the development and implementation of agency strategies in section 1-103 of this order, each Federal agency, whenever practicable and appropriate, shall collect, maintain and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites expected to have a substantial environmental, human health, or economic effect on the surrounding populations, when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action. Such information shall be made available to the public unless prohibited by law; and

Federal environmental administrative or judicial action includes any administrative enforcement action, civil enforcement action, or criminal enforcement action initiated by, or permitting or licensing determination undertaken by, a Federal agency to enforce or execute a Federal law intended, in whole or in part, to protect human health or the environment.

(c) Each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding Federal facilities that are: (1) subject to the reporting requirements under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. section 11001-11050 as mandated in Executive Order No. 12856; and (2) expected to have a substantial environmental, human health, or economic effect on surrounding populations. Such information shall be made available to the public, unless prohibited by law.
(d) In carrying out the responsibilities in this section, each Federal agency, whenever practicable and appropriate, shall share information and eliminate unnecessary duplication of efforts through the use of existing data systems and cooperative agreements among Federal agencies and with State, local, and tribal governments.

Sec. 4-4. SUBSISTENCE CONSUMPTION OF FISH AND WILDLIFE.

4-401. Consumption Patterns. In order to assist in identifying the need for ensuring protection of populations with differential patterns of subsistence consumption of fish and wildlife, Federal agencies, whenever practicable and appropriate, shall collect, maintain, and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence. Federal agencies shall communicate to the public the risks of those consumption patterns.

**Subsistence consumption of fish and wildlife:** Dependence by a minority population, low-income population, Indian tribe or subgroup of such populations on indigenous fish, vegetation and/or wildlife, as the principal portion of their diet.

**Differential patterns of subsistence consumption:** Differences in rates and/or patterns of subsistence consumption by minority populations, low-income populations, and Indian tribes as compared to rates and patterns of consumption of the general population.

4-402. Guidance. Federal agencies, whenever practicable and appropriate, shall work in a coordinated manner to publish guidance reflecting the latest scientific information available concerning methods for evaluating the human health risks associated with the consumption of pollutant-bearing fish or wildlife. Agencies shall consider such guidance in developing their policies and rules.

Sec. 5-5. PUBLIC PARTICIPATION AND ACCESS TO INFORMATION.

(a) The public may submit recommendations to Federal agencies relating to the incorporation of environmental justice principles into Federal agency programs or policies. Each Federal agency shall convey such recommendations to the Working Group.

(b) Each Federal agency may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations.
(c) Each Federal agency shall work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.

(d) The Working Group shall hold public meetings, as appropriate, for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice. The Working Group shall prepare for public review a summary of the comments and recommendations discussed at the public meetings.

Sec. 6-6. GENERAL PROVISIONS.

6-601. Responsibility for Agency Implementation. The head of each Federal agency shall be responsible for ensuring compliance with this order. Each Federal agency shall conduct internal reviews and take such other steps as may be necessary to monitor compliance with this order.

6-602. Executive Order No. 12250. This Executive order is intended to supplement but not supersede Executive Order No. 12250, which requires consistent and effective implementation of various laws prohibiting discriminatory practices in programs receiving Federal financial assistance. Nothing herein shall limit the effect or mandate of Executive Order No. 12250.

6-603. Executive Order No. 12875. This Executive order is not intended to limit the effect or mandate of Executive Order No. 12875.

6-604. Scope. For purposes of this order, Federal agency means any agency on the Working Group, and such other agencies as may be designated by the President, that conducts any Federal program or activity that substantially affects human health or the environment. Independent agencies are requested to comply with the provisions of this order.

6-605. Petitions for Exemptions. The head of a Federal agency may petition the President for an exemption from the requirements of this order on the grounds that all or some of the petitioning agency's programs or activities should not be subject to the requirements of this order.

6-606. Native American Programs. Each Federal agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the Working Group, and, after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that address Federally-recognized Indian Tribes.
Native American programs: Native American programs include those Federal programs designed to serve Indian Tribes or individual Indians, recognizing that such programs are to be guided, as appropriate, by the government-to-government relationship, the Federal trust responsibility, and the role of tribes as governments within the Federal system.

6-607. Costs. Unless otherwise provided by law, Federal agencies shall assume the financial costs of complying with this order.

6-608. General. Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law.

6-609. Judicial Review. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.
MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: NANCY H. SUTLEY, Chair

SUBJECT: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact

The Council on Environmental Quality (CEQ) is issuing this guidance for Federal departments and agencies on establishing, implementing, and monitoring mitigation commitments identified and analyzed in Environmental Assessments, Environmental Impact Statements, and adopted in the final decision documents. This guidance also clarifies the appropriate use of mitigated “Findings of No Significant Impact” under the National Environmental Policy Act (NEPA). This guidance is issued in accordance with NEPA, 42 U.S.C. § 4321 et seq., and the CEQ Regulations for Implementing the Procedural Provisions of NEPA (CEQ Regulations), 40 CFR Parts 1500-1508. The guidance explains the requirements of NEPA and the CEQ Regulations, describes CEQ policies, and recommends procedures for agencies to use to help them comply with the requirements of NEPA and the CEQ Regulations when they establish mitigation planning and implementation procedures.


2 CEQ is issuing this guidance as an exercise of its duties and functions under section 204 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4344, and Executive Order No. 11,514, 35 Fed. Reg. 4,247 (Mar. 5, 1970), as amended by Executive Order No. 11,991, 42 Fed. Reg. 26,927 (May 24, 1977). This guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or other legally binding requirement and is not legally enforceable. The use of language such as “recommend,” “may,” “should,” and “can” is intended to describe CEQ policies and recommendations. The use of mandatory terminology such as “must” and “required” is intended to describe controlling requirements under the terms of NEPA and the CEQ Regulations, but this document does not independently establish legally binding requirements.
NEPA was enacted to promote efforts that will prevent or eliminate damage to the human environment. Mitigation measures can help to accomplish this goal in several ways. Many Federal agencies and applicants include mitigation measures as integral components of a proposed project’s design. Agencies also consider mitigation measures as alternatives when developing Environmental Assessments (EA) and Environmental Impact Statements (EIS). In addition, agencies have increasingly considered mitigation measures in EAs to avoid or lessen potentially significant environmental effects of proposed actions that would otherwise need to be analyzed in an EIS. This use of mitigation may allow the agency to comply with NEPA’s procedural requirements by issuing an EA and a Finding of No Significant Impact (FONSI), or “mitigated FONSI,” based on the agency’s commitment to ensure the mitigation that supports the FONSI is performed, thereby avoiding the need to prepare an EIS.

This guidance addresses mitigation that an agency has committed to implement as part of a project design and mitigation commitments informed by the NEPA review process. As discussed in detail in Section I, below, agencies may commit to mitigation measures considered as alternatives in an EA or EIS so as to achieve an environmentally preferable outcome. Agencies may also commit to mitigation measures to support a mitigated FONSI, so as to complete their review of potentially significant environmental impacts without preparing an EIS. When agencies do not document and, in important cases, monitor mitigation commitments to determine if the mitigation was implemented or effective, the use of mitigation may fail to advance NEPA’s purpose of ensuring informed and transparent environmental decisionmaking. Failure to document and monitor mitigation may also undermine the integrity of the NEPA review. These concerns and the need for guidance on this subject have long been recognized.

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3 42 U.S.C. § 4321 (stating that the purposes of NEPA include promoting efforts which will prevent or eliminate damage to the environment).

4 This trend was noted in CEQ’s Twenty-Fifth Anniversary report on the effectiveness of NEPA implementation. See CEQ, “NEPA: A Study of its Effectiveness After Twenty-Five Years” 20 (1997), available at ceq.hss.doe.gov/nepa/nepa25fn.pdf.

5 See, e.g., CEQ, 1987-1988 Annual Report, available at www.slideshare.net/whitehouse/august-1987-1988-the-eighteenth-annual-report-of-the-council-on-environmental-quality (stating that CEQ 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 mitigation reduces those impacts to less than significant levels). In 2002, CEQ convened a Task Force on Modernizing NEPA Implementation, which recommended that CEQ issue guidance clarifying the requirements for public involvement, alternatives, and mitigation for actions that warrant longer EAs including those with mitigated FONSIs. CEQ NEPA Task Force, “Modernizing NEPA Implementation” 75 (2003), available at ceq.hss.doe.gov/ntf/report/totaldoc.html. NEPA experts and public stakeholders have expressed broad support for this recommendation, calling for consideration of monitoring and public involvement in the use of mitigated FONSIs. CEQ, “The Public and Experts’
this guidance is designed to address these concerns, CEQ also acknowledges that NEPA itself does not create a general substantive duty on Federal agencies to mitigate adverse environmental effects.  

Accordingly, in conjunction with the 40th Anniversary of NEPA, CEQ announced that it would issue this guidance to clarify the appropriateness of mitigated FONSIs and the importance of monitoring environmental mitigation commitments. This new guidance affirms CEQ’s support for the appropriate use of mitigated FONSIs, and accordingly amends and supplements previously issued guidance. This guidance is intended to enhance the integrity and credibility of the NEPA process and the information upon which it relies.

CEQ provides several broad recommendations in Section II, below, to help improve agency consideration of mitigation in EISs and EAs. Agencies should not commit to mitigation measures considered in an EIS or EA absent the authority or expectation of resources to ensure that the mitigation is performed. In the decision documents concluding their environmental reviews, agencies should clearly identify any mitigation measures adopted as agency commitments or otherwise relied upon (to the extent consistent with agency authority or other legal authority), so as to ensure the integrity of the NEPA process and allow for greater transparency.

Review of the National Environmental Policy Act Task Force Report "Modernizing NEPA Implementation" 7 (2004), available at ceq.hss.doe.gov/ntf/CEQ_Draft_Final_Roundtable_Report.pdf; see also CEQ, "Rocky Mountain Roundtable Report" 8 (2004), available at ceq.hss.doe.gov/ntf/RockyMtnRoundTableReport.pdf (noting that participants in a regional roundtable on NEPA modernization identified “developing a means to enforce agency commitments to monitoring and mitigation” as one of the top five aspects of NEPA implementation needing immediate attention); “Eastern Round Table Report” 4 (2003), available at ceq.hss.doe.gov/ntf/EasternRoundTableReport.pdf (reporting that, according to several panelists at a regional roundtable, “parties responsible for monitoring the effects of... mitigation measures are rarely identified or easily held accountable,” and that a lack of monitoring impedes agencies’ ability to address the cumulative effects of EA actions).


8 This previous guidance is found in CEQ, “Forty Most Asked Questions Concerning CEQ’S National Environmental Policy Act Regulations,” 46 Fed. Reg. 18,026 (Mar. 23, 1981), available at ceq.eh.doe.gov/nepa/regs/40/40P1.htm (suggesting that the existence of mitigation measures developed during the scoping or EA stages “does not obviate the need for an EIS”).
Section III emphasizes that agencies should establish implementation plans based on the importance of the project and its projected effects. Agencies should create new, or strengthen existing, monitoring to ensure that mitigation commitments are implemented. Agencies should also use effectiveness monitoring to learn if the mitigation is providing the benefits predicted. Importantly, agencies should encourage public participation and accountability through proactive disclosure of, and provision of access to, agencies' mitigation commitments as well as mitigation monitoring reports and related documents.

Although the recommendations in this guidance are broad in nature, agencies should establish, in their NEPA implementing procedures and/or guidance, specific procedures that create systematic accountability and the mechanisms to accomplish these goals. This guidance is intended to assist agencies with the development and review of their NEPA procedures, by specifically recommending:

- How to ensure that mitigation commitments are implemented;
- How to monitor the effectiveness of mitigation commitments;
- How to remedy failed mitigation; and
- How to involve the public in mitigation planning.

Finally, to assist agencies in the development of their NEPA implementing procedures, an overview of relevant portions of the Department of the Army NEPA regulations is appended to this guidance as an example for agencies to consider when incorporating the recommendations of this guidance as requirements in their NEPA programs and procedures.10

I. THE IMPORTANCE OF MITIGATION UNDER NEPA

Mitigation is an important mechanism Federal agencies can use to minimize the potential adverse environmental impacts associated with their actions. As described in the CEQ Regulations, agencies can use mitigation to reduce environmental impacts in several ways. Mitigation includes:

- Avoiding an impact by not taking a certain action or parts of an action;
- Minimizing an impact by limiting the degree or magnitude of the action and its implementation;
- Rectifying an impact by repairing, rehabilitating, or restoring the affected environment;
- Reducing or eliminating an impact over time, through preservation and maintenance operations during the life of the action; and

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9 40 CFR § 1507.3 (requiring agencies to issue, and continually review, policies and procedures to implement NEPA in conformity with NEPA and CEQ Regulations).

10 See id.; see also id. § 1507.2 (requiring agencies to have personnel and other resources available to implement NEPA reviews and meet their NEPA responsibilities).
• Compensating for an impact by replacing or providing substitute resources or environments.\(^\text{11}\)

Federal agencies typically develop mitigation as a component of a proposed action, or as a measure considered in the course of the NEPA review conducted to support agency decisionmaking processes, or both. In developing mitigation, agencies necessarily and appropriately rely upon the expertise and experience of their professional staff to assess mitigation needs, develop mitigation plans, and oversee mitigation implementation. Agencies may also rely on outside resources and experts for information about the ecosystem functions and values to be protected or restored by mitigation, to ensure that mitigation has the desired effects and to develop appropriate monitoring strategies. Any outside parties consulted should be neutral parties without a financial interest in implementing the mitigation and monitoring plans, and 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.\(^\text{12}\)

Further, when agencies delegate responsibility for preparing NEPA analyses and documentation, or when other entities (such as applicants) assume such responsibility, CEQ recommends that any experts employed to develop mitigation and monitoring should have the kind of expert knowledge, training, and experience described above.

The sections below clarify practices Federal agencies should use when they employ mitigation in three different contexts: as components of project design; as mitigation alternatives considered in an EA or an EIS and adopted in related decision documents; and as measures identified and committed to in an EA as necessary to support a mitigated FONSI. CEQ encourages agencies to commit to mitigation to achieve environmentally preferred outcomes, particularly when addressing unavoidable adverse environmental impacts. Agencies should not commit to mitigation, however, unless they have sufficient legal authorities and expect there will be necessary resources available to perform or ensure the performance of the mitigation. The agency’s own underlying authority may provide the basis for its commitment to implement and monitor the mitigation. Alternatively, the authority for the mitigation may derive from legal requirements that are enforced by other Federal, state, or local government entities (e.g., air or water permits administered by local or state agencies).

A. Mitigation Incorporated into Project Design

Many Federal agencies rely on mitigation to reduce adverse environmental impacts as part of the planning process for a project, incorporating mitigation as integral components of a proposed project design before making a determination about the

\(^{11}\) Id. § 1508.20 (defining mitigation to include these activities).

\(^{12}\) See id. § 1506.5 (providing that agencies are responsible for the accuracy of environmental information submitted by applicants for use in EISs and EAs, and requiring contractors selected to prepare EISs to execute disclosure statement specifying that they have no financial or other interest in the outcome of the project).
significance of the project’s environmental impacts. Such mitigation can lead to an environmentally preferred outcome and in some cases reduce the projected impacts of agency actions to below a threshold of significance. An example of mitigation measures that are typically included as part of the proposed action are agency standardized best management practices such as those developed to prevent storm water runoff or fugitive dust emissions at a construction site.

Mitigation measures included in the project design are integral components of the proposed action, are implemented with the proposed action, and therefore should be clearly described as part of the proposed action that the agency will perform or require to be performed. Consequently, the agency can address mitigation early in the decisionmaking process and potentially conduct a less extensive level of NEPA review.

B. Mitigation Alternatives Considered in Environmental Assessments and Environmental Impact Statements

Agencies are required, under NEPA, to study, develop, and describe appropriate alternatives when preparing EAs and EISs. The CEQ Regulations specifically identify procedures agencies must follow when developing and considering mitigation alternatives when preparing an EIS. When an agency prepares an EIS, it must include mitigation measures (not already included in the proposed action or alternatives) among the alternatives compared in the EIS. Each EIS must contain a section analyzing the environmental consequences of the proposed action and its alternatives, including “means to mitigate adverse environmental impacts.”

When a Federal agency identifies a mitigation alternative in an EA or an EIS, it may commit to implement that mitigation to achieve an environmentally-preferable outcome. Agencies should not commit to mitigation measures considered and analyzed in an EIS or EA if there are insufficient legal authorities, or it is not reasonable to foresee the availability of sufficient resources, to perform or ensure the performance of the mitigation. Furthermore, the decision document following the EA should—and a Record of Decision (ROD) must—identify those mitigation measures that the agency is adopting

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13 CEQ NEPA Task Force, “Modernizing NEPA Implementation” at 69.

14 42 U.S.C. § 4332(2)(C) (mandating that agencies’ detailed statements must include alternatives to the proposed action); id. § 4332(E) (requiring 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).

15 40 CFR § 1502.14(f) (listing mitigation measures as one of the required components of the alternatives included in an EIS); id. § 1508.25(b)(3) (defining the “scope” of an EIS to include mitigation measures).

16 Id. § 1502.16(h).
and committing to implement, including any monitoring and enforcement program applicable to such mitigation commitments.17

C. Mitigation Commitments Analyzed in Environmental Assessments to Support a Mitigated FONSI

When preparing an EA, many agencies develop and consider committing to mitigation measures to avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts that would otherwise require full review in an EIS. CEQ recognizes the appropriateness, value, and efficacy of providing for mitigation to reduce the significance of environmental impacts. Consequently, when such mitigation measures are available and an agency commits to perform or ensure the performance of them, then these mitigation commitments can be used to support a FONSI, allowing the agency to conclude the NEPA process and proceed with its action without preparing an EIS.18 An agency should not commit to mitigation measures necessary for a mitigated FONSI if there are insufficient legal authorities, or it is not reasonable to foresee the availability of sufficient resources, to perform or ensure the performance of the mitigation.19

Mitigation commitments needed to lower the level of impacts so that they are not significant should be clearly described in the mitigated FONSI document and in any other relevant decision documents related to the proposed action. Agencies must provide for appropriate public involvement during the development of the EA and FONSI.20

17 Id. § 1505.2(c) (providing that a record of decision must 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; and providing that a monitoring and enforcement program must be adopted and summarized where applicable for any mitigation).

18 This guidance approves of the use of the “mitigated FONSI” when the NEPA process results in enforceable mitigation measures. It thereby amends and supplements previously issued CEQ guidance that suggested that the existence of mitigation measures developed during the scoping or EA stages “does not obviate the need for an EIS.” See CEQ, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” 46 Fed. Reg. 18,026 (Mar. 23, 1981), available at ceq.eh.doe.gov/nepa/regs/4040P1.htm.

19 When agencies consider and decide on an alternative outside their jurisdiction (as discussed in 40 CFR § 1502.14(c)), they should identify the authority for the mitigation and consider the consequences of it not being implemented.

20 40 CFR § 1501.4(b) (requiring agencies to involve environmental agencies, applicants, and the public, to the extent practicable); id. § 1501.4(e)(1) (requiring agencies to make FONSIIs available to the affected public as specified in § 1506.6); id. § 1501.4(e)(2) (requiring agencies to make FONSIIs available for public review for thirty days before making any final determination on whether to prepare an EIS or proceed with an action when the proposed action is, or is closely similar to, one which normally requires the
Furthermore, in addition to those situations where a 30-day public review of the FONSI is required, agencies should make the EA and FONSI available to the public (e.g., by posting them on an agency website). Providing the public with clear information about agencies’ mitigation commitments helps ensure the value and integrity of the NEPA process.

II. ENSURING THAT MITIGATION COMMITMENTS ARE IMPLEMENTED

Federal agencies should take steps to ensure that mitigation commitments are actually implemented. Consistent with their authority, agencies should establish internal processes to ensure that mitigation commitments made on the basis of any NEPA analysis are carefully documented and that relevant funding, permitting, or other agency approvals and decisions are made conditional on performance of mitigation commitments.

Agency NEPA implementing procedures should require clear documentation of mitigation commitments considered in EAs and EISs prepared during the NEPA process and adopted in their decision documents. Agencies should ensure that the expertise and professional judgment applied in determining the appropriate mitigation commitments are described in the EA or EIS, and that the NEPA analysis considers when and how those mitigation commitments will be implemented.

Agencies should clearly identify commitments to mitigation measures designed to achieve environmentally preferable outcomes in their decision documents. They should also identify mitigation commitments necessary to reduce impacts, where appropriate, to a level necessary for a mitigated FONSI. In both cases, mitigation commitments should be carefully specified in terms of measurable performance standards or expected results, so as to establish clear performance expectations. The agency should also specify the preparation of an EIS under agency NEPA implementing procedures, or when the nature of the proposed action is one without precedent); id. § 1506.6 (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures).

21 Id. § 1501.4(e)(2).

22 In 2001, the Committee on Mitigating Wetland Losses, through the National Research Council (NRC), 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.” NRC Committee on Mitigating Wetland Losses, “Compensating for Wetland Losses Under the Clean Water Act” 2 (2001). The study’s recommendations were incorporated into the 2008 Final Compensatory Mitigation Rule promulgated jointly by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency. See U.S. Army Corps of Engineers & U.S. Environmental Protection Agency, “Compensatory Mitigation for Losses of Aquatic Resources,” 73 Fed. Reg. 19,594 (Apr. 10, 2008).
timeframe for the agency action and the mitigation measures in its decision documents, to ensure that the intended start date and duration of the mitigation commitment is clear. When an agency funds, permits, or otherwise approves actions, it should also exercise its available authorities to ensure implementation of any mitigation commitments by including appropriate conditions on the relevant grants, permits, or approvals.

CEQ views funding for implementation of mitigation commitments as critical to ensuring informed decisionmaking. For mitigation commitments that agencies will implement directly, CEQ recognizes that it may not be possible to identify funds from future budgets; however, a commitment to seek funding is considered essential and if it is reasonably foreseeable that funding for implementation of mitigation may be unavailable at any time during the life of the project, the agency should disclose in the EA or EIS the possible lack of funding and assess the resultant environmental effects. If the agency has disclosed and assessed the lack of funding, then unless the mitigation is essential to a mitigated FONSI or necessary to comply with another legal requirement, the action could proceed. If the agency committing to implementing mitigation has not disclosed and assessed the lack of funding, and the necessary funding later becomes unavailable, then the agency should not move forward with the proposed action until funding becomes available or the lack of funding is appropriately assessed (see Section III, below).

A. Establishing a Mitigation Monitoring Program

Federal agencies must consider reasonably foreseeable future impacts and conditions in a constantly evolving environment. Decisionmakers will be better able to adapt to changing circumstances by creating a sound mitigation implementation plan and through ongoing monitoring of environmental impacts and their mitigation. Monitoring can improve the quality of overall agency decisionmaking by providing feedback on the effectiveness of mitigation techniques. A comprehensive approach to mitigation planning, implementation, and monitoring will therefore help agencies realize opportunities for reducing environmental impacts through mitigation, advancing the integrity of the entire NEPA process. These approaches also serve NEPA’s goals of ensuring transparency and openness by making relevant and useful environmental information available to decisionmakers and the public.23

Adaptive management can help an agency take corrective action if mitigation commitments originally made in NEPA and decision documents fail to achieve projected environmental outcomes and there is remaining federal action. Agencies can, in their NEPA reviews, establish and analyze mitigation measures that are projected to result in the desired environmental outcomes, and can then identify those mitigation principles or measures that it would apply in the event the initial mitigation commitments are not implemented or effective. Such adaptive management techniques can be advantageous to both the environment and the agency’s project goals.24 Agencies can also, short of

23 40 CFR § 1500.1(b).

24 See CEQ NEPA Task Force, “Modernizing NEPA Implementation” at 44.
adaptive management, analyze specific mitigation alternatives that could take the place of mitigation commitments in the event the commitment is not implemented or effective.

Monitoring is fundamental for ensuring the implementation and effectiveness of mitigation commitments, meeting legal and permitting requirements, and identifying trends and possible means for improvement. Under NEPA, a Federal agency has a continuing duty to ensure that new information about the environmental impact of its proposed actions is taken into account, and that the NEPA review is supplemented when significant new circumstances or information arise that are relevant to environmental concerns and bear on the proposed action or its impacts.\textsuperscript{25} For agency decisions based on an EIS, the CEQ Regulations explicitly require that “a monitoring and enforcement program shall be adopted . . . where applicable for any mitigation.”\textsuperscript{26} In addition, the CEQ Regulations state that agencies may “provide for monitoring to assure that their decisions are carried out and should do so in important cases.”\textsuperscript{27} Accordingly, an agency should also commit to mitigation monitoring in important cases when relying upon an EA and mitigated FONSI. Monitoring is essential in those important cases where the mitigation is necessary to support a FONSI and thus is part of the justification for the agency’s determination not to prepare an EIS.

Agencies are expected to apply professional judgment and the rule of reason when identifying those cases that are important and warrant monitoring, and when determining the type and extent of monitoring they will use to check on the progress made in implementing mitigation commitments as well as their effectiveness. In cases that are less important, the agency should exercise its discretion to determine what level of monitoring, if any, is appropriate. The following are examples of factors that agencies should consider to determine importance:

- Legal requirements of statutes, regulations, or permits;
- Human health and safety;
- Protected resources (e.g., parklands, threatened or endangered species, cultural or historic sites) 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 projected impacts.

Once an agency determines that it will provide for monitoring in a particular case, monitoring plans and programs should be described or incorporated by reference in the

\textsuperscript{25} 40 CFR § 1502.9(c) (requiring supplementation of EISs when there are substantial changes to the proposed action, or significant new information or circumstances arise that are relevant to the environmental effects of the proposed action).

\textsuperscript{26} Id. § 1505.2(c).

\textsuperscript{27} Id. § 1505.3.
Agency’s decision documents. Agencies have discretion, within the scope of their authority, to select an appropriate form and method for monitoring, but they should identify the monitoring area and establish the appropriate monitoring system. The form and method of monitoring can be informed by an agency’s past monitoring plans and programs that tracked impacts on similar resources, as well as plans and programs used by other agencies or entities, particularly those with an interest in the resource being monitored. For mitigation 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. Other possible monitoring methods include agency-specific environmental monitoring, compliance assessment, and auditing systems. For activities involving third parties (e.g., permittees or grantees), it may be appropriate to require the third party to perform the monitoring as long as a clear accountability and oversight framework is established. The monitoring program should be implemented together with a review process and a system for reporting results.

Regardless of the method chosen, agencies should ensure that the monitoring program tracks whether mitigation commitments are being performed as described in the NEPA and related decision documents (i.e., implementation monitoring), and whether the mitigation effort is producing the expected outcomes and resulting environmental effects (i.e., effectiveness monitoring). Agencies should also ensure that their mitigation monitoring procedures appropriately provide for public involvement. These recommendations are explained in more detail below.

28 The mitigation plan and program should be described to the extent possible based on available and reasonably foreseeable information in cases where the NEPA analysis and documentation are completed prior to final design of a proposed project.

29 The Department of the Army regulations provide an example of this approach. See 32 CFR part 651 App. C. These regulations are summarized in the Appendix to this guidance.

30 An EMS provides a systematic framework for a Federal agency to monitor and continually improve its environmental performance through audits, evaluations of legal and other requirements, and management reviews. The potential for EMS to support NEPA work is further addressed in CEQ, “Aligning National Environmental Policy Act Processes with Environmental Management Systems” 4 (2007) available at ceq.hss.doe.gov/nepa/nepapubs/Aligning_NePa_Processes_with_Environmental_Management_Systems_2007.pdf (discussing the use of EMSs to track implementation and monitoring of mitigation). In 2001, the Department of the Army announced that it 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. To learn more about how EMS implementation has resulted in an effective EMS for monitoring purposes at an Army installation, see the Sustainability website for the Army’s Fort Lewis installation, available at sustainablefortlewis.army.mil.
B. Monitoring Mitigation Implementation

A successful monitoring program will track the implementation of mitigation commitments to determine whether they are being performed as described in the NEPA documents and related decision documents. The responsibility for developing an implementation monitoring program depends in large part upon who will actually perform the mitigation—the lead Federal agency or cooperating agency; the applicant, grantee, or permit holder; another responsible entity or cooperative non-Federal partner; or a combination of these. The lead agency should ensure that information about responsible parties, mitigation requirements, as well as any appropriate enforcement clauses are included in documents such as authorizations, agreements, permits, financial assistance awards, or contracts. Ultimate monitoring responsibility rests with the lead Federal agency or agencies to assure that monitoring is occurring when needed and that results are being properly considered. The project’s lead agency can share monitoring responsibility with joint lead or cooperating agencies or other entities, such as applicants or grantees. The responsibility should be clearly described in the NEPA documents or associated decision documents, or related documents describing and establishing the monitoring requirements or expectations.

C. Monitoring the Effectiveness of Mitigation

Effectiveness monitoring tracks the success of a mitigation effort in achieving expected outcomes and environmental effects. Completing environmental data collection and analyses prior to project implementation provides an understanding of the baseline conditions for each potentially affected resource for reference when determining whether the predicted efficacy of mitigation commitments is being achieved. Agencies can rely on agency staff and outside experts familiar with the predicted environmental impacts to develop the means to monitor mitigation effectiveness, in the same way that they can rely on agency and outside experts to develop and evaluate the effectiveness of mitigation (see Section I, above).

When monitoring mitigation, agencies should consider drawing on sources of information available from the agency, from other Federal agencies, and from state, local, and tribal agencies, as well as from non-governmental sources such as local organizations, academic institutions, and non-governmental organizations. Agencies should especially consider working with agencies responsible for overseeing land management and impacts to specific resources. For example, agencies could consult with the U.S. Fish and Wildlife and National Marine Fisheries Services (for information to evaluate potential impacts to threatened and endangered species) and with State Historic Preservation Officers (for information to evaluate potential impacts to historic structures).

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Such enforcement clauses, including appropriate penalty clauses, should be developed as allowable under the applicable statutory and regulatory authorities.
D. The Role of the Public

Public involvement is a key procedural requirement of the NEPA review process, and should be fully provided for in the development of mitigation and monitoring procedures. Agencies are also encouraged, as a matter of transparency and accountability, to consider including public involvement components in their mitigation monitoring programs. The agencies' experience and professional judgment are key to determining the appropriate level of public involvement. In addition to advancing accountability and transparency, public involvement may provide insight or perspective for improving mitigation activities and monitoring. The public may also assist with actual monitoring through public-private partnership programs.

Agencies should provide for public access to mitigation monitoring information consistent with NEPA and the Freedom of Information Act (FOIA). NEPA and the CEQ Regulations incorporate the FOIA by reference to require agencies to provide public access to releasable documents related to EISs, which may include documents regarding mitigation monitoring and enforcement. The CEQ Regulations also require agencies to involve the public in the EA preparation process to the extent practicable and in certain cases to make a FONSI available for public review before making its final determination on whether it will prepare an EIS or proceed with the action. Consequently, agencies should involve the public when preparing EAs and mitigated FONSIs. NEPA further requires all Federal agencies to make information useful for restoring, maintaining, and

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32 40 CFR § 1506.6 (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures).


34 42 U.S.C. § 4332(2)(C) (requiring Federal agencies to make EISs available to the public as provided by the FOIA); 40 CFR § 1506.6(f) (requiring agencies to make EISs, comments received, and any underlying documents available to the public pursuant to the provisions of the FOIA without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action).

35 40 CFR § 1501.4(b) (requiring agencies to involve environmental agencies, applicants, and the public, to the extent practicable); id. § 1501.4(e)(1) (requiring agencies to make FONSIs available to the affected public as specified in § 1506.6); id. § 1501.4(e)(2) (requiring agencies to make a FONSI available for public review for thirty days before making its final determination on whether it will prepare an EIS or proceed with the action when the nature of the proposed action is, or is similar to, an action which normally requires the preparation of an EIS); id. § 1506.6 (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures).

36 Id. § 1501.4.
enhancing the quality of the environment available to States, counties, municipalities, institutions, and individuals. This requirement can include information on mitigation and mitigation monitoring.

Beyond these requirements, agencies are encouraged to make proactive, discretionary release of mitigation monitoring reports and other supporting documents, and to make responses to public inquiries regarding mitigation monitoring readily available to the public through online or print media. This recommendation is consistent with the President’s Memorandum on Transparency and Open Government directing agencies to take affirmative steps to make information public without waiting for specific requests for information. The Open Government Directive, issued by the Office of Management and Budget in accordance with the President’s Memorandum, further directs agencies to use their web sites and information technology capabilities to disseminate, to the maximum extent practicable, useful information under FOIA, so as to promote transparency and accountability.

Agencies should exercise their judgment to ensure that the methods and media used to provide mitigation and monitoring information are commensurate with the importance of the action and the resources at issue, taking into account any risks of harm to affected resources. In some cases, agencies may need to balance competing privacy or confidentiality concerns (e.g., protecting confidential business information or the location of sacred sites) with the benefits of public disclosure.

III. REMEDYING INEFFECTIVE OR NON-IMPLEMENTED MITIGATION

Through careful monitoring, agencies may discover that mitigation commitments have not been implemented, or have not had the environmental results predicted in the NEPA and decision documents. Agencies, having committed to mitigation, should work to remedy such inadequacies. It is an agency’s underlying authority or other legal authority that provides the basis for the commitment to implement mitigation and monitor its effectiveness. As discussed in Section I, agencies should not commit to mitigation considered in an EIS or EA unless there are sufficient legal authorities and they expect the resources to be available to perform or ensure the performance of the mitigation. In some cases, as discussed in Section II, agencies may exercise their authority to make


relevant funding, permitting, or other agency approvals and decisions conditional on the performance of mitigation commitments by third parties. It follows that an agency must rely on its underlying authority and available resources to take remedial steps. Agencies should consider taking remedial steps as long as there remains a pending Federal decision regarding the project or proposed action. Agencies may also exercise their legal authority to enforce conditions placed on funding, grants, permits, or other approvals.

If a mitigation commitment is simply not undertaken or fails to mitigate the environmental effects as predicted, the responsible agency should further consider whether it is necessary to prepare supplemental NEPA analysis and documentation. The agency determination would be based upon its expertise and judgment regarding environmental consequences. Much will depend upon the agency’s determination as to what, if any, portions of the Federal action remain and what opportunities remain to address the effects of the mitigation failure. In cases where an EIS or a supplementary EA or EIS is required, the agency must avoid actions that would have adverse environmental impacts and limit its choice of reasonable alternatives during the preparation of an EIS.

In cases where there is no remaining agency action to be taken, and the mitigation has not been fully implemented or has not been as effective as predicted, it may not be appropriate to supplement the original NEPA analysis and documentation. However, it would be appropriate for future NEPA analyses of similar proposed actions and relevant programs to consider past experience and address the potential for environmental consequences as a result of mitigation failure. This would ensure that the assumed environmental baselines reflect true conditions, and that similar mitigation is not relied on in subsequent decisions, at least without more robust provisions for adaptive management or analysis of mitigation alternatives that can be applied in the event of mitigation failure.

IV. CONCLUSION

This guidance is intended to assist Federal agencies with the development of their NEPA procedures, guidance, and regulations; foster the appropriate use of Findings of No Significant Impact; and ensure that mitigation commitments are appropriately and effectively documented, implemented, and monitored. The guidance also provides Federal agencies with recommended actions in circumstances where mitigation is not

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40 CFR § 1502.9(c) (requiring an agency to prepare supplements to draft or final EISs if the agency makes substantial changes in the proposed action that are 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).

41 Id. § 1506.1(a) (providing that until an agency issues a Record of Decision, no action concerning the proposal may be taken that would have an adverse environmental impact or limit the choice of reasonable alternatives).
implemented or fails to have the predicted effect. Questions regarding this guidance should be directed to the CEQ Associate Director for NEPA Oversight.
APPENDIX

Case Study: Existing Agency Mitigation Regulations & Guidance

A number of agencies have already taken actions to improve their use of mitigation and their monitoring of mitigation commitments undertaken as part of their NEPA processes. For example, the Department of the Army has promulgated regulations implementing NEPA for military installations and programs that include a monitoring and implementation component.\textsuperscript{42} These NEPA implementing procedures are notable for their comprehensive approach to ensuring that mitigation proposed in the NEPA review process is completed and monitored for effectiveness. These procedures are described in detail below to illustrate one approach agencies can use to meet the goals of this Guidance.

a. Mitigation Planning

Consistent with existing CEQ guidelines, the Army’s NEPA implementing regulations place significant emphasis on the planning and implementation of mitigation throughout the environmental analysis process. The first step of mitigation planning is to seek to avoid or minimize harm.\textsuperscript{43} When the analysis proceeds to an EA or EIS, however, the Army regulation requires that any mitigation measures be “clearly assessed and those selected for implementation will be identified in the [FONSI] or the ROD,” and that “[t]he proponent must implement those identified mitigations, because they are commitments made as part of the Army decision.”\textsuperscript{44} This is notable as this mitigation is a binding commitment documented in the agency NEPA decision. In addition, the adoption of mitigation that reduces environmental impacts below the NEPA significance threshold is similarly binding upon the agency.\textsuperscript{45} When the mitigation results in a FONSI in a NEPA analysis, the mitigation is considered legally binding.\textsuperscript{46} Because these regulations create a clear obligation for the agency to ensure any proposed mitigation adopted in the environmental review process is performed, 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 adopted mitigation. It is acknowledged in the regulations that “unless money is actually budgeted and manpower

\textsuperscript{42} The Department of the Army promulgated its NEPA implementing procedures as a regulation.

\textsuperscript{43} See 40 CFR § 1508.2.

\textsuperscript{44} 32 CFR § 651.15(b).

\textsuperscript{45} Id. § 651.35(g).

\textsuperscript{46} Id. § 651.15(c).
assigned, the mitigation does not exist. 47 As a result, a proposed action cannot proceed until all adopted mitigation is fully resourced or until the lack of funding is addressed in the NEPA analysis. 48 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. 49 The Army regulations require monitoring plans and implementation programs to 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, controversy over the selected alternative, potential impacts or adverse effects on federally or state protected resources, and statutory permitting requirements. 50 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. 51 In a helpful appendix to its regulations, the Army outlines guidelines for the creation of an implementation monitoring program to address contract performance, the role of cooperating agencies, and the responsibilities of the lead agency. 52

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 (EMS) based on the standardized ISO 14001 protocols. 53 The core of this

\[\text{\textsuperscript{47} Id. § 651.15(d).}\]

\[\text{\textsuperscript{48} Id. § 651.15(d).}\]

\[\text{\textsuperscript{49} Id. § 651.15(i).}\]

\[\text{\textsuperscript{50} Id. §§ 651.15(h)(1)-(4) Appendix C to 32 CFR § 651, 67 Fed. Reg. 15,290, 15,326-28 (Mar. 29, 2002).}\]

\[\text{\textsuperscript{51} Id. § 651.15(i)(1).}\]

\[\text{\textsuperscript{52} See Appendix C to 32 CFR § 651, 67 Fed. Reg. 15,290, 15,326-28 (Mar. 29, 2002).}\]

\[\text{\textsuperscript{53} See also CEQ, “Aligning NEPA Processes with Environmental Management Systems” (2007), available at}\]
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. In the context of a mitigated FONSI, the Army regulations provide that 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 [Notice of Intent] and prepare an EIS.” 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 identified through monitoring. If mitigation is ineffective, the agency entity responsible should re-examine the mitigation and consider a different approach to mitigation. However, if mitigation is required to reduce environmental impacts below significance levels are found to be ineffective, the regulations contemplate the issuance of a Notice of Intent and preparation of an EIS.

The Army regulations also provide guidance for the challenging task of defining parameters for effectiveness monitoring. Guidelines 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. 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. 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. The regulations place responsibility on the entity proposing the action to respond to inquiries from the public and other agencies regarding the status of mitigation adopted in the NEPA process. In addition, the regulations find that “concerned citizens are essential to the credibility of [the] review” of mitigation

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54 32 CFR § 651.15(c).

55 See id. § 651.35(g) (describing the implementation steps, including public availability and implementation tracking, that must be taken when a FONSI requires mitigation); id. § 651.15(k).

56 See subsections (g)(1)-(5) of Appendix C to 32 CFR § 651, 67 Fed. Reg. at 15,327.

57 32 CFR § 651.15(l).

58 Id. § 651.15(b).
effectiveness.\textsuperscript{59} The Army specifies that outreach with the interested public regarding mitigation efforts is to be coordinated by the installation's Environmental Office.\textsuperscript{60} These regulations bring the public a step closer to the process by designating an agency source responsible for enabling public participation, and by 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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\textsuperscript{59} Id. § 651.15(k).

\textsuperscript{60} 32 CFR § 651.15(j).
PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-14

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: State and Local Agency Review of Environmental Statements

The following references apply to this memorandum and all except 511 Departmental Manual (DM) 1-8 are available as attachments in portable document format. The Internet locations for the clearinghouse offices and the DM remain at the Universal Resource Locators (URL) noted below. The clearinghouse URL should be consulted regularly for updated information.

Executive Order 12372 (as amended by EO 12416); Intergovernmental Review of Federal Programs.

Intergovernmental Review of the Department of the Interior Programs and Activities; 43 CFR 9, as amended.

Directory of State and Areawide Clearinghouses; Office of Management and Budget, pursuant to EO 12372. Available at: http://www.whitehouse.gov/OMB/grants/spoc.html.


Bureaus and offices are requested to utilize State Clearinghouses in order to secure State agency review of environmental statements. In addition, where bureaus deem it appropriate, they may circulate statements directly to State agencies with a clear indication that the statement has also been sent to the State Clearinghouse or to the Governor’s designated alternative if there is one.

Bureaus and offices are requested to utilize Areawide Clearinghouses in order to secure local agency review of environmental statements. Where Areawide Clearinghouses do not exist, environmental statements will be circulated directly to appropriate local governmental agencies.

Clearinghouses or designated alternatives must receive sufficient copies of statements for multi­agency review. Accordingly, it is generally recommended that at least ten (10) copies be
transmitted. If copies are sent to individual State or local agencies, it is generally recommended that at least two (2) copies be transmitted. Bureau field installations should develop their own lists of State and Areawide Clearinghouses and the number of copies needed by each. Periodic connection to the OMB Internet site is recommended to update the clearinghouse list.

Please refer to ESM 10-3.

This memorandum replaces ESM 04-14.

Attachments
PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-15

To: Heads of Bureaus and Offices
From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Publication and Distribution of Department of the Interior National Environmental Policy Act Compliance Documents via Electronic Methods

I. General

A. This policy guidance is offered in order to maintain consistency throughout the Department when publishing and distributing National Environmental Policy Act (NEPA) compliance documents electronically. The guidance will be reviewed and revised from time to time as more experience is gained in the use of electronic formats for publication and distribution of a wide variety of Departmental documents. To date no standard format for electronic distribution of all Departmental documents has been adopted.

B. NEPA compliance documents are appearing with greater frequency in electronic format on the Internet and on CD-ROM from various agencies.

1. It is the Department's intention to promote electronic distribution of its

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1Electronic methods refers to and includes the computer- and Internet-based systems for publishing or posting information for easier public access. This ESM guides the use of such systems for publication of NEPA compliance documents. Therefore, the user is cautioned not to become too focused on the terminology that is used casually and interchangeably. No particular type of electronic method is being promoted. However, the most common electronic distribution of NEPA documents is currently on Compact Disk-Read Only Memory (CD-ROM) and the Internet. This guidance is generally based on these two types of distribution but recognizes that future electronic methods may appear and replace or modify earlier types.

2NEPA compliance documents include notices of intent (NOI), environmental assessments (EA), findings of no significant impact (FONSI), categorical exclusions (CX), draft (DEIS), final (FEIS), and supplemental environmental impact statements. Where necessary in this ESM, the text will specify particular documents when further clarity is required. Otherwise, NEPA compliance document, NEPA document, compliance document, etc. should be considered interchangeable. It is acknowledged that in most cases this ESM is dealing with publication and distribution of environmental impact statements (EISs), but the more general terms are used so that the ESM can apply to unforeseen situations where the document may not be an EIS.
2. NEPA compliance documents to benefit the public review and disclosure process. Electronic publication and distribution has the potential to aid in reaching a broader public and facilitating review of documents that can seem overwhelming in paper form.

3. Nonetheless, because not all potentially-interested agencies, organizations, and individuals have such capability, publication in electronic format is a supplement to—not a replacement for—publication and distribution of paper copies.

C. Paper copies must always be available for and distributed to those requesting them to permit their review within established time frames.

D. This gradual conversion to a greater use of electronic formats is in compliance with the Electronic Freedom of Information Act Amendments of 1996.

II. Formats

A. Current experience indicates that most CD-ROM distributions of environmental documents utilize the Portable Document Format (PDF).

1. This format is currently recommended for CD-ROM distribution.

2. If this format is used, documents shall include the latest edition of Adobe Acrobat Reader for the recipient’s immediate use.

B. Documents placed on an Internet web site shall be made available for download in PDF, text, or hypertext markup language (html).

1. When PDF is used, bureaus shall include a link for downloading Adobe Acrobat Reader.

2. It is recommended that a “text” version be offered as an optional download when offering either PDF or html.

C. Formats should consider and make every effort to meet the requirements of Section 508 of the Americans with Disabilities Act. To that extent bureaus using Adobe are referred to: http://access.adobe.com/tools.html [or current universal resource locator (URL)] for assistance in making PDF documents accessible to Americans with disabilities.
III. Department and Environmental Protection Agency (EPA) Processing Requirements

A. Department

1. The three copies of an EIS needed by the Office of Environmental Policy and Compliance (OEPC) shall include one paper copy and two CDs. If only an Internet distribution is made (no CD-ROM), then OEPC will need the exact URL and three paper copies. If a combined distribution is made, then please supply one paper copy, two CDs, and the URL.

2. The two copies of an EIS needed by the Natural Resources Library shall be in paper format.

3. Refer to ESM 10-12 (particularly Attachment 4) and ESM 10-13 for Departmental processing procedures.

B. EPA

1. The five copies needed for filing with EPA shall be in paper format.

2. A draft, final, or supplemental environmental impact statement is not officially filed until publication of the EPA notice of availability in the Federal Register.

   a. This publication generally occurs each Friday and contains EISs received for filing during the past week and starts the comment period.

   b. Publication on the Internet does not start the NEPA comment period.

   c. This is an important matter that all bureau NEPA personnel should remember so that filings are not later found to be procedurally flawed.

IV. Bureau/office Processing

A. Bureau and office NEPA distribution lists must be continually updated to recognize which document recipients can use Internet, CD-ROM, and/or paper and in what quantities.
1. Remember to update State clearinghouse needs and other Interior bureau needs in this process.

2. bureaus and offices may want to periodically send a questionnaire to customer agencies and individuals to update their lists.

3. An option to keeping special lists is to allow the public to sign up for electronic notification of all documents issued by a particular bureau or office. Once signed up, the public can access and comment on those items of interest.

4. Another option is to send advance return postage paid mailers to everyone on the mailing list. The mailer would describe the formats available and allow the recipient to order the desired format.

B. Notices of availability shall give all necessary information to the public about how to obtain both paper and electronic copies. This information shall include traditional contact names with street addresses and voice and fax telephone numbers as well as exact URLs and e-mail addresses for downloading documents and contacting personnel over the Internet.

C. Electronic versions of NEPA documents must be complete and match the official paper copy page by page.

1. Commenters identifying specific pages, paragraphs, and sentences must have the assurance that they are identifying the same location in either the electronic or paper versions. The PDF format serves this need well.

2. Electronic versions must include the complete text as well as viewable reproductions of all maps, tables, appendices, and other graphics that appear in the paper version. If this is not possible, then the electronic format must explain to the user what items are not available electronically and where and how to get paper copies of the electronically unavailable items.

D. Distribution to Federal and State agencies with jurisdiction by law or special expertise and Indian Tribes shall also be in paper format unless a bureau has received a written request from that agency or Tribe for the document in electronic format or a mixture of paper and electronic formats.

This memorandum replaces ESM 04-15.
PEP – ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-17

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
      Office of Environmental Policy and Compliance

Subject: Procedures for Implementing Tiered and Transference of Analyses

The requirements in this Environmental Statement Memorandum (ESM) are being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, and by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department’s compliance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) regulations, and 516 DM 1.21, which authorizes OEPC to provide further guidance concerning NEPA.

1. Purpose and Scope

   The purpose and scope of this memorandum is to provide guidance to bureaus and offices on implementing the tiering and transferring of analyses under NEPA.

2. Tiered and Transferred Analyses (see 43 CFR 46.140 and 516 DM 1.18)

   A NEPA document that tiers to another broader NEPA document in accordance with 40 CFR 1508.28 must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions.

   (a) Where the impacts of the narrower action are identified and analyzed in the broader NEPA document, no further analysis is necessary, and the previously prepared document can be used for purposes of the pending action.

   (b) To the extent that any relevant analysis in the broader NEPA document is not sufficiently comprehensive or adequate to support further decisions, the tiered NEPA document must explain this and provide any necessary analysis.
(c) An environmental assessment prepared in support of an individual proposed action can be tiered to a programmatic or other broader-scope environmental impact statement. An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects. Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. A finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered may also be called a “finding of no new significant impact.”

Transferred analysis is where environmental impact information learned in one circumstance can be used in the analysis of a similar project or circumstance, thus avoiding duplication of effort. Transferred analysis can be assisted by the exchange of existing information that is often stored in agency libraries and databases.

3. Procedures

a. Bureaus and offices should establish a network of communication with Interior and other agencies to share environmental information particularly in the same geographic area.

b. Bureaus and offices should establish, when possible, common databases of environmental information so that bodies of similar information can be re-used in future environmental impact work.

c. The types of information bureaus and offices should store and share with other bureaus and offices and agencies are: examples of good and bad documents, sources with contact information, procedures for tiered and transferred analyses, and limits on use of certain information.

d. Bureaus and offices should seek training for tiered and transferred analyses or provide it to their personnel.

e. Bureaus and offices should work toward establishing interdisciplinary teams which can provide quick assistance to offices needing help in identifying where tiered and transferred analyses would be appropriate.
When appropriate, bureaus and offices should determine the sufficiency of existing environmental analyses. If an existing analyses is found to be sufficient, that document may be cited in the record of decision without doing additional and duplicate analysis.

This memorandum replaces ESM 03-3.
PEP – ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-18

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Procedures for Implementing Public Participation and Community-Based Training

The requirements in this Environmental Statement Memorandum (ESM) are being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, and by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department's compliance with NEPA, the CEQ regulations, and 516 DM 1.21, which authorizes OEPC to provide further guidance concerning NEPA.

1. Purpose and Scope

The purpose of this memorandum is to provide guidance to bureaus and offices on implementing public participation and community-based training as part of NEPA analyses.

2. Public Participation

Public participation is the involvement, as early as possible, in the NEPA process of persons and organizations having an interest in any Departmental activity which must meet the requirements of NEPA. Public participation also includes the pro-active efforts of Departmental personnel to locate and involve the public.

3. Community-Based Training (see 43 CFR 46.30)

Community-based training in the NEPA context is the training of local participants together with Federal participants in the workings of the environmental planning effort as it relates to the local community(ies).
4. Procedures

a. Bureaus and offices shall build public participation into their NEPA procedures so that the process of involving the public is part of the first actions taken when beginning NEPA compliance.

b. Public participation should be conducted often and prior to development of draft alternatives and other early project documents.

c. Use local partnerships, facilitated meetings, collaborative workgroups, and other mechanisms to provide a timely exchange of information with the public so that the scoping process and follow-up activities continue to reflect the public’s input. The public should be included as soon as possible to obtain their ideas and comments. Bureaus and offices should share their public participation methods with each other to develop and improve the process.

d. Bureaus and offices shall develop training methods and courses for community-based planning and the use of the NEPA process.

e. This training must be available for both bureau staff and the key segments of the involved public. It is recognized that not all interested publics will want or need this training. However, those planning on following the project’s development to completion will certainly benefit from training.

f. Bureaus and offices shall inventory existing training programs so as not to duplicate something already available and shall review existing and proposed training programs to assure unity and consistency in their conduct.

g. Training programs will need to reach out to communities to foster high levels of participation, identify the appropriate role of contractors or other third parties, and consider when to offer such training (e.g., only with high profile cases).

5. Management Training

a. Any DOI employee holding a public meeting for the purpose of addressing NEPA compliance must have received training as shown in b. below.

b. Training must be in use of the collaborative approach, meeting facilitation, fostering partnerships, negotiation, and alternative dispute resolution.
c. The subjects in b. above may be found in separate or combined courses. Employees must be able to show by course documentation that the completed training covers these topics whether they are contained in one or several courses.

This memorandum replaces ESM 03-4.
PEP – ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-19

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Procedures for Implementing Integrated Analyses in the National Environmental Policy Act (NEPA) Process

The requirements in this Environmental Statement Memorandum (ESM) are being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department’s compliance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) regulations, and by 516 DM 1.21, which authorizes OEPC to provide further guidance concerning NEPA.

1. Purpose and Scope

The purpose of this memorandum is to provide guidance to bureaus and offices on implementing integrated analyses under NEPA.

2. Integrated Analyses

Integrating analyses uses a single NEPA process to enable several agencies to satisfy multiple environmental requirements by conducting concurrent rather than consecutive analyses. The need for integrated analyses may occur whenever agency actions and activities require compliance with other permitting and regulatory requirements within the Department and among outside Departments with overlapping authority. For example, Departmental bureaus and offices must comply with requirements of the Endangered Species Act, the Clean Water and Clean Air Acts, and cultural resource protection. Integrating analyses may facilitate and streamline compliance.
3. Procedures

a. Bureaus and offices should develop memoranda of understanding (MOU) with relevant regulatory agencies to incorporate their regulatory and permitting requirements in the NEPA process. The MOUs should detail the process by which regulatory and permitting procedures will be integrated into the bureau’s and office’s NEPA processes including ways to streamline analysis and the setting of benchmarks for when analyses will be completed.

b. Bureaus and offices should establish core NEPA evaluation and documentation teams that include contact individuals from relevant regulatory and permitting agencies to coordinate the regulatory requirements of all agencies involved in a particular NEPA activity. Including regulatory and permitting agencies in the action agency’s NEPA process enhances accountability for regulatory requirements and fosters inter-agency cooperation.

c. Bureaus and offices should arrange the sequencing of permits with other bureaus, offices, and governmental agencies to avoid unnecessary delays in agency planning, preparation and implementation.

d. Bureaus and offices should notify applicants when other permitting and regulatory requirements exist and provide them with the points of contact in the appropriate agencies to identify any additional information needed.

This memorandum replaces ESM 03-5.
PEP – ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-20

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Coordinating Adaptive Management and National Environmental Policy Act Processes

This Environmental Statement Memorandum (ESM) is being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, and by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department of the Interior on matters pertaining to environmental quality and for overseeing and coordinating the Department’s compliance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality and departmental regulations, which authorize OEPC to provide further guidance concerning NEPA.¹


1. Purpose and Scope

The purpose of this memorandum is to provide guidance to bureaus and offices on the use of AM and the relationship between AM practices and NEPA processes. As an approach to management of resources, any use of AM is subject to compliance with NEPA’s statutory and regulatory requirements for Federal activities affecting the environment.

¹ This ESM is internal Department of the Interior guidance directed toward its bureaus and offices, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.
2. What is Adaptive Management?

Adaptive Management is a system of management practices based on clearly identified outcomes and monitoring to determine whether management actions are meeting desired outcomes; and, if not, facilitating management changes that will best ensure that outcomes are met or re-evaluated. Adaptive management recognizes that knowledge about natural resource systems is sometimes uncertain. (43 CFR 46.30).

The Department technical guide emphasizes structured decision making and employs an iterative learning process that acknowledges uncertainty and that values reducing that uncertainty thus producing improved understanding and improved management over time as follows:

"Adaptive management [is a decision process that] promotes flexible decision making that can be adjusted in the face of uncertainties as outcomes from management actions and other events become better understood. Careful monitoring of these outcomes both advances scientific understanding and helps adjust policies or operations as part of an iterative learning process. Adaptive management also recognizes the importance of natural variability in contributing to ecological resilience and productivity. It is not a 'trial and error' process, but rather emphasizes learning while doing. Adaptive management does not represent an end in itself, but rather a means to more effective decisions and enhanced benefits. Its true measure is in how well it helps meet environmental, social, and economic goals, increases scientific knowledge, and reduces tensions among stakeholders." (Adaptive Management: The U.S. Department of the Interior Technical Guide (2007)).

Adaptive Management emphasizes transparency, shared decision making, and the importance of cooperative engagement of stakeholders. The objective of using an AM strategy is to reach a particular desired outcome or to achieve a specific goal while formulating decisions in an operational setting characterized by uncertainty. Thus, AM should not be the strategy of choice whenever it is unclear as to desired outcomes and specific goals. Use of an AM strategy also may be inappropriate in situations where there is little to no chance for changing the decision or where the decision space is very limited. Adaptive Management is a technique to be employed for charting a decision making course along an uncertain path whose goal is to obtain an expected and desirable situation. An effective and necessary monitoring program can provide the needed navigational framework for successfully meeting the challenges of adaptively managing the path.

3. What is the Relationship between Adaptive Management and the NEPA Process?

Compliance with NEPA is a statutory and regulatory requirement for Federal activities affecting the environment. Adaptive Management is a discretionary management
approach to structured decision making that may be used in conjunction with the NEPA process. Adaptive Management is not a substitute for NEPA compliance for agency decisions. Because AM provides a mechanism for addressing uncertainties and data gaps that may be identified through the NEPA process, it is a management tool that is consistent with NEPA’s goal of informed decision making.

It must be clearly understood that NEPA compliance is a statutory requirement, the implementation of which is governed by regulations that set forth the obligations and the procedural provisions embodied in the statute. National Environmental Policy Act compliance is required for all Federal actions affecting the environment. AM is a discretionary learning-based management process having no statutory or regulatory requirements.

Adaptive Management and NEPA are similar in that each emphasizes collaboration principles and working with stakeholders. The responsible official should consider and make an effort to meet the separate but related needs for stakeholder involvement in the AM and NEPA processes. These distinctive needs, the NEPA requirement for public involvement on the one hand, and the emphasis of AM on the ongoing relationship between the agency and other persons interested in the decisions to be made, on the other, must be clearly articulated. There may be some overlap, but NEPA requirements and the role of AM, in the context of stakeholder involvement, need to be explicitly understood.

Adaptive Management and NEPA are also similar in that each emphasizes learning. To provide an adequate framework for an AM approach to decision making, it is important to openly acknowledge uncertainty and the need to learn during the AM process. Learning and adjusting are part of the ongoing AM process. In AM, the need to learn is best expressed as one or more key questions with regard to uncertainty about the consequences of management actions. If such uncertainty motivates the use of an AM approach to a given management situation, it is important to acknowledge the existence of this uncertainty in the NEPA process. This acknowledgement informs the public involvement and shapes the analysis of environmental effects that is required for compliance with NEPA. When using an AM approach for a proposed agency action, the need to supplement or prepare additional NEPA documents in the future may be reduced or eliminated if management adaptations, which could occur in light of new information that is predicted to emerge, are fully documented and analyzed through the NEPA process.

4. **Criteria for Considering Whether to Use AM**

The Department supports the use of AM under appropriate circumstances, recognizing that not all decisions can or should use an AM approach. The conditions for using AM are discussed in detail in the DOI technical guide. These conditions include clear objectives, uncertainty about management impacts, and monitoring to guide decision making and evaluating management effectiveness. These conditions are listed here:
• A real management choice is to be made;
• There is an opportunity to apply learning;
• Clear and measurable management objectives can be identified;
• The value of information for decision making is high;
• Uncertainty exists and decision-making is ongoing;
• Uncertainty can be expressed as a set of testable models;
• A monitoring system can be established to reduce uncertainty; and
• There is an ability to analyze the effects of the AM actions in the NEPA document.

Conditions where AM may not be appropriate include the following:

• Resource management decisions cannot be revisited and modified over time;
• Monitoring cannot provide useful information for decision making;
• Irresolvable conflicts in defining explicit and measurable management objectives or alternatives exist;
• The agency has limited discretion over resource systems and outcomes; and
• Risks associated with learning-based decision making are too high.

5. Coordinating Adaptive Management and the NEPA Process

In general, when an AM approach to decision making is considered to be appropriate, the NEPA compliance associated with that decision may be structured to potentially allow changes to management decisions without the need to initiate further NEPA analysis. The conditions in which NEPA compliance can be structured to allow for the iterative, learning-based decision making characteristic of AM include:

a. the management actions under consideration in the AM approach are identified in the NEPA analysis;

b. the criteria for management adjustments are clearly articulated in the NEPA analysis; and

c. the AM process produces outcomes within the range analyzed in the NEPA analysis.

However, it is important that monitoring be designed in the context of AM to promote learning, track progress in achieving objectives, and facilitate decision making through time. There needs to be assurance that monitoring will occur and that appropriate adjustments in project activities will be made in response to the information provided by that monitoring. Monitoring protocols need to be integrated into the project and considered in the NEPA analysis. Monitoring should be used to evaluate the adequacy of the original action and to determine whether management adjustments need to be undertaken to meet the identified goals/outcomes. If monitoring indicates that the management options analyzed during the NEPA process are inadequate to achieve the
expected outcomes or that outcomes can be achieved more effectively or efficiently via other management actions, agencies may need to re-initiate the NEPA process in order to ensure that any restructured management decision framework complies with NEPA. Above all, commitments and mechanisms need to be in place to ensure bureaus and offices adjust their decisions based on the results of such monitoring and evaluation.

6. How to Conduct NEPA Analyses for Proposed Actions That Include an AM Approach

Adaptive Management prescribes the integration of decision making, monitoring, and assessment into an iterative process of learning - and performance-based management. If and when an agency chooses to use an AM approach to a decision or project, that AM process needs to be spelled out in the NEPA document analyzing the proposed action. Since AM is an approach to management over time, not itself a statutorily required analysis of the environmental consequences of certain actions, the AM effort is likely to continue after the NEPA process has been completed. Therefore, the parameters of the AM process need to be included in the NEPA analysis and the subsequent decision and its implementation should follow the parameters outlined in the NEPA analysis.

An AM approach may be included in, or even shape in large part, the proposed action and/or in one or more alternatives to the proposed action. An AM proposal or alternative must clearly identify the adjustment(s) that may be made when monitoring during project implementation indicates that the action is not achieving its intended result, or is causing unintended and undesirable effects. The environmental document prepared pursuant to NEPA must disclose not only the effects of the proposed action or alternative but also the anticipated effect of the adjustments that may be made. Such a proposal or alternative must also describe the monitoring that would take place to inform the responsible official whether the action is achieving its desired outcome. Specifically, the proposed action or alternative employing an AM approach must describe, and the supporting NEPA document must analyze:

- The proposed AM approach;
- Identification of uncertainties to be addressed through management and monitoring;
- One or more specific questions that can be answered in the course of managing and identifying monitoring protocols which follow from the question(s);
- How the AM approach is reflected in the alternatives being considered;
- The environmental effects of the proposed AM approach and each of the alternatives;
- The monitoring protocol including a reasonable mechanism to assure that monitoring will occur;
- The desired outcome;
- The performance measures that will determine whether the desired outcome is being achieved or whether a mid-course corrective action is needed;
- The factors for determining whether additional NEPA review will be needed in the future;
- The thresholds or triggers requiring adaptive or remedial action and the specific management options that may be used;
- Clear timeframes for long-term goals and short-term evaluations;
- A description of the AM oversight team composition and processes, with provisions for conflict resolution; and
- Provisions for data management, documentation, and reporting.

The following table identifies the AM steps documented in the technical guide and corresponding NEPA components. The AM steps may be coordinated with one or more of the procedural requirements for complying with NEPA and are part of an iterative process advancing the understanding of the environment and improving management decisions. Stakeholder involvement is a continuous part of both of the AM approach and the NEPA process from scoping, preparation and review of environmental documents and effectiveness monitoring with respect to implementation of the decision.

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<tr>
<th>NEPA Components</th>
<th>AM Step</th>
<th>Comments</th>
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<tbody>
<tr>
<td>Proposed Action</td>
<td>Identify a set of potential AM management actions for decision making.</td>
<td>Evaluate the role of AM in the development of this proposal; fully describe the proposed AM actions to be implemented.</td>
</tr>
<tr>
<td></td>
<td>Adaptive Management may be an integral and major feature of the proposed action and/or the alternatives.</td>
<td>In carrying out initial public participation in the NEPA evaluation process, bureaus and offices should strive to ensure that stakeholders and public understand the principles and implications of AM and have reasonable opportunity to provide input.</td>
</tr>
<tr>
<td>Purpose and Need</td>
<td>Identify clear, measurable, and agreed-upon management objectives to guide decision making and evaluate management effectiveness over time.</td>
<td>NEPA documents for projects that invoke AM should explain how monitoring and interpretation will be used to answer one or more key questions that could be answered in the course of managing and to demonstrate that learning has occurred.</td>
</tr>
<tr>
<td>Scoping</td>
<td>Ensure stakeholder commitment to an adaptive management approach for the enterprise for its duration.</td>
<td>In carrying out initial public participation in the NEPA evaluation process, bureaus and offices should strive to ensure that stakeholders and the public understand AM principles and its implications and have reasonable opportunity to provide input.</td>
</tr>
<tr>
<td>Incorporate the views from scoping into a reasonable range of approaches that could be tried and compared within the project.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alternatives</td>
<td>Identify a set of potential AM management actions for decision making.</td>
<td>Develop performance metrics relating to the management objectives</td>
</tr>
<tr>
<td>In some cases, Adaptive Management may be more narrowly focused, only involving and requiring discussion with respect to one or</td>
<td>Design and implement a monitoring plan to track resource status and</td>
<td></td>
</tr>
<tr>
<td>Describe Affected Environment</td>
<td>Identify models that characterize different ideas (hypotheses) about how the system may work.</td>
<td>Identify whether the ecological/resource processes that drive resource dynamics are understood and the uncertainties in that understanding.</td>
</tr>
<tr>
<td>Effects Analysis (direct, indirect, &amp; cumulative)</td>
<td>Assess management alternatives as to their resource consequences and contributions toward achieving objectives.</td>
<td>The EIS (or EA) must disclose not only the effects of the proposed action or alternative but also the effect of the adjustment.</td>
</tr>
<tr>
<td>Decision</td>
<td>Select management actions based on management objectives, resource conditions, and understanding. Identify how future decisions will be made.</td>
<td></td>
</tr>
<tr>
<td>Implementation</td>
<td>Use monitoring to track system responses to management actions. Improve understanding of resource dynamics by, among other things, comparing predicted and observed changes in resource status. Review and refine management actions throughout the life of the project.</td>
<td>If the revised management action is analyzed in the NEPA document, then no new NEPA analysis is necessary if and when the revised action is eventually taken. If evaluation or monitoring indicates that the management options analyzed during the NEPA process are not achieving the performance goals, agencies may need to re-initiate the NEPA process. Bureaus and Offices should maintain open channels of information to the public and affected regulatory and permitting agencies during the application of AM, including transparency of the monitoring process that precedes AM and the decision-making process that implements it. This involves: (a) identifying indicators of change, (b) assessing monitoring activities for accuracy and usefulness, and (c) making changes in management activities and/or strategies.</td>
</tr>
</tbody>
</table>

This memorandum replaces ESM 03-6.
PEP – ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 10-21

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Procedures for Incorporating Consensus-Based Management in Agency Planning and Operations

The requirements in this Environmental Statement Memorandum (ESM) are being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, and by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department’s compliance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) regulations, and 516 DM 1.21, which authorizes OEPC to provide further guidance concerning NEPA.

1. Purpose and Scope

The purpose of this memorandum is to provide guidance to bureaus and offices on incorporating consensus-based management into NEPA analyses.

2. Incorporating Consensus-Based Management in Agency Planning and Operations (see 43 CFR 46.110)

Consensus-based management incorporates direct community involvement in consideration of bureau activities subject to NEPA analyses, from initial scoping to implementation of the bureau decision. It seeks to achieve agreement from diverse interests on the goals of, purposes of, and needs for bureau plans and activities, as well as the methods anticipated to carry out those plans and activities. For the purposes of this Part, consensus-based management involves outreach to persons, organizations or communities who may be interested in or affected by a proposed action with an assurance that their input will be given consideration by the Responsible Official in selecting a course of action.
3. Procedures

a. Bureaus should establish a network of communication with the diverse interest groups that represent the community\(^1\) affected by a proposed project. Community-based training that precedes the NEPA process is useful in developing the network of communication. Training will also allow participants the opportunity to understand the NEPA process and their roles. This also provides a focal point for assembling the diverse interest groups that make-up the relevant participating persons, organizations or communities.

b. Bureaus should initiate the scoping process with full and direct involvement by the participating persons, organizations or communities, identifying and evaluating issues and impacts of concern relating to the project or activity. This applies to any NEPA compliance document.

c. When feasible and practicable, one alternative evaluated in the NEPA analysis should be the consensus-based alternative if one exists.

d. In incorporating consensus-based management in the NEPA process, bureaus should consider any consensus-based alternative(s) put forth by those participating persons, organizations or communities who may be interested in or affected by the proposed action. While there is no guarantee that any particular consensus-based alternative will be considered to be a reasonable alternative or be identified as the bureau’s preferred alternative, bureaus must be able to show that the reasonable consensus-based alternative, if any, is reflected in the evaluation of the proposed action and discussed in the final decision. To be selected for implementation, a consensus-based alternative must be fully consistent with NEPA, the CEQ regulations, and all applicable statutory and regulatory provisions, as well as Departmental and bureau written policies and guidance.

e. Bureaus should use various dispute resolution processes as necessary.

4. Compliance with the Federal Advisory Committee Act (FACA)

a. The FACA, 5 U.S.C.A App. 2, was enacted to reduce narrow special-interest group influence on decision makers, to foster equal access to the decision-making process for the general public, and to control costs by preventing the establishment of unnecessary advisory committees.

\(^1\)Community, for this purpose, means those who are directly affected by or whose interests are affected by a bureau-proposed action and are represented by elected officials as well as locally-established or commonly recognized groups within the proposed action’s reasonable area of impact.
b. The FACA applies whenever a statute or an agency official establishes or utilizes a committee, board, commission or similar group for the purpose of obtaining advice or recommendations on issues or policies within the agency official's responsibility.

c. The Department’s managers and staff must understand the provisions of FACA when they are gathering public input for the decision-making processes and when working in collaborative efforts. To ensure that the Department’s collaborative efforts comply with FACA, any time the Department establishes or uses a group for consultation or recommendations, that official should verify whether FACA applies and, if so, ensure that the FACA requirements are followed.

d. As a general rule, collaborative groups that are not initiated by the Department can avoid application of FACA and can continue to have active participation in Departmental activities by maintaining their independence from the DOI’s management or control. Further, NEPA collaborative groups composed entirely of government representatives would not be subject to FACA. However, in making the determination as to whether FACA will apply, the official should consult with the Office of the Solicitor.

e. If FACA applies, bureaus should consult their Group Federal Officer (GFO) under FACA for assistance in document preparation.

This memorandum replaces ESM 03-7.
PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 11-2

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Procedures for Approving and Filing Environmental Impact Statements

1. Purpose and Scope

This memorandum prescribes procedures for filing environmental impact statements (EISs) with the Environmental Protection Agency (EPA). It pertains to both draft and final EISs and both delegated and non-delegated EISs. This memorandum is issued pursuant to 43 CFR 46.415, and supplements 516 DM 3.3.

2. Delegated EISs

A delegated EIS is one for which the decision authority on the proposed action is delegated to a single Assistant Secretary or a subordinate officer.

3. Non-Delegated EISs

A non-delegated EIS is one for which the decision authority on the proposed action requires the approval of more than one Assistant Secretary (or bureaus under more than one Assistant Secretary), OR is an EIS reserved or elevated to the Secretary (or Office of the Secretary) by expressed interest of the Secretary, Deputy Secretary, the Chief of Staff, the Solicitor or the Assistant Secretary for Policy, Management and Budget, OR is of a highly controversial nature or one in which the Secretary has taken a prominent public position in a highly controversial issue, OR faces a high probability of judicial challenge to the Secretary.

4. Notification

a. As early as possible in the NEPA compliance process for all proposed departmental programs and projects, a bureau or office will notify the Office of Environmental Policy and Compliance (OEPC) of its determination under sections 2 and 3 above. Bureaus will also notify OEPC when EISs are required for proposals where the determination of delegated vs. non-delegated is unclear.
b. The responsible bureau or office decides whether a particular EIS is delegated or non-delegated. OEPC may advise the bureau or office and the Assistant Secretary/Policy, Management and Budget (AS/PMB) on the bureau or office decision.

c. If OEPC does not concur with the determination, OEPC will advise the bureau or office in writing setting forth its reasons for the non-concurrence. When the determination is unclear, OEPC will advise the bureau or office in an effort to assist them in making the determination.

d. Bureaus and offices will make this determination no later than the filing of a Notice of Intent (NOI) and/or the conducting of scoping meetings.

5. Procedures for Delegated EISs

a. Assistant Secretaries, bureaus or offices, upon approval of a delegated EIS, but before its release to EPA and the public, are to contact OEPC by telephone and inform it of the title of the EIS, the date of its transmittal, and the URL for the project site. OEPC will assign the document a Department of the Interior (DOI) control number and log it, as well as place it in the OEPC on-line environmental review database at: http://www.doi.gov/oepc/review.html. Control numbers will only be given to authorized bureau personnel involved with the processing of the EIS. Control numbers will not be given to unauthorized persons such as contractors, joint lead agencies, or cooperating agencies. Control numbers should be secured as late as practicable, but prior to filing with EPA. Control numbers shall be stamped or written in ink on the outside cover of all copies transmitted to EPA and Interior bureaus and offices, and included in any electronically-published versions of the document.

b. Before calling for a DOI control number, a bureau or office should determine the exact status of the printing job. If the documents are printed and mailed, or waiting to be mailed from the printer, the bureau or office should request a number. If the documents are printed and in transit back to the bureau or office for mailing, the bureau or office should wait until the documents are ready for mailing to request a control number. If the document has not yet been given to the printer, a control number should not be requested.

c. At the time of transmittal to EPA, Assistant Secretaries, bureaus, and offices will file delegated EISs directly with EPA and publish separate bureau notices of availability in the Federal Register for all draft, final and supplemental EISs. The time period for review in the bureau or office notice must be consistent with the time period for review in EPA’s notice of availability. Four (4) copies of the EIS are required by EPA (one paper copy, three electronic). The EPA will not accept the EIS without the DOI control number.
d. Concurrent with the filing of an EIS with EPA, bureaus and offices are to distribute the document to Federal agencies with jurisdiction by law or special expertise and to State and local agencies, including Indian Tribes, which are authorized to set and enforce related environmental standards, and to make it available to the public. Upon transmittal, the responsible official will promptly provide two (2) copies to the Department’s Natural Resources Library (U.S. Department of the Interior Library, (Mail Stop: 1151), 1849 C Street NW, Washington, DC 20240, and three (3) copies (one (1) paper and two (2) CDs) to OEPC. In addition, OEPC will be furnished a copy of the transmittal letter to EPA and the bureau or office Federal Register notice.

e. Circulation to Interior bureaus and offices will take place in accordance with ESM 11-3.

f. Circulation to other Federal and State agencies is guided by ESM 10-3 and ESM 10-14.

6. Procedures for Non-Delegated EISs

a. Non-delegated EISs must be approved and filed with EPA by the AS/PMB. The AS/PMB has assigned this responsibility to OEPC.

b. Bureaus and offices are encouraged to consult early with OEPC in scheduling and preparing these documents to avoid delays in their approval. The OEPC is available for providing or interpreting guidance and reviewing preliminary drafts (or portions of drafts) at headquarters and, subject to the availability of resources, at OEPC’s or bureau field offices. This advance consultation and coordination with OEPC will facilitate granting clearances to print documents with a minimum of formal correspondence and associated processing and mailing delays.

c. A clearance to print is OEPC’s substantive approval of non-delegated EISs. It generally takes the form of a memorandum from the bureau or office to the Director, OEPC requesting a clearance to print. A concurrence line is provided at the bottom for the Director’s signature. Once signed, OEPC will provide a fax transmission of the document so printing may commence. An example is shown in Attachment 1.

d. Where adequate and early consultation and coordination is not achieved with OEPC, bureaus and offices will transmit proposed EISs to OEPC for review and approval. This should be done concurrently with any bureau or office headquarters review. Bureaus and offices should allow at least 2 weeks for OEPC’s review, comment, and approval. In such cases, bureaus and offices will also provide in their preparation schedules sufficient time to accommodate comments by OEPC.
e. In order to file non-delegated EISs with EPA, bureaus and offices will forward, through their Assistant Secretary to OEPC:

- a transmittal letter (Attachment 2)
- a notice of availability (Attachment 3)
- a draft press release (if required by any Interior process), and
- four (4) copies of the EIS (one paper copy, three electronic).

The transmittal letter, upon signature by the Director of OEPC, is the official document signifying AS/PMB approval. After signature, a bureau or office may hand carry it and four (4) copies of the EIS to EPA and the notice of availability to the Federal Register if it so chooses; otherwise OEPC will mail them. The notice of availability must be in the form of three originals with the OEPC original signature and date on each.

f. A DOI control number will also be obtained by the same method outlined in Part 5.a. and b. above.

g. Concurrent with the filing of an EIS with EPA, bureaus and offices are to distribute the document to Federal agencies with jurisdiction by law or special expertise and to State and local agencies, including Indian Tribes, which are authorized to set and enforce related environmental standards, and to make it available to the public. In addition, bureaus will provide two (2) copies to the Department’s Natural Resources Library and three (3) copies (one (1) paper and two (2) CDs) to OEPC for its distribution and files.

h. Circulation to Interior bureaus and offices will take place in accordance with ESM 11-3.

i. Circulation to other Federal and State agencies is guided by ESM 10-3 and ESM 10-14.

7. Numbers and Formats of EIS Copies

Please refer to Attachment 4 for a discussion of the numbers and formats of EIS copies that are needed by various recipients.

This memorandum replaces ESM 10-12.

Attachments

cc: DAS/P&IA
ATTACHMENT 1 TO ESM 11-2

To: Director, Office of Environmental Policy and Compliance
Department of the Interior, MS 2462 MIB

From: (Authorizing Officer for the EIS)

Subject: Request for Approval to Print the Draft (or Final) Environmental Impact Statement
for the ...

In accordance with Environmental Statement Memorandum ESM 11-2, we request clearance to
print the subject draft (or final) environmental impact statement. Please document this approval
by signing the "concur" line below and returning the signed memorandum to this office.

(Any additional information may be given here.)

The draft (or final) environmental impact statement for the ... is approved for printing.

Concur: ___________________________ Date:
Director, Office of Environmental
Policy and Compliance

Notes:
1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 5, 2011.
U.S. Environmental Protection Agency  
Office of Federal Activities  
EIS Filing Section  
Mail Code 2252-A  
Ariel Rios Building (South Oval Lobby)  
1200 Pennsylvania Avenue NW  
Washington, D.C. 20460

Dear Sir or Madam:

In compliance with Section 102(2)(C) of the National Environmental Policy Act of 1969 and in accordance with 40 CFR 1506.9, we are enclosing four (4) copies of a (draft/final) environmental impact statement (EIS) for (title of proposal). This statement was prepared by the (bureau/office).

This EIS has been transmitted to all appropriate agencies, special interest groups, and the general public. The official responsible for the distribution of the EIS and knowledgeable of its content is (name and phone number).

Sincerely,

Willie R. Taylor  
Director, Office of Environmental Policy and Compliance

Enclosures

Notes:

1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 5, 2011.
3. Please note that the address above may change and that hand deliveries may use a different address.
4. Refer to ESM 10-10 for instructions and the EPA web site to verify the current address.
DEPARTMENT OF THE INTERIOR
(BUREAU)

Notice of Availability of (Draft/Final) Environmental Impact Statement

AGENCY: (Bureau/Office), Department of the Interior

ACTION: Notice of availability of a (draft/final) environmental impact statement (EIS) for the proposed (title)

SUMMARY: (Cite the authority that authorizes your agency to issue your notice)

*DATES: Comments will be accepted until (date)

*ADDRESSES: If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to (office name and address). You may also comment via the Internet to (office Internet address). Finally, you may hand-deliver comments to (office street address). See supplementary information section for information on submitting comments via the internet and the public disclosure of commenter’s names and addresses.

FOR FURTHER INFORMATION CONTACT: (office contact, address, phone number, e-mail)

SUPPLEMENTAL INFORMATION: A limited number of individual copies of the EIS may be obtained from (the above contact or wherever). Copies are also available for inspection at the following locations:

** A public (hearing/meeting) will be held on the proposal on (dates and locations).

(Include any other pertinent information which will assist the public, including web sites.)

**Submitting Internet Comments

Please submit Internet comments (format such as, plain text file, MS Word, PDF, etc.) avoiding the use of special characters and any form of encryption. Please also include "Attn: (any identifying names or codes)" and your name and return address in your Internet message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at (office contact and phone number).
Public Disclosure of Names and Addresses:

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment including your personal identifying information may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Willie R. Taylor
Director, Office of Environmental Policy and Compliance

Date

* Include only for a draft EIS
** Include if appropriate to this notice

Notes:

1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 5, 2011.
1. EPA filings will consist of four (4) copies (one paper and three electronic).

2. Format of OEPC’s three (3) copies.
   - A. If the EIS is published in paper only, OEPC must receive three (3) paper copies.
   - B. If the EIS is published in paper and CD-ROM only, OEPC must receive one (1) paper copy and two (2) CDs.
   - C. If the EIS is published in paper and Internet only, OEPC must receive three (3) paper copies and the exact Universal Resource Locator (URL) for the Internet site.
   - D. If the EIS is published in paper, CD-ROM, and Internet, OEPC must receive one (1) paper copy, two (2) CDs, and the exact URL.

3. Disposition of OEPC’s three (3) copies.
   - A. One (1) paper copy will remain in the official OEPC EIS file for ultimate storage in the National Archives. While in OEPC this copy may be checked out by Regional Environmental Officers and authorized bureau personnel and must be returned to OEPC.
   - B. If additional paper copies are available, one will remain in OEPC headquarters and one will be sent to the REO. Again, authorized bureau personnel may check out these copies for review and return to OEPC.
   - C. If two (2) CDs are available, one will remain in OEPC headquarters and one will be sent to the REO. These CDs may be checked out by REOs and authorized bureau personnel. However, the preferred action is to copy a new CD which can be forwarded to the REO or bureau with no return necessary.
   - D. If only paper and URL are available, OEPC’s additional paper copies may be borrowed as noted above, but it is preferred that the user download the EIS from the URL and produce their own electronic or paper copy if needed.

4. The Natural Resources Library’s copies will consist of two (2) paper copies.

Notes:

1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 5, 2011.
PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 11-3

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Procedures for Intra-Departmental Review of National Environmental Policy Act (NEPA) Compliance Documents Prepared by Bureaus and Offices

This memorandum describes procedures for the intra-Departmental distribution and review of NEPA Compliance Documents prepared by bureaus and offices and filed at the Environmental Protection Agency (EPA) and supplements 43 CFR 46.155 and the Departmental Manual (516 DM 1.20). The following definitions are included for clarity:

Preparing office--Departmental bureaus, offices, or other entities which prepare and circulate NEPA Compliance Documents for review.

Reviewing office--Heads of other bureaus, offices, or other entities from which comments are sought on NEPA Compliance Documents.

Preparing offices shall first obtain a Department of the Interior (DOI) control number (see ESM 11-2) from the Office of Environmental Policy and Compliance (OEPC) and then direct their requests for review to the reviewing offices. This request should be sent to the bureau environmental contacts as listed on Attachment 1 to this memorandum. Information copies may be sent to field elements of reviewing offices, but the transmittal must clearly indicate that the official review will only be accepted from the headquarters level.

Copies of environmental documents shall be made available to the reviewing bureaus and offices as shown in Attachment 1 to facilitate simultaneous review by different organizational units or field offices of the bureau. Bureaus and offices may wish to advise other bureaus/offices of any special mailing requirements for these copies. Information copies shall be sent to the Department's Regional Environmental Officers (REOs) for activities within their geographic areas. Please refer to Attachment 2 for a list of REOs.

Preparing offices are encouraged to make their compliance documents available by electronic means such as CDs. Preparing offices should also make compliance documents available on bureau and office web sites and inform the reviewing bureaus and offices, the REOs and this office of the project URL.
Preparing offices may consult with reviewing offices to determine whether a particular reviewing office has an interest in reviewing a specific environmental document. If the reviewing office agrees, a preparing office may delete that reviewing office from its distribution list for that environmental document.

For tracking purposes, the reviewing bureaus shall use the DOI control number assigned by OEPC. This number shall be stamped or written in ink on the outside cover of all copies. If any copies are not numbered, the preparing office's environmental contact can furnish this information. For draft statements, the statement control number takes the form: DES (year)-(sequential number). For final statements: FES (year)-(sequential number).

Reviewing bureaus may delegate their response within their bureau; however, the response shall be directed to the specific office of the preparing bureau that made the original review request. A copy of the review comments shall be sent to the Natural Resources Management Team, OEPC and to the appropriate REO.

Reviewing bureaus shall not independently release to the public their comments on environmental statements prepared by other bureaus or offices. Preparing bureaus are responsible for making comments received available to the public as part of the final environmental statement in accordance with 40 CFR 1503.4(b). Further, preparing bureaus are responsible for making comments received available to the public pursuant to provisions of the Freedom of Information Act (FOIA) [40 CFR 1506.6(f)]. See Departmental regulations at 43 CFR 2 which implements the FOIA.

Occasionally bureaus will participate as joint lead agency along with other Federal or State agencies to prepare an environmental impact statement. It is important to understand that only one of the joint leads can file the Federal EIS and receive comments. This decision must be made as early as possible in the process by the interagency team developing the EIS. Joint lead environmental statements prepared in coordination with other Federal or State agencies will be treated as Interior statements if Interior files them with EPA. Such statements will be treated as non-Interior statements if they are filed by a non-Interior joint lead agency.

In cases where Interior files the EIS with EPA, the provisions of this memorandum apply and the bureau will be the recipient of comments from other Interior bureaus, will consider them individually, and will publish these individual comments and responses in the final EIS. This is the same process as the one followed when Interior bureaus have no joint lead responsibilities. In cases where another non-Interior joint lead agency files the EIS with EPA, this memorandum does not apply, and the statement will be circulated for review under 516 DM 4. This circulation will result in a consolidation of bureau comments and recommendations into a single Interior response to the filing agency.

This memorandum replaces ESM 10-13.

Attachments

cc: DAS/P&IA
# ATTACHMENT 1 TO ESM 11-3

## BUREAU ENVIRONMENTAL CONTACTS

<table>
<thead>
<tr>
<th>BUREAU</th>
<th>CONTACT</th>
<th>ADDRESS</th>
<th>PHONE</th>
<th>FAX</th>
<th>NUMBER OF COPIES **</th>
</tr>
</thead>
</table>
| FWS    | Patricia Carter  
Pat_carter@fws.gov  
Stephanie Nash  
Stephanie_nash@fws.gov | 4401 N. Fairfax Drive  
MS 400  
Arlington, VA 22203 | 703-358-1764 | 703-358-1869 | 1 |
| NPS    | Patrick Walsh  
Patrick_Walsh@nps.gov  
Dale Morlock  
Dale_Morlock@nps.gov | 1849 C Street, NW  
NPS-2310  
MS 2242  
Washington, DC 20240 | 303-969-2073 | 303-969-2997 | 5 |
| GS     | Gary LeCain  
Gary_LeCain@usgs.gov  
Brenda Johnson  
Brenda_Johnson@usgs.gov | 12201 Sunrise Valley Dr.  
MS 423  
Reston, VA 20192 | 303-236-5050 | 703-648-5644 | 4 |
| BLM    | Shannon Stewart  
Shannon_Stewart@blm.gov  
Elizabeth Meyer  
Elizabeth_Meyer@blm.gov | 1620 L Street, NW  
MS 1075  
Washington, DC 20036 | 202-912-7219 | 202-557-3599 | 1 |
| BR     | Catherine Cunningham  
cunningham@usbr.gov  
Theresa Taylor  
TTaylor@usbr.gov | Sixth & Kipling Bldg 67  
Denver, Colorado 80225 | 303-445-2807 | 303-445-6465 | 1 |
| BIA    | Judith Wilson  
Judith_Wilson@bia.gov  
Marvin Keller  
Marvin_Keller@bia.gov | 2051 Mercator Drive  
MS 228R  
Reston, VA 20191 | 703-390-6470 | 703-390-6325 | 1 |
| MMS    | James Bennett  
James_Bennett2@mms.gov  
Winston deMonsabert  
Winston.deMonsabert@mms.gov | 381 Elden Street  
MS 4042  
Herndon, VA 20170 | 703-787-1660 | 703-787-1026 | 1 |
| OSM    | Li-Tai Bilbao  
jlbilbao@osmre.gov  
Steve Sheffield  
ssheffield@osmre.gov | 1951 Constitution Avenue, NW  
MS 202  
Washington, DC 20240 | 202-208-2895 | 202-219-3276 | 1 |

*Environmental Documents Distribution  
**Reviewing bureaus may request additional copies in specific EIS cases. Preparing Bureaus should keep enough copies on hand to serve this need.*
Notes:
1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 10, 2011.
3. Information in this attachment is routinely updated and available at:
   http://www.doigov/oepec/nepacontacts.html
# REGIONAL ENVIRONMENTAL OFFICERS

<table>
<thead>
<tr>
<th>NAME</th>
<th>STATES COVERED</th>
<th>ADDRESS</th>
<th>PHONE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Andrew L. Raddant</td>
<td>CT, MA, ME, NH, NJ, NY, RI, VT</td>
<td>408 Atlantic Avenue Room 142 Boston, MA 02210-3334</td>
<td>617-223-8565</td>
</tr>
<tr>
<td>Michael T. Chezik</td>
<td>DC, DE, IL, IN, MD, MI, MN, OH, PA, VA, WI, WV</td>
<td>Custom House, Room 244 200 Chestnut Street Philadelphia, PA 19106</td>
<td>215-597-5378</td>
</tr>
<tr>
<td>Gregory Hogue</td>
<td>AL, FL, GA, KY, MS, NC, PR, TN, SC, VT</td>
<td>Russell Federal Building Suite 1144 75 Spring Street, S.W. Atlanta, GA 30303</td>
<td>404-331-4524</td>
</tr>
<tr>
<td>Stephen Spencer</td>
<td>AR, LA, NM, OK, TX</td>
<td>P.O. Box 26567, (MC-9) Albuquerque, NM 87125-6567</td>
<td>505-563-3572</td>
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**Notes:**
1. This attachment may be revised as necessary without revising the entire ESM.
2. This attachment is dated: February 10, 2011.
MEMORANDUM

To: Regional Directors
    Attn: PN-1000, MP-100, LC-1000, UC-100, GP-1000

From: Roscann Gonzales
    Director, Office of Program and Policy Services

Subject: Guidance on Use of Consensus-Based Management in the National Environmental Policy Act (NEPA) Process

On March 8, 2004, the Department of the Interior published in the Federal Register a notice containing the revised Interior policies and procedures for complying with NEPA. These revisions have now been incorporated into Part 516, Chapters 1-6, of the Departmental Manual (DM). Among the new features is a directive to use consensus-based management in all NEPA compliance activities to the extent possible. Refer to: Part 516, DM, 1.3 D (5), 1.5 A (1), and 2.2 D. The Office of Environmental Policy and Compliance also provided guidance on consensus-based management in Environmental Statement Memorandum (ESM) 03-7, dated July 2, 2003. The following guidance clarifies some key provisions of this new requirement and how it is to be incorporated into the Bureau of Reclamation’s NEPA review procedures.

What is consensus?

DM Part 516 and ESM 03-7 do not define “consensus” but address it more in terms of a process. It is usually thought of in the context of reaching general agreement on a course of action or having a majority of opinion on which direction to proceed. The DM and ESM indicate that in order to reach a consensus in the NEPA context, it is not necessary to have a unanimous agreement on an issue. Consensus may be achieved if the resolution of an issue or proposed action has the broad support of a cross section of interests within a community, and/or no commonly recognized or established group within a community opposes it. If a majority of diverse interests represented in a community support a particular course of action then consensus exists. If an affected area includes several communities with divergent and competing interests, consensus exists if there is general agreement among a majority of the communities.
What is consensus-based management?

Consensus-based management is defined in the DM as “… the inclusion of interested parties with assurance for the participants that the results of their work will be given consideration by the decision maker in selecting a course of action.” It is a means of providing greater public participation in agency activities from planning to implementation. It is different from other public participation efforts in that consensus-based management seeks to achieve agreement, where possible and appropriate, among a majority of diverse community interests in the goals, purposes, and needs of bureau proposals and mechanisms for implementation. Consensus-based management is to be utilized in the NEPA process, where feasible and appropriate. However, bureaus have flexibility regarding when and how it is to be carried out. There may be statutory, regulatory, or policy requirements for certain Reclamation programs that would restrict or eliminate its use. Also, it is important to note that Reclamation, as with other bureaus, is still responsible for making the final decision on an action, regardless of whether consensus has been achieved among community interests on an alternative. This needs to be made clear to participants early-on in the NEPA process.

Who participates?

Consensus-based management focuses on community involvement. The ESM defines a community as “those who are directly affected by or whose interests are affected by a bureau-proposed action and are represented by elected officials as well as locally-established or commonly recognized groups within the proposed action’s reasonable area of impact.” Another way of defining ‘community’ is “a group of people residing in the same locality under the same government” (Webster’s II New Riverside University Dictionary). For proposed actions encompassing large geographical areas, there could be more than one community affected, therefore community is addressed in the collective sense. Representatives may include state, as well as, locally elected officials and individuals representing various organized groups among the communities.

Getting the community informed and involved

To apply consensus-based management, the Reclamation NEPA team needs to identify the communities which would be affected by a proposed Reclamation action and then inform those communities, including local officials and organized interest groups, about the proposed action and pending NEPA process. Information should be provided on how to participate, regardless of whether an environmental assessment (EA) or environmental impact statement (EIS) is being prepared. The degree of Reclamation effort that is expended on this should be guided by the proposed action and potential for significant impacts upon a community, the level of community interest, and extent of community concern and/or controversy. Information about a proposed

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1 "Interests" may be viewed as things of personal value that could be diminished or enhanced by an action, such as businesses, recreational activities, natural resource conservation efforts, cultural or religious practices. "Interests" would not include feelings or attitudes about something.
action and the NEPA process could be communicated at public meetings, through newspapers, and via the Internet. More intense NEPA training (workshops) would be appropriate in the preparation of EISs and EAs on complex and/or multi-project proposals, and could be conducted as part of scoping. This level of NEPA training and scoping is not necessary on EAs pertaining to routine projects.

Applying consensus-based management to the NEPA Process

Consensus-based management is to be utilized wherever possible and appropriate in carrying out NEPA compliance activities. Common sense should be used to determine how and when it can be applied. For routine, singular types of actions involving preparation of EAs, it may not be needed. In addition, for particularly large and complex projects where there are many communities and numerous diverse and competing interests and issues, it may not be practicable or feasible to attempt consensus-based management. The goal is to bring individuals representing various parties within the community together (elected officials, organized groups) where it is workable. Reclamation is a facilitator in this process. This does not mean that all parties must come to a unanimous agreement at every step in the process and on all issues. Nor does this nullify Reclamation's compliance responsibility as the lead Federal agency for the NEPA process. Regardless of whether consensus exists, Reclamation retains the responsibility to continue the NEPA process in a timely manner while continuing to involve and inform the public throughout the process.

In the selection and analysis of alternatives, Reclamation should include a community alternative if one exists. There may be more than one community alternative. A community alternative exists if it has the majority of support from a cross section of community interests and/or there are no objections from any groups within the community that would undermine implementation of the alternative. To be selected for analysis, Reclamation must determine that the community alternative(s) meets the purpose and need for action and be feasible and practicable.

In evaluating alternatives, Reclamation should consider designating a community alternative as the preferred alternative, if it meets the purpose and need for action and does not conflict with Reclamation's statutory and regulatory authorities, contractual obligations, and policies. If Reclamation decides not to designate a community alternative as the preferred alternative, this determination should be communicated to community representatives and discussed in the NEPA document.

Making the decision

Reclamation is responsible for making the final decision on a proposed Reclamation action. In making a decision, the Reclamation decision maker should give serious consideration to the outcome of public involvement in the NEPA process, particularly any alternatives, mitigation measures, and follow-up monitoring activities where consensus among diverse interests in the impacted area has been achieved, as long as it does not violate any laws, regulations or Reclamation policy. If consensus-based management is utilized, the Record of Decision (ROD) should explain how the analyses/recommendations of the participants entered into making the decision. For example, if a community alternative was designated as the preferred alternative
and a decision was made to go forward with another alternative, the ROD should discuss the legal and substantive considerations that contributed to the decision. Additionally, the ROD should discuss what mitigation measures were adopted, including the ones that were and were not adopted where consensus had been achieved, and why agreed-upon mitigation measures may not have been adopted. The ROD should also discuss what follow-up monitoring will be undertaken, and how activities relate to any consensus reached on this topic.

A Finding of No Significant Impact should briefly discuss how consensus-based management, if utilized, contributed in making the determination, particularly the outcome of any alternative or mitigation measures which had the consensus of the community.

Applicability of the Federal Advisory Committee Act (FACA)

In implementing consensus-based management, Reclamation staff and managers need to be aware of the requirements of FACA and how it may apply to this process. As a rule, Reclamation should avoid having to establish FACA advisory committees. The applicability of FACA will depend on how consensus-based management is carried out and who the participants are. Formation of FACA advisory committees is not required if the community representatives are all elected officials, if they constitute a local civic group rendering a public service, or if the collaborative group maintains its independence from Reclamation’s management or control. Additionally, meetings and workshops should be open to all members of the public and broad public input should continue to be sought throughout the process. If FACA is a concern, the project manager should consult with the Solicitor’s office to be clear on how to proceed.
MEMORANDUM

To: Regional Directors
   Attn: PN-1000, MP-100, LC-1000, UC-100, GP-1000

From: Roseann Gonzales /s/
       Director, Office of Program and Policy Services

Subject: Guidance on Complying with the National Environmental Policy Act (NEPA) and Other Environmental Laws for Water 2025 Challenge Grant Proposals

As the Water 2025 Challenge Grant program is being implemented, we want to ensure that the Bureau of Reclamation appropriately complies with NEPA and other environmental laws. The following guidance has been prepared to clarify some environmental issues associated with the program.

The Water 2025 Challenge Grant program is a competitive 50-50 cost-share program involving irrigation districts and water districts, Reclamation, and possibly other Federal agencies. The projects funded this year will primarily include physical improvements to water conveyance systems, aimed at increasing water conservation and efficiency, or facilitating the use of water markets. The Federal action in this program is the funding of the project through the issuance of a cooperative agreement. The Department of the Interior aims to finalize the cooperative agreements and award the grants by August 1, 2004.

Environmental Issues

When should compliance with NEPA and other environmental laws be initiated?

The Department will announce which proposals have been selected for detailed analysis in mid-June. In order to facilitate meeting the August 1, 2004, deadline for awards, compliance with NEPA and other environmental laws should be initiated soon after the Department’s announcement. Reclamation should meet with the applicants to inform them about the data, analyses, and costs needed for compliance with NEPA and other environmental laws. The proposal may require the involvement of other governmental agencies if permits or other approvals are needed to conduct some project activities. Reclamation and the applicant will need to identify any other governmental and tribal parties that should be invited to participate in the NEPA process.
In general, compliance with NEPA and other environmental laws should be fulfilled before any cooperative agreement is signed. However, some exceptions to this requirement may be considered, so long as environmental compliance is fulfilled before funds are transferred to the applicant. Such exceptions should be evaluated on a case-by-case basis and should be documented in the terms and conditions of the cooperative agreement.

What should be the role of Reclamation and the applicant in carrying out compliance with NEPA and other environmental laws?

In most cases, Reclamation will be the lead Federal agency for compliance with NEPA and, as such, responsible for assuring that all NEPA compliance is adequate and meets the requirements of the law, regulations, and Reclamation policy for each proposal under the Water 2025 Challenge Grant program. Each proposal will have to be individually reviewed at the regional or area office level to determine the appropriate level of NEPA documentation and public involvement. The regional or area office will make the determination as to whether a proposal meets the criteria for a categorical exclusion (CE), and whether preparation of a categorical exclusion checklist (CEC), environmental assessment (EA), or environmental impact statement (EIS) is warranted. Reclamation may utilize CEs listed in its NEPA procedures in 516 DM 6 Appendix 9, where applicable, as long as there are no extraordinary circumstances (as listed in 516 DM 2 Appendix 2) which would disqualify its use.

Applicants should be encouraged to undertake the preparation of draft environmental documents under Reclamation’s guidance, using a contractor, if needed. In carrying out compliance with the Endangered Species Act (ESA), grant applicants should be afforded the status of applicants under the ESA, as described in the Fish and Wildlife Service and National Marine Fisheries Service regulations in 50 CFR Part 402.08 and their joint ESA handbook.

In preparing environmental documents, coordination between Reclamation and the applicant is a necessity to ensure that the documents are adequate and meet both Reclamation and the applicant’s needs for compliance. This will also help in avoiding delays that could occur later on in the compliance process. In preparing an EA or EIS, the purpose and need statement would address the applicant’s objective for the project. This objective should be consistent with achieving the stated outcomes of the Water 2025 Challenge Grant program. Mitigation measures that can be implemented by the applicant should be identified and evaluated, and on a case-by-case basis, can be included in the cooperative agreement terms and conditions.

How should costs associated with compliance with NEPA and other environmental laws be allocated?

The cost of complying with NEPA and other environmental laws may be considered to be a project cost and may be cost-shared by Reclamation and the applicant. The portion of the cost which each party will pay will be determined on a case-by-case basis in the development of the cooperative agreement.
If you have any questions regarding the guidance or other NEPA issues relative to the Water 2025 Water Challenge Grant program, please feel free to contact Jennifer Gimbel, D-5500, at 303-445-3010, or Judy Troast, W-5500, at 202-513-0605.

cc: W-1500 (Limbaugh), W-1512 (Salenik), W-6000 (Rinne)
    D-2000 (Gabaldon), D-5000, D-5500 (Gimbel, Treasure, Troast, Morgan)
    PN- 6403 (Lute), PN-6510 (Lechefsky)
    MP-152 (Michny), MP-700 (Milligan)
    LC-2600 (Green), LC-7015 (Grinstead)
    UC-400 (Trueman), UC-725 (Coulam)
    GP-1100 (Beek), GP-4200 (Epperly)

Area Managers: (see attached list)
Memorandum

To: Commissioner, Attention: W-1000
Manager, Washington Administration and Performance
   Review Initiatives, Attention: W-1100 (Maymi)
Director, Policy and External Affairs, Attention: W-1500
Director, Operations, Attention: W-6000
Regional Directors, PN, MP, LC, UC, GP
   Attention: 100 and 1000
Title Transfer Regional Coordinators
Title Transfer Management Team

From: J. Austin Burke /s/ Austin Burke
Director, Program Analysis Office

Subject: Title Transfer Cost Sharing for NEPA and Other Transaction Costs

In January 1997, Commissioner Martinez requested the Program Analysis Office to review the existing policy and to prepare some additional guidance concerning the payment of costs associated with compliance with the National Environmental Policy Act (NEPA). Our policy at the time -- that the potential transferees should bear all the costs of NEPA -- was based on both legal and practical constraints which have not disappeared. However, we have come to recognize that since the title transfer will not only benefit the transferees, but the Federal Government as well, the costs for compliance with NEPA should be shared in an equitable fashion. Attached is additional guidance on cost-sharing NEPA activities.

In addition to the issue of cost-sharing NEPA, there has been some recent confusion about how to handle the transaction costs associated with the transfer. On June 10, 1997, Commissioner Martinez testified before the Senate Energy and Natural Resources Subcommittee on Water and Power about three proposals to transfer title to specific Bureau of Reclamation facilities. Included in the testimony on S. 538, legislation to convey certain features of the Minidoka Project to the Burley Irrigation District, was a sentence that requires some clarification: "We recommend that Congress ... require the transferees to cost share all the transaction costs, including, but not limited to those associated with NEPA and real estate boundary surveys."
TITLE TRANSFER: ADDITIONAL GUIDANCE CONCERNING THE PAYMENT OF NEPA COSTS INCURRED AS PART OF A TITLE TRANSFER

The Bureau of Reclamation (Bureau) may pay up to 50% of the costs, not to exceed base value, of complying with the requirements of the National Environmental Policy Act (NEPA) incurred as a direct result of executing a title transfer agreement, consistent with the "Framework for the Transfer of Title, Bureau of Reclamation Projects, August 7, 1995" (Framework), between the Bureau and the transferee. The policy originally set forth in the Framework recognized the legal requirement that the potential transferee was responsible for 100% of the costs of NEPA compliance.

The Bureau's proposal to share in the costs of the NEPA compliance associated with a title transfer represents a shift from its previous policy of requiring the potential transferee to pay all of the NEPA costs. This revision in policy is being made to reflect the fact that title transfer will not only benefit the transferee but the Federal Government as well. The Bureau presently is required to recover costs for NEPA activities. A departure from this requirement to permit cost-sharing these costs will require legislation. Only those projects that meet the criteria set forth in the Framework document will be eligible to cost-share the NEPA compliance costs.

The transferee will be expected to finance the full amount of the NEPA compliance costs up-front. The transferees' portion of the cost-share will be made as an adjustment to the base-value of the project. (The base value will be determined pursuant to the Valuation Policy attached to the August 7, 1995, Framework document as modified by the Supplement to Project Valuation Policy dated December 6, 1996). The transferee will receive a deduction in the base-value of the project equal to its agreed-upon share of the NEPA compliance costs. In no case will the allowed credits exceed the base value of the project.

NOTE: As a general rule, the Bureau is required to recover costs for NEPA activities where the major federal action contemplated is requested by individuals or entities for their benefit, and where the Bureau is not undertaking the action, for the benefit of the public, generally. Since title transfers are voluntary actions initiated by the potential transferee, the Bureau's ability to pay any of the NEPA costs depends upon the enactment of legislation authorizing title transfer and the payment of the NEPA costs. Language to authorize the Bureau to pay a portion of the NEPA costs for the transfer of title of a particular project should, therefore, be included in the draft legislation for the transfer of that project. This means that the potential transferee bears a financial risk if the transfer is not consummated, and/or if Congress does not approve the cost-share. It is important that this situation be fully explained to the potential transferee.
The Bureau will provide the potential transferee with an estimate of the total costs associated with NEPA compliance by the time the Bureau and the potential transferee reach an agreement to proceed with title transfer negotiations. The Bureau will provide an “early warning” to potential transferees whenever the Bureau expects the costs of the NEPA compliance might exceed the estimate. Should the potential transferee decide against the further pursuit of transfer activities because of such increased costs, the Bureau will stop work, and thus not exceed the estimate. It is the Bureau’s intention to provide potential transferees with the best possible information, made available in a timely manner, concerning the transferee’s financial exposure and risks associated with the title transfer transaction.

Major Issues Raised:

Does the Bureau have the authority to cost-share the NEPA compliance costs? No. The Bureau may advise the transferee that it will support language in the title transfer legislation authorizing a cost-sharing arrangement. The transferee must pay for 100% of the NEPA compliance costs up-front and bear the risk that Congress will approve the transfer and the cost-share.

Does the cost-share include cultural, hazard material and similar surveys? Yes, if these costs are incurred as a result of complying with the NEPA actions triggered by the title transfer process. If these are costs for activities the Bureau was planning to undertake anyway on its own behalf, the Bureau will pay such costs.

What happens if a potential transferee cost-shares, changes its mind and the transfer does not go through? The transferee is obligated to pay for the NEPA compliance costs already incurred by the Bureau. The Bureau will return funds not already obligated for the NEPA costs to the transferee. The forgoing will be included as a provision in the NEPA cost-share agreement.

When a project is paid out or the base value is so low that the NEPA costs exceed the base value, any deduction of those costs from the base value will result in a negative number. How do we handle this situation? Once the transfer price reaches zero, all remaining costs will be borne by the transferee.

What are the NEPA costs covered by this guidance? The costs include surveys, title searches, coordination activities which the Bureau undertakes in order to comply with the NEPA requirements triggered because of the proposed title transfer.

The guidance refers to projects eligible for transfer pursuant to the Framework document, i.e., uncomplicated projects. What about projects which don’t fit under the Framework document and/or are complicated? Only those projects which fit under the Framework guidance are eligible to cost-share NEPA costs.
MEMORANDUM

To: Regional Directors
   Attn: PN-1000, MP-100, LC-1000, UC-100, GP-1000

From: Roseann Gonzales
      Director, Office of Program and Policy Services

Subject: Guidance on Appropriate National Environmental Policy Act (NEPA) Compliance for Water-Related Contracting Activities

Current Bureau of Reclamation Policy (WTR P01) defines the costs of water-related contract activities that are reimbursable. During the June 2003 Reclamation Leadership Team meeting, it was decided that a review would be preformed concerning the costs associated with the renewal of water contracts and other water-related contract activities. Accordingly, a team comprised of regional and Office of Program and Policy Services staff was formed and performed the review.

The team concluded that the scope and level of NEPA compliance can represent a significant contribution to costs. The appropriate determination of scope of analysis and level of NEPA compliance were identified as issues. This is the subject of this memorandum.

Reclamation is responsible for determining the scope of analysis and the level of NEPA compliance for water-related contracting activities, both for new contracts and modification or renewal of existing contracts. Experience has indicated that limitations on Reclamation’s discretion under both State water law and Reclamation law often reduce the potential for significant impacts. This is especially true where the action is the modification or renewal of an existing contract. Experience also indicates that costs increase as alternatives not focused upon the contracting action are included in the analysis.

Therefore, the scope of NEPA analysis for water-related contracts should be sharply focused upon the contracting action under consideration. Additionally, the initial level of NEPA compliance to consider should typically be an Environmental Assessment. Specific contracting actions may appropriately use a Categorical Exclusion (existing categorical exclusions D.3. and D.4. may be applicable, as well as others). Only rarely in our experience has an Environmental Impact Statement (EIS) been the appropriate level of NEPA compliance for water-related contracting activities, although specific circumstances may make an EIS appropriate.
The appropriate scope of analysis and level of NEPA compliance should be determined by the potential for a specific proposed action to affect the environment. Therefore, the final determination should always reflect consideration of the project specific circumstances, both to ensure appropriate NEPA compliance and to ensure that the costs passed on to the contractors reflect the appropriate level of analysis.

Please feel free to contact Jennifer Gimbel at 303-445-3010, or Don Treasure at 303-445-2807 with any questions.

cc: W-1500, W-6000
    D-2000, D-5500 (Gimbel), D-5600 (Simons)
    PN-3300 (Patterson), PN-6510 (Lechefsky)
    MP-152 (Michny), MP-440 (Stevenson)
    LC-2600 (Green)
    UC-446 (Loring), UC-725 (Coulam)
    GP-3100 (L. Smith), GP-4200 (Epperly)
    BCOO-4400 (Hvinden)
    Area Managers
    (see attached list)
MEMORANDUM

To: Regional Directors
   Attn: PN-1000, MP-100, LC-1000, UC-100, GP-1000

From: Roseann Gonzales
       Director, Office of Program and Policy Services

Larry L. Todd
       Director, Security, Safety and Law Enforcement

Subject: Guidance on Compliance with the National Environmental Policy Act (NEPA) for
         Emergency Road Closures or Restriction of Public Access at the Bureau of Reclamation
         Facilities for Security Purposes

The Commissioner’s memorandum dated January 6, 2005, established an interim policy under
which Reclamation will take immediate emergency action when security concerns necessitate
closing roads or restricting public access at our facilities to protect public health and safety. In
such instances, Reclamation’s obligation to comply with NEPA will be addressed after the
emergency action is taken, and the focus will be on evaluating the effects of the action and not
the purpose and need for the action. This memorandum provides guidance on how to accomplish
compliance.

When assessing the vulnerability of a Reclamation facility to potential threats from terrorists or
other adversaries, a determination may be made that an unacceptable risk level exists. This
determination will be made by Reclamation’s Director of Security, Safety and Law Enforcement
(SSLE) in concert with the appropriate area manager and regional director. The first priority is
to take whatever emergency actions are necessary to immediately secure the facility and reduce
risks to public health, safety, and important resources.

Emergency actions may include closing roads and restricting public access to, from, and across
Reclamation lands and facilities, including visitor centers. Emergency road closure or restriction
of public access may be of short term (days), longer term (weeks to several months), or indefinite
duration. In some situations, these actions could result in significant effects; e.g., when a road is
a major public thoroughfare, alternative routing is limited or not available, and the road will be
closed indefinitely. The Director of SSLE, area manager, and regional director will determine
what actions will be taken to secure the facility. A preliminary determination of whether the
action will result in any significant effects may be made at this time. If possible, as the action is being taken, measures should be implemented to reduce or eliminate any significant effects.

**Alternative NEPA Procedures**

The Council on Environmental Quality (CEQ) NEPA Regulations in 40 CFR 1506.11, and the Department of the Interior NEPA Procedures in the Departmental Manual, 516 DM 5.8, provide for situations where emergency circumstances make it necessary to take actions that could result in significant impacts without following the usual NEPA procedures (see attachment).

If the emergency action could result in significant effects upon the environment, the regional director should inform the Director of Operations, the Commissioner, and the Assistant Secretary for Water and Science (ASWS) of the situation. Before the action is taken or immediately thereafter, either the regional director or Director of Operations should notify the Solicitor’s Office and Office of Environmental Policy and Compliance (OEPC) in Washington D.C. about the emergency action and potential for significant effects. OEPC will immediately notify CEQ. As soon as possible, the regional director and OEPC should begin consulting with CEQ regarding alternative arrangements for complying with NEPA.

The term “alternative arrangements,” as used in the CEQ NEPA Regulations cited above, refers to procedures that an agency uses in place of the normal NEPA procedures for preparing an environmental impact statement (EIS). With emergency road closures or restriction of public access in response to security concerns, there may be little or no time to notify and involve the public and coordinate with other governmental entities in the usual manner prior to the event; i.e., publication of a Notice of Intent (NOI) and holding public scoping meetings.

Under alternative arrangements, notification and coordination with governmental officials, stakeholders, and the public regarding preparation of the NEPA document may be deferred until after the emergency action has been taken. Reclamation’s plans for NEPA compliance may be included with the information Reclamation supplies to the public about the emergency action. Communication directories developed as part of Reclamation’s Emergency Action Plans and Standing Operating Procedures should be utilized in identifying agencies to be notified regarding NEPA compliance. Communications with the public may include phone calls and e-mails to local officials and stakeholders. Local and statewide notices and public meetings may also be utilized to inform the public of the actions being taken, identify further actions needed and possible alternatives, determine local effects and ways to alleviate any on-going effects. In the consultations that take place with OEPC and CEQ, the regional director should discuss the proposed arrangements for public involvement in the NEPA process.

**Emergency Actions Without Significant Effects - Use of Categorical Exclusions**

Many emergency actions involving temporary road closures or restriction of public access for security purposes may be so limited in duration and extent that the physical and biological effects would not be significant. Reclamation does not presently have a categorical exclusion (CE) for these types of actions. Until a CE is developed, there is a Departmental CE that may be utilized, where appropriate. This Departmental CE is found in 516 DM Chapter 2, Appendix 1,
and reads as follows: “1.6 Routine and continuing government business, including such things as supervision, administration, operations, maintenance, renovations and replacement activities, having limited context and intensity (e.g., limited size and magnitude or short-term effects.)

Note that the area manager will still need to determine whether any extraordinary circumstances exist that would prevent use of this CE. It is recommended that as soon as possible after the emergency action is taken, staff in the affected area office complete a categorical exclusion checklist (CEC) to document the finding. If the finding supports the use of the CE, then compliance with NEPA is completed. If the CE does not apply, then further NEPA analysis will have to be performed either through preparation of an environmental assessment (EA) or an environmental impact study (EIS). See discussion below.

Emergency Actions Where Effects Are Uncertain or Long-Term—Preparation of an EA

There may be situations where the duration of the response action and extent or level of effects is uncertain; extraordinary circumstances exist; or effects may continue in the long term, as in cases where closure of a public road may continue indefinitely. These situations may not meet the qualifications of the CE described above; i.e., actions having limited context and intensity. Each action will have to be evaluated on a case-by-case basis to determine whether a CE or preparation of an EA is appropriate.

Preparation of an EA for emergency security actions will be different than the usual EA for project-related actions. “No action” is not a feasible alternative since action in response to the emergency has already been taken. The range of alternatives may also be limited. The challenges that Reclamation may encounter will be similar to those associated with the preparation of an EIS under alternative arrangements. (See further discussion in the following section on EIS preparation.)

The CEQ regulations cited above do not address procedures for emergency actions which would not have significant effects. However, 516 DM 5.8 requires bureaus to consult with OEPC on emergency actions that do not have significant effects. Before contacting OEPC, the regional director should notify the Director of Operations, the Commissioner, and the ASWS of the region’s plans to prepare an EA and to consult with OEPC. OEPC may choose to alert CEQ of the situation, and Reclamation may also seek advice from the Solicitor’s Office, if needed.

Copies of EAs and a finding of no significant impact (FONSI) should be made available to the public. Public meetings may be held and a comment period on draft EAs and FONSIs provided, as appropriate. If an EA results in a FONSI, no further NEPA documentation is required. Otherwise, alternative arrangements would be warranted and further consultation with OEPC and CEQ would be required, as described above.

Emergency Actions Having Potentially Significant Effects – Preparation of an EIS

Some emergency road closures could have significant impacts, as with closure of a public road carrying a high level of traffic. The rerouting of traffic could cause increases in noise and air pollution along the new route. Depending on the routing and types of traffic, there could be public health and safety issues, ecological concerns if traffic was rerouted through an
environmentally sensitive area, and environmental justice issues. There could also be cultural issues if access to certain cultural sites was cut off because of the road closure. If the potential for significant effects exists, then Reclamation should prepare an EIS under the alternative arrangement approach addressed in the CEQ regulations. Note that for most emergency road closures and restriction of public access, the primary effect will be socio-economic. If this is the only potentially significant effect, then in accordance with the CEQ’s NEPA regulations in 40 CFR 1508.14, Reclamation would not be required to prepare an EIS.

Under alternative arrangements, NEPA documentation will be required but will differ from EIS preparation under normal circumstances. The content of the NEPA document may be substantially scaled down from the usual EIS. Details on the purpose and need for the emergency action may not be fully disclosed because of security concerns. There may be additional confidential information that cannot be made public in the analysis of effects because it could expose the vulnerability of the Reclamation facility. The range of alternatives may be very limited. Alternatives normally considered reasonable (economically and technically feasible), according to the definition in CEQ regulations and guidance, may not be reasonable because of security issues. The public should be engaged in the development of alternatives and mitigation measures to the extent possible, but use of consensus-based management and selection of a community alternative may not be practicable in all circumstances. Copies of the document should be made available to the public but the normal public comment period for EISs may be reduced. Consultations with OEPC, CEQ, and the Solicitor’s Office should address the content of the NEPA document and time for public comment.

The analysis of effects would acknowledge the existing condition(s) attributable to the initial implementation of the emergency action, and then focus on the long-term effects of continuing the emergency action. The proposed action would be defined as continuation of the ongoing emergency action. “No action” would be defined as “not continuing” or “ending” the emergency action. Other alternatives may be considered, so long as they meet the purpose and need for the action (i.e., the security and safety needs at the facility). Mitigation would address what, if any, measures have been put in place to control the initial impacts of the emergency, and what additional measures may be undertaken.

Should you have any questions about this process, please contact Don Treasure at 303-445-2807.

Attachment

c:  W-6000
    D-2000, D-5500 (Harris, Treasure)
    (w/att to each)

bc:  D-1400, D-5000
    (w/att to each)

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Reclamation Consultation Under the Endangered Species Act of 1973, as Amended

Describes Reclamation's role in consultations required by the Endangered Species Act.

Federal Reclamation law, including individual project authorizations and contracts; the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (hereafter, ESA or the Act).

Environmental and Planning Coordination Office, D-5100

1. Definitions (as used herein).

A. Critical Habitat means:

(1) Specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (constituent elements):

(a) Essential to the conservation of the species; and

(b) Which may require special management consideration or protection.

(2) Specific areas outside the geographical area occupied by the species, at the time it is listed in accordance with provisions of section 4 of the Act, upon determination by the Secretary that such areas are essential for the conservation of the species.

B. Listed Species mean any species of fish, wildlife, or plant which has been determined to be threatened or endangered under section 4 of the Act.

C. Proposed Species means any species of fish, wildlife, or plant proposed in the Federal Register to be listed under section 4 of the Act.

D. Species includes any subspecies of fish, wildlife, or plants and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

2. General Policy.

A. Legal Authorities of Reclamation.
Policy

(1) Reclamation staff must design proposed actions and prepare biological assessments in a manner that is consistent with Reclamation’s legal authorities. In all section 7 consultations, Reclamation must be prepared to clearly set forth its authority with respect to proposed actions. Reclamation is responsible for making all determinations about the scope of its authority and discretion.

(a) **Explanation.** Section 7 of the Act and the requirements of the Act’s implementing regulations set out in 50 CFR Part 402 apply to all actions in which there is discretionary Federal involvement or control. It is critical that Reclamation be prepared to clearly identify its legal authorities when preparing the proposed action statement and during any section 7 consultation. Identification of the scope of those authorities will be made by Reclamation, in consultation with the Solicitor’s Office.

B. **Consultations.** Reclamation will undertake or support activities to determine the effects that Reclamation’s actions (both proposed actions and existing project operations where Reclamation retains discretionary involvement or control) may have on listed or proposed species, or on their designated or proposed critical habitat. Reclamation will ensure, through consultations and/or conferences pursuant to section 7(a)(2) of the Act and any applicable regulations or guidelines issued by the U.S. Fish and Wildlife Service or National Marine Fisheries Service (Services), that its discretionary actions are not likely to jeopardize the continued existence of any listed or proposed species, or result in the adverse modification or destruction of designated or proposed critical habitat.

(1) **Definition of Proposed Action.** As the action agency under the ESA’s implementing regulations, Reclamation is responsible for defining its proposed actions for purposes of section 7 consultations.

(a) **Explanation.** As the action agency under the ESA, Reclamation is responsible for defining its proposed discretionary actions and ensuring that any such action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species. The implementing regulations state that the action agency has the discretion to determine the contents of a biological assessment, and the contents are dependent on the nature of the proposed action (50 CFR § 402.12). Reclamation will be the entity to define, modify, or expand a proposed action. In developing a description of a proposed action, Reclamation will coordinate with the Services and may coordinate with other affected interests.
(2) **Determinations of Effect.** Reclamation will determine whether the proposed action may affect a listed species or designated critical habitat.

(a) **Explanation.** As set out in 50 CFR § 402.14, it is the responsibility of the action agency to determine whether a proposed action may affect listed species or critical habitat. In the past, Reclamation has sometimes requested concurrence from the Services with its determination that a proposed action had no effect on listed species, although this concurrence is not required by the ESA regulations. In the future, Reclamation will not seek such concurrence unless the Regional Director determines it is appropriate. Even if Reclamation determines there is no effect, it is important to recognize that the Services retain the ability to request consultation, in the event they identify actions that they believe may affect listed species that have not undergone consultation. Reclamation may then agree to consult or decline to consult. Such determination should be appropriately documented.

(3) **Establishment of Baseline.** For purposes of evaluating effects of a proposed action in a biological assessment or any other document that initiates formal consultation, Reclamation will define a baseline of population and habitat quantity and quality for listed and proposed species and designated and proposed critical habitat.

(a) **Explanation.** The environmental baseline is a component of both biological assessments (including any other document that initiates formal consultation) and biological opinions and must be established and applied in accordance with the Act and the implementing regulations. For purposes of biological assessments, Reclamation is responsible for defining the environmental baseline. In developing the baseline, Reclamation may want to coordinate with the Services, because they are responsible for issuing the biological opinion and supporting analysis.

(4) **Determination of Reasonable and Prudent Measures (RPMs) and Implementing Terms and Conditions.** In order to decide whether to accept the terms and coverage of an incidental take statement, Reclamation must determine whether the scope of the RPMs to be included in the incidental take statement meets the requirements of the Act and the implementing regulations and whether Reclamation has the capability to implement the RPMs.

(a) **Explanation.** RPMs should be used only to minimize the amount or extent of incidental take when there is either a no jeopardy determination as to a
proposed action or in the implementation of a reasonable and prudent alternative. Such RPMs, along with the terms and conditions that implement them, may not alter the basic design, location, scope, duration, or timing of a proposed action and may involve only minor changes to the proposed action [50 CFR § 402.14(i)(2)]. Before accepting a biological opinion and its incidental take statement, Reclamation must determine whether (i) the RPMs comply with the Act and the implementing regulations and (ii) Reclamation has the capability to implement those requirements. It is important to recognize that in making this determination Reclamation has two alternatives. It may accept the biological opinion and its incidental take statement, including the RPMs and the terms and conditions that implement them. Or, if Reclamation believes the RPMs do not comply with the Act or the implementing regulations or cannot be implemented by Reclamation, Reclamation should work with the appropriate Service to develop legally acceptable RPMs that are amenable to both agencies.

(5) **Reasonable and Prudent Alternatives (RPAs).** Reclamation will work with the Services to develop RPAs that are consistent with the Act’s implementing regulations.

(a) **Explanation.** If one of the Services notifies Reclamation that the proposed action is likely to jeopardize the continued existence of a listed species, Reclamation will work with the Service to develop an RPA that will avoid the likelihood of jeopardizing the listed species. As set out in 50 CFR § 402.02, the RPA must be one that can be implemented in a manner consistent with the intended purpose of the action, can be implemented consistent with the scope of Reclamation’s legal authority and jurisdiction, and is economically and technologically feasible.

C. **Costs of Consultations.** Determinations as to what portion of the costs of preparing biological assessments, carrying out consultations pursuant to section 7(a)(2) (including testing, data collection, and monitoring carried out prior to or as part of a consultation), and implementing the commitments resulting from a consultation will be project costs and what portion will be non-project costs (non-reimbursable) will be made on a case-by-case basis.

(1) Costs that are determined to be project costs will be expensed or capitalized as appropriate and will be allocated among project purposes (both reimbursable and non-reimbursable). Any costs allocable to reimbursable project purposes will be borne by project beneficiaries in the appropriate manner.
(2) Costs that are determined to be non-project costs will be non-reimbursable.

3. **Effective Date.** This policy will be effective immediately.
10-1 American Indian Religious Freedom Act of 1978 (P.L. 95-341)

This Act makes it a policy of the Government to protect and preserve for American Indians, Eskimos, Aleuts, and Native Hawaiians their inherent right of freedom to believe, express, and exercise their traditional religions. It allows them access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rights. It further directs various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with Native traditional religious leaders to determine changes necessary to protect and preserve Native American cultural and religious practices. Applicable regulation is 43 CFR 7, ARPA Permitting.

10-2 Antiquities Act of 1906 (34 Stat. 225)

This Act was the first general act providing protection for archeological resources. It protects all historic and prehistoric sites on Federal lands and prohibits excavation or destruction of such antiquities without the permission (Antiquities Permit) of the Secretary of the Department having jurisdiction. It also authorizes the President to declare areas of public lands as National Monuments and to reserve or accept private lands for that purpose. Applicable regulation is 43 CFR 3, Antiquities Act of 1906.

10-3 Archaeological Resources Protection Act of 1979 (P.L. 96-95)

This Act supplements the provisions of the 1906 Antiquities Act. The law makes it illegal to excavate or remove from Federal or Indian lands any archeological resources without a permit from the land manager. Permits may be issued only to educational or scientific institutions, and only if the resulting activities will increase knowledge about archeological resources. Major penalties for violating the law are included. Regulations (43 CFR 7) for the ultimate disposition of materials recovered as a result of permitted activities state that archeological resources excavated on public lands remain the property of the United States. Those excavated from Indian lands remain the property of the Indian or Indian Tribe having rights of ownership over such resources.

10-4 Archeological and Historic Preservation Act of 1974 (P.L. 93-291)

Congress amended the Reservoir Salvage Act to extend the provisions of the Act to all Federal construction activities and all federally licensed or assisted activities that will cause loss of scientific, prehistoric, or archeological data. It requires the Secretary of the Interior (Secretary) to coordinate this effort and to report annually to the Congress on the program. It permits agencies either to undertake necessary protection activities on their own or to transfer to the Secretary up to 1 percent
of the total authorized for expenditure on a Federal or federally assisted or licensed project to enable the Secretary to undertake the necessary protection activities.

10-5 Bald Eagle Protection Act of 1940 (16 U.S.C. 668-668d)

No person within the United States, or any place subject to the jurisdiction thereof, shall possess, sell, purchase, barter, offer to sell, transport, export, or import at any time or in any manner any bald eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof.

The Secretary of the Interior, if determined to be compatible with the preservation of the bald or golden eagle, can permit the taking, possession, and transportation of specimens thereof for scientific or exhibition purposes or for the religious purposes of Indian Tribes.

10-6 Clean Air Act (42 U.S.C. 7401) and Amendments of 1970

National Primary and Secondary Ambient Air Quality Standards – 40 CFR 50;
State Implementation Plan Requirements – 40 CFR 51

The purposes of this Act are to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population; to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution; to provide technical and financial assistance to State and local governments for aid in their development and execution of air pollution control programs; and to encourage and assist the development and operation of regional air pollution control programs.”

The Act requires the Environmental Protection Agency (EPA) to publish national primary standards to protect public health and more stringent national secondary standards to protect public welfare (40 CFR 50). States and local governments are to be responsible for the prevention and control of air pollution.

States, which are divided into air quality control regions, are required to submit State Implementation Plans (SIPs) for EPA approval (40 CFR 51). SIPs provide strategies for implementation, maintenance, and enforcement of national primary and secondary ambient air quality standards for each air quality control region.

EPA’s rules require Federal agencies to determine if their proposed actions conform to the appropriate SIPs. The requirement applies to proposed Federal actions occurring in nonattainment or maintenance areas for: carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. Federal actions could include construction and permitting types of activities. The conformity determination examines the impacts of the direct and indirect emissions resulting from the Federal action. Federal agencies are required to take into account only those indirect emissions for which they provide support, can practically control, and are under their continuing program responsibility. Federal agencies making conformity determinations must provide a 30-day notice for both the draft and
final conformity determinations to the appropriate EPA regional office(s), State and local air quality agencies, and, where applicable, affected Federal land managers, the agency designated under Section 174 of the Act, and the Metropolitan Planning Office. Federal agencies must also make their draft conformity determinations available to the public for a 30-day review. These reviews may be integrated into the NEPA public review process.

10-7 Clean Water Act (33 U.S.C. 1251 et seq.)

Public Law 92-500 as amended

The Clean Water Act strives to “restore and maintain the chemical, physical, and biological integrity of the Nation’s water.” To achieve this objective, the Act sets forth the following goals: “(1) that the discharge of pollutants into the navigable waters of the United States be eliminated by 1985; (2) that as an interim goal there be attained by 1983 water quality which provides for the protection and propagation of fish, shellfish and wildlife, and provides for recreation in and on the water; (3) that the discharge of toxic pollutants in toxic amounts be prohibited; (4) that Federal financial assistance be provided to construct publicly owned waste treatment works; (5) that area wide waste treatment management planning processes be developed and implemented to ensure adequate control of source pollutants in each State; (6) that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into navigable waters, waters of the contiguous zone, and the oceans; and (7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.”

The basic means to achieve the goals of the Act is through a system of water quality standards, discharge limitations, and permits. The Act authorizes EPA to require owners and operators of point source discharges to monitor, sample, and maintain effluent records.

If the water quality of a water body is potentially affected by a proposed action (i.e., construction of a wastewater treatment plant), a National Pollutant Discharge Elimination System (NPDES) permit (Section 402) may be required. In most cases, the EPA has turned this responsibility over to the States as long as the individual State program is acceptable to the Agency.

Similarly, if a project may result in the placement of material into waters of the United States, a U.S. Army Corps of Engineers Dredge and Fill Permit (Section 404) may be required. It should be noted that the 404 permit also pertains to activities in wetlands and riparian areas.

Prior to the issuance of either a NPDES or 404 permit, the applicant must obtain a section 401 certification. This declaration states that any discharge complies with all applicable effluent limitations and water quality standards. Certain Federal projects may be exempt from the requirements of section 404 if the conditions set forth in section 404(r) are met.
Section 319 – Nonpoint Source Management Programs – was added to the Clean Water Act by P.L. 100-4. The purpose of this section is to have the States establish nonpoint source management plans designed to deal with each State’s nonpoint source pollution problems. Section 319(k) requires each Federal department and agency to allow States to review individual development projects and assistance applications and accommodate, in accordance with Executive Order 12372, the concerns of the State regarding the consistency of these applications or projects with the State nonpoint source pollution management program.

10-8 Coastal Zone Management Act of 1972 (P.L. 92-583)

Federal Consistency with Approved State Coastal Management Programs – 15 CFR 930

It is the stated policy of the Act “to preserve, protect, develop, and where possible, restore or enhance, the resources of the Nation’s coastal zone for this and future generations.”

The Act provides for financial and technical assistance and Federal guidance to States and territories for the conservation and management of coastal resources.

The Act encourages but does not require States to develop a coastal zone management program. A state program would consider such things as ecological, cultural, historic, and esthetic values, as well as economic development needs.

The provisions of 15 CFR 930.30 are provided to ensure that all federally conducted or supported activities, including development projects directly affecting the coastal zone, are undertaken in a manner consistent, to the maximum extent practicable, with approved State coastal management programs.


The primary objective of the Superfund program is the cleanup of the worst abandoned hazardous waste sites in the country. Owners or operators of an inactive (uncontrolled) hazardous waste site must notify the appropriate State official and convey information to them as to the nature (i.e., location, waste present) of the site. States, in turn, compile this information and submit it to EPA for the development of a national inventory of hazardous waste sites. The most serious sites will be placed on the National Priorities List (NPL). The State and national lists are required to be updated annually.

Sources for cleanup funding include general revenues and excise taxes on petroleum and specified chemical manufactures. The purpose/use of the fund is to aid in the identification, assessment, and ultimate cleanup of abandoned hazardous waste sites, when those responsible either no longer exist, are unidentifiable, or lack the necessary funds for cleanup.
Endangered Species Act of 1973 (P.L. 93-205)

It is the purpose of this Act to provide protection for animal and plant species that are currently in danger of extinction (endangered) and those that may become so in the foreseeable future (threatened).

Section 7 of this Act requires Federal agencies to ensure that all federally associated activities within the United States do not have adverse impacts on the continued existence of threatened or endangered species or on designated areas (critical habitats) that are important in conserving those species. Action agencies must consult with the U.S. Fish and Wildlife Service (FWS) (or NOAA-Fisheries), which maintains current lists of species that have been designated as threatened or endangered, to determine the potential impacts a project may have on protected species.

Section 9 of the Act prohibits any person subject to United States jurisdiction to possess, sell, deliver, carry, transport, or ship any species listed under this Act, except by authorized permit.

The FWS has established a system of informal and formal consultation procedures. FWS preparation of a “Biological Opinion” will conclude formal consultation. The result of informal or formal consultations with the FWS under Section 7 of the Endangered Species Act Amendments of 1978 should be described and documented in the Environmental Assessment (EA) or Environmental Impact Statement (EIS). This should include:

- A list of endangered, threatened, or candidate species occurring in the project areas. What impacts, if any, the project could have on endangered fish and wildlife and their habitat.
- Action or project features included to enhance, mitigate, or reduce adverse impacts to threatened or endangered species.
- A description of the formal and informal consultation with the FWS and the FWS’s Biological Opinion, if appropriate.

The “Alternatives Including the Recommended Plan” chapter should include any threatened and endangered species mitigation or enhancement project features included in the proposed alternative and the reasonable alternatives.

The “Affected Environment and Environmental Consequences” chapter should compare threatened and endangered species impacts for the proposed alternative, the “Without Project (no action)” alternative, and all reasonable alternatives. If a threatened or endangered species is located within the project area and is affected by the project, it may be desirable to attach a more detailed endangered species assessment to the end of the EA or EIS.

Additional detail on Endangered Species Act compliance is found in Reclamation’s ESA Handbook.
10-11 Executive Order 11514 (amended by Executive Order 11991 - Protection and Enhancement of Environmental Quality, 1977)

This Executive Order directs Federal agencies to initiate measures needed to direct their policies, plans, and programs so as to meet national environmental goals.

Federal agencies are responsible for developing procedures (i.e., public hearings, information on alternative courses of action) to ensure the provision of timely public review and understanding of Federal plans and programs with environmental impact in order to obtain interested party views.

This order directs the Council on Environmental Quality (CEQ) to develop regulations requiring EISs to be more concise, clear, and to the point, and therefore, more useful to the decisionmakers. CEQ has also issued regulations for implementing the procedural provisions of NEPA (40 CFR 6).


This Executive Order requires Federal agencies to take a leadership role in preservation by surveying all lands under their ownership or control and nominating to the National Register of Historic Places all properties which appear to qualify. It also requires agencies to avoid inadvertently destroying such properties prior to completing their inventories (codified as part of 1980 amendments to the National Historic Preservation Act).

10-13 Executive Order 11988 (Floodplain Management, 1977)

requires a construction agency to:

“... avoid to the extent possible the long- and short-term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct and indirect support of floodplain development wherever there is a practicable alternative ...” within the 100-year flood elevation.

The purpose of this directive is to avoid, where practicable alternatives exist, the short- and long-term adverse impacts associated with flood plain development.

Federal agencies are required to reduce the risk of flood loss; minimize the impact of floods on human safety, health, and welfare; and restore and preserve the natural and beneficial values served by flood plains in carrying out agency responsibility.

For proposed Federal flood plain projects, where an EIS is required, the agency shall consider alternatives to avoid adverse effects and incompatible development. If development requires siting in a flood plain, action shall be taken to modify or design the project in a way that minimizes potential harm to or within the flood plain. Procedures for early public review shall be provided in cases not requiring and EIS.
It is also recommended that planning reports/environmental impact statements include the following statement of findings on actions located in a floodplain or wetland:

1. Reasons why the proposed action must be located in a flood plain or wetlands.

2. Facts considered in making the determination to locate in a flood plain or wetlands, including alternative sites and actions considered.

3. Statement about whether the proposed action conforms to applicable State or local flood plain or wetlands protection standard.

4. Statement about whether the action affects the natural or beneficial values of the flood plain or wetlands.

5. Description of steps taken to design or modify the proposed action to minimize potential harm to or within the flood plain or wetlands.

6. A general listing of other involved agencies, groups, and organizations.

**10-14 Executive Order 11990 (Protection of Wetlands, 1977)**

requires a construction agency to:

“... avoid to the extent possible the long- and short-term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative. . .”

Executive agencies, in carrying out their land management responsibilities, are to take action which will minimize the destruction, loss, or degradation of wetlands, and take action to preserve and enhance the natural and beneficial values of wetlands.

Each agency shall avoid undertaking or assisting in wetland construction projects, unless the head of the agency determines that there is no practicable alternative to such construction and that the proposed action includes measures to minimize harm.

Also, agencies shall provide opportunity for early public review of proposals for construction in wetlands including those projects not requiring an EIS.

**10-15 Executive Order 12088 (Federal Compliance with Pollution Control Standards, 1978)**

This Presidential directive delegates the head of each executive agency responsible for ensuring that all necessary actions are taken for the prevention, control, and abatement of environmental pollution.

EO 12088 gives EPA authority to conduct reviews and inspections for the purpose of monitoring Federal facility compliance with pollution control standards.
Also, each executive agency shall submit a semi-annual plan to the Office of Management and Budget for the control of environmental pollution. The plan shall indicate methods of improvement in the design, construction, management, operation, and maintenance of Federal facilities, and shall include annual cost estimates.

10-16 Executive Order 12114 (Environmental Effects Abroad of Major Federal Actions, 1979)

EO 12114 addresses the issue of how the environmental review process should be implemented for major Federal actions having significant environmental effects outside the borders of the United States.

Procedures to implement this order shall be developed by Federal agencies taking actions that will impact areas outside the United States border, its territories, and possessions.

10-17 Executive Order 13186 (Responsibilities of Federal Agencies to Protect Migratory Birds)

EO 13186 was issued to assist Federal agencies in complying with the Migratory Bird Treaty Act (MBTA) and to reduce agencies’ liability under the MBTA in regards to unintentional take of migratory birds. The EO lists 15 actions that agencies may take to avoid or minimize take of migratory birds. These measures should be considered and implemented, to the extent practicable, to reduce liability under the MBTA.

10-18 Executive Order 13352, Facilitation of Cooperative Conservation

This Executive Order encourages agencies to collaborate and work cooperatively with other Federal, State, local and tribal governments, interest groups, and individuals in promoting natural resource conservation. It encourages local participation in Federal decisionmaking. Federal agencies are to report annually to the Chairman of CEQ on actions taken to implement the order.

10-19 Farmland Protection Policy Act


The U.S. Soil Conservation Service (SCS) is responsible for administering the Farmland Protection Policy Act, Public Law 97-98. The SCS office in the project area should be contacted and asked to identify whether the proposed action will affect any lands classified as prime and unique farmlands.

10-20 Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (through P.L. 100-460, 100-464 to 100-526, and 100-532)

The Federal Insecticide, Fungicide, and Rodenticide Act, as amended, is the basic law regulating pesticides in the
United States. The EPA is responsible for the regulatory aspects of this Act. The Act regulates the marketing of economic poisons and devices, as well as the requirements for its use.

The FIFRA requires all pesticides used be classified for restricted or general use, as well as requiring only certified applicators, or applicants under the direct supervision of a certified applicator to apply restricted use pesticides. Each State provides an individual certification program. This program may be conducted by the State’s department of agriculture or, in some cases, EPA may administer the program.

EPA responsibilities include regulating the amount of residue of a pesticide which can remain in or on raw farm products. The FIFRA prohibits using a pesticide in a manner inconsistent with its labeling. EPA may assess penalties for violations of the FIFRA.

10-21 Federal Water Project Recreation Act of 1965 (P.L. 89-72)

The policy of this Act states that Federal agencies in planning navigation, flood control, reclamation, hydroelectric, or multi-purpose water resource projects must consider the potential outdoor recreational opportunities and potential fish and wildlife enhancement that the project might afford. If both purposes can be served by the project, it shall be constructed, operated, and maintained accordingly.

Also, project construction agencies shall encourage non-Federal public bodies to administer project land and water areas for recreation and fish and wildlife enhancement purposes, and operate, maintain, and replace facilities used for these purposes. There are also specific cost sharing requirements prescribed by the Act.

10-22 Fish and Wildlife Coordination Act of 1958 (Public Law 85-624)

The objective of this Act is to provide that wildlife conservation receive equal consideration and be coordinated with other features of water resource development programs.

Sections 1 and 2 of the Fish and Wildlife Coordination Act (FWCA) mandate that fish and wildlife receive equal consideration with water resources development programs throughout planning, development, operation, and maintenance. Whenever Reclamation proposes to impound, divert, channelize, or otherwise alter or modify any stream, river, or other body of water for any purpose, Reclamation must first consult and coordinate its actions and projects with the FWS and the affected State fish and game agency(ies) wherein the impoundment, diversion, or other control facility is to be constructed. This consultation and coordination will address ways to conserve wildlife resources by preventing loss of and damage to such resources, as well as to further develop and improve these resources.

The FWS is authorized to survey, investigate, prepare reports, and recommend methods to determine the possible damage to wildlife resources and to determine means and measures that should be adopted to prevent the loss of, or damage to, such wildlife resources.
resources, as well as to concurrently develop and improve such resources. The FWCA report shall be made a part of any Reclamation report submitted to Congress. Reclamation shall give full consideration to the report and recommendations and to any report of the State agency. The project plan shall include such justifiable fish and wildlife means and measures as Reclamation determines necessary to obtain maximum overall project benefits.

The usual FWS procedure is to provide Reclamation with periodic planning aid memorandum letters throughout the planning process, and to provide a FWCA report at the conclusion of the planning process. Any FWS planning aid memorandums should be made a part of the project record, and any FWCA report received should be attached to the NEPA document (EA or EIS).

Any recommendations of the FWS received should be summarized in the NEPA document and responses made to such recommendations. This summary is usually made a part of the Consultation and Coordination section. If Reclamation decides not to implement a recommendation, the reasons the recommendation is not implemented must be given.

10-23 Food Security Act (Farm Bill) of 1985

The major intent of this Act is to reverse the declining economic environment on the American farm. As part of the legislation, Congress recognized a need to more effectively manage the physical environment upon which American farmers depend. Several conservation provisions were included in the legislation which present opportunities to conserve and restore wetlands, prairies, and other habitats.

The “sodbuster” and “swampbuster” provisions will help to conserve the natural values of wetlands, will help to reduce soil erosion, and will help to reduce commodity surpluses. The wetland conservation provisions will reduce the loss of wetlands by making producers who convert them and produce an agricultural commodity on the converted wetland ineligible for certain U.S. Department of Agriculture programs' benefits. The soil erosion provisions will reduce erosion and the loss of topsoil from agricultural lands by making producers who farm on highly erodible lands, as determined by SCS, ineligible for most agricultural subsidies, unless they farm such lands under a “Conservation Plan” that SCS has approved.

The legislation also provides for the establishment of conservation reserve, conservation set aside, and conservation easement programs on existing farmlands.

10-24 Intergovernmental Cooperation Act of 1968 (P.L. 90-577)

It is the purpose of this Act to encourage better cooperation and coordination of activities among levels of government in order to improve the operation of our Federal system.

The Act states that the President shall prescribe regulations governing the formulation, evaluation, and review of government programs and projects.
having significant impact on community development. These regulations shall promote sound and orderly development of urban and rural areas by considering such things as an appropriate choice of use for land development (i.e., housing, commercial, industrial), conservation of natural resources, balanced transportation systems, and adequate outdoor recreation and open space areas.

This Act also gives authority to Federal departments and agencies to provide specialized or technical services to States or local governments when a written request and payment for services has been made.

Title II of the Act aims to improve administration of grants-in-aid to the States.


Under the Migratory Bird Treaty Act (MBTA), it is unlawful “by any means or manner to pursue, hunt, take, capture, or kill” any migratory bird except as permitted by regulations issued by the Fish and Wildlife Service (Service). “Take” is not defined in the MBTA, but the Service’s regulations define it as “pursue, hunt, shoot, wound, kill, trap, capture, or collect any migratory bird or any part, including nest or egg.” The Service has developed a system of permits for activities involving intentional take of migratory birds but has no regulations for unintentional take. Federal agencies are liable under the MBTA for unintentional take, even when carrying out lawful activities. In carrying out actions, Federal agencies should implement measures to avoid or minimize take of migratory birds.

10-26 National Historic Preservation Act of 1966 (P.L. 89-665), as amended (Public Law 95-515)

Cultural (Historical, Archeological, Architectural, and Paleontological) Resources

National Historic Preservation Act of 1966, as amended (P.L. 89-665; 80 Stat. 915; 16 U.S.C. 470) establishes, as Federal policy, the protection of historic sites and values in cooperation with other nations, States, and local governments. The Act creates the National Register of Historic Places and extends protection to historic places of State and local, as well as national, significance. It establishes the Advisory Council on Historic Preservation, State Historic Preservation Officers, Tribal Preservation Officers, and a preservation grants-in-aid program.

Section 106 directs Federal agencies to take into account effects of Federal actions (“undertakings”) on properties in or eligible for the National Register. Section 106 is implemented by regulations of the Advisory Council on Historic Preservation, 36 CFR Part 800. http://www.achp.gov/regs/html. Among other things, the regulations outline the process for coordinating compliance with section 106 and the requirements of NEPA. The DOI criteria and procedures for evaluating a property’s eligibility for the National Register are at 36 CFR Part 60.

Section 110(a) sets inventory, nomination, protection, and preservation responsibilities for federally owned cultural properties. Section 110(c) requires each Federal agency to
designate a Preservation Officer to coordinate activities under the Act.

The NEPA process requires that an evaluation be conducted to determine whether a proposed action will affect districts, sites, structures, or objects listed in, or eligible for listing in, the National Register of Historic Places (National Register). It is then determined whether the effect is adverse.

Reclamation uses three levels of surveys to locate and identify cultural resources. Consultation with the appropriate SHPO is necessary at appropriate times during and after such surveys.

Class I Survey. A class I survey is primarily a literature/archival search. It consists of consulting the National Register and supplemental National Register listings to determine whether any National Register eligible-listed properties exist in the area of a Reclamation action. It also includes contacting the SHPO, State Archeologist, State Historian, State Historical Society, and/or other appropriate individuals, agencies, or institutions to determine what cultural resources may be present in an area and what kind of additional information may be needed for an adequate inventory of cultural resources. Regional records shall also be examined for potentially eligible properties for listing on the National Register on lands under Reclamation’s administration. It may be necessary to visit potentially significant areas or sites identified by the literature/archival research. If a class I survey indicates the area has not been adequately inventoried, a field examination is necessary.

Class II Survey. The goal of the class II survey is to evaluate the resources based on a sample that can serve as an indicator of resources present in the entire area to be affected. This type of survey would normally be an on-the-ground examination of a statistically valid sample of the total survey area and may include remote sensing and/or geomorphological investigations or other appropriate techniques. Class II surveys are designed to aid in determining the necessity for a class III survey and may be combined with a class I survey or bypassed in favor of a class III survey.

Class III Survey. A class III survey consists of an intensive on-the-ground examination of all the areas to be affected by Reclamation action or on lands under Reclamation’s administration. It is designed to locate and make a preliminary professional evaluation of all identified cultural resources. All cultural resources identified as historically significant will be nominated to the National Register or a determination of eligibility will be sought. A class III survey may require test excavations or other specialized studies for the purpose of evaluating the significance of cultural resources.

The EA or EIS shall document the results of all cultural resources surveys conducted. In addition to identifying the effects of the proposed action to identified National Register listed-eligible properties, the EA or EIS will describe mitigation plans to the extent they have been resolved with the SHPO and Advisory Council on Historic Places.

Reclamation Instruction 376.11, “Identification and Administration of
Cultural Resources,” contains additional information on the process outlined here. Complete or full compliance with the NEPA process given here does not constitute compliance with all cultural resources legislation and regulations. See RI 376.11 for details.


This Act establishes rights of Indian tribes and Native Hawaiian organizations to claim ownership of certain “cultural items,” including human remains, funerary objects, sacred objects, and objects of cultural patrimony, held or controlled by Federal agencies and museums that receive Federal funds. It requires agencies and museums to identify holdings of such remains and objects and to work with appropriate Native Americans toward their repatriation. Permits for the excavation and/or removal of “cultural items” protected by the Act require Native American consultation, as do discoveries of “cultural items” made during Federal land use activities. The Secretary of the Interior’s implementing regulations are at 43 CFR Part 10.

10-28 **Reservoir Salvage Act of 1960 (P.L. 86-523)**

Federally constructed reservoirs represent another major source of destruction of archeological resources that cannot be resolved without a specific source of funding. The act requires Federal agencies building or permitting the building of reservoirs to notify the Secretary of the Interior when such activities might destroy important archeological, historic, or scientific data. The Secretary is authorized to conduct appropriate investigations to protect those data. The act also authorizes agencies to spend up to 1 percent of their construction funds on the protection of historic and archeological resources. This is the first act to recognize that archeological sites are important for their data content, and to provide a source of funding for collecting archeological data.

10-29 **Rivers and Harbors Act of 1899 (33 U.S.C. 401-413; Sec 407, referred to as the Refuse Act)**

Permits for structures or work in or affecting navigable waters of the United States — 33 CFR 322

Section 10 of the Rivers and Harbors Act of 1899 prohibits the unauthorized obstruction or alteration of any navigable waters of the United States. The construction of any structure in or over any waters of the United States, excavation or deposit of material in such waters, and various types of work performed in such water, including fill and stream channelization, are examples of activities requiring a U.S. Army Corps of Engineers permit (33 CFR 322).


Standards for Treatment, Storage, and Disposal Facilities (T/S/D’s) – 40 CFR 264
Interim Status Standards for T/S/D’s – 40 CFR 265
Interim Status Standards for Owners and Operators of a New Hazardous Waste Land Disposal Facility – 40 CFR 267
Land Disposal Restrictions – 40 CFR 268
Requirements for Authorization of a State Hazardous Waste Program – 40 CFR 271
Standards Applicable to Transporters of Hazardous Waste – 40 CFR 272

The objectives of RCRA are to promote the protection of health and the environment and to conserve valuable material and energy resources. The first serious Federal attempt to address the problems of solid waste and hazardous waste management began with the passage of RCRA.

Subtitle C of RCRA establishes a hazardous waste program. The program is designed to regulate all areas of hazardous waste management from generation to disposal. States can assume authority for implementation of a hazardous waste program (40 CFR 271), and all but a few have not acquired this authority. State programs must be at least equivalent to the Federal program, and many are more stringent.

EPA is responsible for identifying what wastes are hazardous by either listing those wastes that are hazardous or by identifying hazardous characteristics for waste (40 CFR 261). It is the responsibility of the persons generating solid waste to determine if the waste they are generating is hazardous.

Under authority of subtitle C, EPA establishes standards for generators, transporters, and treatment, storage, and disposal facilities (T/S/D’s).

Generators are required to prepare manifests for tracking the hazardous waste when it is being transported to a T/S/D facility. Generators must use T/S/D facilities that have acquired an EPA identification number and, therefore, are also regulated under RCRA (40 CFR 272).

To own and operate a T/S/D facility, permit is required (40 CFR 264). Interim status allows facilities existing at the time the regulations went into effect (November 19, 1980) to remain in operation until a permanent RCRA permit has been issued. Interim status standards (40 CFR 265) are comparable to permanent standards. To date, very few final operating permits have been issued, either by EPA or authorized States.

In the 1984 amendments, a ban on the disposal in landfills of noncontainerized hazardous waste and waste containing free liquids was imposed and became effective on May 8, 1985. Also, in 1984, the Congress directed EPA to determine whether to ban or restrict, in whole or in part, the land disposal of all RCRA hazardous wastes that are not pretreated using the best available technologies. If EPA misses the deadlines established in RCRA section 3004 for any phase, the ban for all waste in that phase will automatically go into effect.

Interim status standards for owners and operators of a new hazardous waste land disposal facility and land disposal
restrictions are standards in 40 CFR 267 and 268, respectively.


National Primary Drinking Water Regulations – 40 CFR 141
National Interim Primary Drinking Water Regulations Implementation – 40 CFR 142
National Secondary Drinking Water Regulations – 40 CFR 143

The Safe Drinking Water Act provides for the safety of drinking water supplies throughout the United States by establishing national standards of which the States are responsible for enforcing.

The Act provides for the establishment of primary regulations for the protection of the public health and secondary regulations relating to the taste, odor, and appearance of drinking water. Primary drinking water regulations, by definition, include either a maximum contaminant level (MCL) or, when a MCL is not economically or technologically feasible, a prescribed treatment technique which would prevent adverse health effects to humans. An MCL is the permissible level of a contaminant in water that is delivered to any user of a public water system. Primary and secondary drinking water regulations are stated in 40 CFR 141 and 143, respectively.

The Act’s 1986 amendments require EPA to publish, by January 1, 1988, and at 3-year intervals thereafter, a list of contaminants which are known or anticipated to occur in public water systems. Two years after publication of this list, EPA is to publish proposed maximum contaminant goals and promulgate national primary drinking water regulations for at least 25 of these contaminants.

The Act also provides measures to protect underground drinking water sources through State underground injection control programs. State programs protect drinking water from subsurface placement of fluids from well operations.

In 1962, the U.S. Public Health Service set standards for water used in interstate commerce. (EPA was established in 1970.)


This Act extensively amends CERCLA or Superfund. SARA’s major goals include a stepped-up pace of cleanup, increased public participation, and more stringent and better defined cleanup standards, emphasizing remedial actions that permanently and significantly reduce hazardous situations. Remedial actions are generally more extensive than removal actions, usually requiring a National Priorities Listing, a detailed site study, and an analysis of the cost effectiveness of various cleanup options, known as Remedial Investigation and Feasibility Study. Removal actions are for more immediate needs not requiring any of the above-mentioned restrictions.

The Act requires EPA to revise the Hazard Ranking System to more accurately reflect the degree of risk to human health and the environment.
SARA adds (1) damage to natural resources and (2) contamination of ambient air as criteria to be considered in evaluating potential hazards.

SARA also requires that EPA or the State provide public notice and opportunity to comment on any proposed plan for remedial action prior to government approval of the plan. In addition to requiring a cost-effective cleanup remedy for a Superfund site, as required by CERCLA, SARA requires that preference be given to remedies that permanently reduce the toxicity, volume, or mobility of the hazardous substances.

To reduce health and environmental risks to communities near chemical manufacturing facilities, the Act establishes a comprehensive reporting and emergency planning program. Each local emergency committee is to complete, by October 17, 1988, an emergency plan. The plan shall include such things as identifying facilities covered by the emergency response requirements (i.e., those facilities using any of the 402 extremely hazardous substances listed by EPA), emergency response methods for facility operators and local medical personnel, and evacuation plans.

10-33 Toxic Substances Control Act of 1986 (TSCA) (P.L. 99-519)

Polychlorinated biphenyls (PCB’s) – manufacturing, processing, distribution in commerce, and use prohibitions – 40 CFR 761

The stated policy of TSCA is to place the responsibility of developing data on the effect of chemical substances and mixtures on those who do the manufacturing and processing. Also, to provide authority for the regulation of chemical substances presenting unreasonable risk of injury to health and/or the environment.

If EPA finds that a chemical substance, through its processing, use, or disposal, will pose an unreasonable risk to health and/or the environment, it may apply certain requirements prohibiting a particular use, or use in a particular concentration, limit the amount that can be manufactured, and/or require the substances to be marked with warnings and instructions for use, distribution, and disposal.

To ensure compliance with the requirements of this Act, EPA may inspect any facility where chemicals are manufactured, processed, and stored, or any conveyance being used to transport chemical substances.

This Act required EPA to prescribe methods for the disposal of PCB’s and unless by EPA rule, no person may manufacture, process, distribute in commerce, or use PCB’s (40 CFR 761).

The Act also provided for the establishment of Federal regulations which require inspection for asbestos-containing material and implementation of appropriate response actions (methods that protect human health and the environment from asbestos-containing material).
The purpose of this Act is to provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms by Federal and federally assisted programs and to establish uniform and equitable land acquisition policies for Federal and federally listed programs.

The Act states that whenever the acquisition of real property for a program or project by a Federal agency will result in the displacement of any person, the agency shall make a payment to the displaced person for:

1. Reasonable moving expenses accrued while searching for a replacement business, farm operation, or other personal property.

2. Direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation.

3. Reasonable expenses accrued while searching for a replacement business or farm.

The Act also provides for relocation planning, assistance coordination, and advisory services. These services shall include such measures, facilities, or services as may be necessary or appropriate to:

1. Determine and make timely recommendations on the needs and preferences, if any, of displaced persons for relocation assistance.

2. Provide current and continuing information on the availability, sales prices, and rental charges of comparable replacement dwellings for displaced homeowners and tenants and suitable locations for businesses and farm operations.

3. Ensure that a person shall not be required to move from a dwelling unless the person has had a reasonable opportunity to relocate to a comparable replacement dwelling.

4. Assist a person displaced from a business or farm operation in obtaining and becoming established in a suitable replacement location.

5. Supply information concerning other Federal and State programs which may be of assistance to displaced persons, technical assistance to such person in applying for assistance under such programs.

6. Provide other advisory services to displaced persons in order to minimize hardships to such persons in adjusting to relocation.

Construction of Water Resources Projects Affecting Wild and Scenic Rivers administered by the Secretary of Agriculture – 36 CFR 297

The Wild and Scenic Rivers Act ensures that:

“. . . Certain selected rivers . . . shall be preserved in a free flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.”

It is policy of this Act to select certain rivers of the Nation possessing remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values; preserve them in a free-flowing condition; and protect their local environments. This Act establishes three classes of river areas (1) wild river areas, characterized as being free of impoundments, generally inaccessible except by trail, watersheds or shoreline essentially primitive, and unpolluted waters; (2) scenic river areas, characterized as being free of impoundments, accessible in places by road, and have shorelines or watersheds still largely undeveloped; (3) recreational river areas are characterized as being readily accessible by road or railroad, may have some development along their shoreline, and may have undergone some impoundment or diversion in the past.

36 CFR 297 applies to the construction of water resources projects affecting wild and scenic rivers or study rivers administered by the Secretary of Agriculture.

Selected rivers and streams have been placed into the National Rivers Inventory by acts of Congress. Other rivers and streams have been proposed to be included into the system. Rivers and streams included or proposed for inclusion into the system must be considered during project planning and project impacts identified in the EA or EIS. If there are no impacts to wild and scenic rivers, this fact should be noted in the Wild and Scenic Rivers Act summary.

There is no legal requirement to consider State-listed wild and scenic rivers and streams or unique areas during project planning or in the EA or EIS. However, it is recommended that any impacts to State-listed, or proposed-for-listing, rivers and streams and unique areas be considered and addressed at levels comparable to consideration given to rivers and streams protected by the Wild and Scenic Rivers Act.

10-36 Others

Anadromous Fish Conservation Act
Commercial Fisheries Research and Development Act of 1974
Department of Transportation Act
Federal Aid in Fish Restoration Act
Federal Environmental Pesticide Control Act of 1972
Federal Power Act
Federal Water Pollution Control Act
Federal Water Pollution Control Act Amendments of 1972
Federal Power Act
Federal Water Pollution Control Act
Federal Water Pollution Control Act
   Amendments of 1972
Fish and Wildlife Act of 1956
Land and Water Conservation Fund Act
Marine Protection, Research and
   Sanctuaries Act of 1972
Marine Mammal Protection Act
Migratory Bird Conservation Act
National Trails System Act
National Wildlife Refuge System
   Administration Act of 1966
Noise Control Act of 172 (Public Law
   92-574)

Noise Pollution and Abatement Act of
   1970 (Public Law 91-604)
Pesticides Research Act
Quiet Communities Act of 1978 (Public
   Law 95-609)
Water Bank Act
Water Resources Research Act of 1964
Watershed Protection and Flood
   Prevention Act
Wild Horses and Burros Protection Act
   of 1964
Wilderness Act of 1964
Executive Order No. 11988
42 Federal Register 26951
1977 WL 23619 (Pres.)

Executive Order 11988
Floodplain Management
May 24, 1977

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001 et seq.), and the Flood Disaster Protection Act of 1973 (Public Law 93-234, 87 Stat. 975), in order to avoid to the extent possible the long and short term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development wherever there is a practicable alternative, it is hereby ordered as follows:

SECTION 1. Each agency shall provide leadership and shall take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains in carrying out its responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; (2) providing Federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.

SEC. 2. In carrying out the activities described in Section 1 of this Order, each agency has a responsibility to evaluate the potential effects of any actions it may take in a floodplain; to ensure that its planning programs and budget request reflect consideration of flood hazards and floodplain management; and to prescribe procedures to implement the policies and requirements of this Order, as follows:

(a) (1) Before taking an action, each agency shall determine whether the proposed action will occur in a floodplain--for major Federal actions significantly affecting the quality of the human environment, the evaluation required below will be included in any statement prepared under Section 102(2)(C) of the National Environmental Policy Act. This determination shall be made according to a Department of Housing and Urban Development (HUD) floodplain map or a more detailed map of an area, if available. If such maps are not available, the agency shall make a determination of the location of the floodplain based on the best available information. The Water Resources Council shall issue guidance on this information not later than October 1, 1977.

(2) If an agency has determined to, or proposes to, conduct, support, or allow an action to be located in a floodplain, the agency shall consider alternatives to avoid adverse effects and incompatible development in the floodplains. If the head of the agency finds that the only practicable alternative consistent with the law and with the policy set forth in this Order requires siting in a floodplain, the agency shall, prior to taking action, (i) design or modify its action in order to minimize potential harm to or within the floodplain, consistent with regulations issued in accord with Section 2(d) of this Order, and (ii) prepare and circulate a notice containing an explanation of why the action is proposed to be located in the floodplain.

(3) For programs subject to the Office of Management and Budget Circular A-95, the agency shall send the notice, not to exceed three pages in length including a location map, to the state and areawide A-95 clearinghouses for the geographic areas affected. The notice shall include: (i) the reasons why the action is proposed to be located in a floodplain; (ii) a statement indicating whether the action conforms to applicable state or local floodplain protection standards and (iii) a list of the alternatives considered. Agencies shall
endeavor to allow a brief comment period prior to taking any action.

(4) Each agency shall also provide opportunity for early public review of any plans or proposals for actions in floodplains, in accordance with Section 2(b) of Executive Order No. 11514, as amended, including the development of procedures to accomplish this objective for Federal actions whose impact is not significant enough to require the preparation of an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969, as amended.

(b) Any requests for new authorizations or appropriations transmitted to the Office of Management and Budget shall indicate, if an action to be proposed will be located in a floodplain, whether the proposed action is in accord with this Order.

(c) Each agency shall take floodplain management into account when formulating or evaluating any water and land use plans and shall require land and water resources use appropriate to the degree of hazard involved. Agencies shall include adequate provision for the evaluation and consideration of flood hazards in the regulations and operating procedures for the licenses, permits, loan or grants-in-aid programs that they administer. Agencies shall also encourage and provide appropriate guidance to applicants to evaluate the effects of their proposals in floodplains prior to submitting applications for Federal licenses, permits, loans or grants.

(d) As allowed by law, each agency shall issue or amend existing regulations and procedures within one year to comply with this Order. These procedures shall incorporate the Unified National Program for Floodplain Management of the Water Resources Council, and shall explain the means that the agency will employ to pursue the nonhazardous use of riverine, coastal and other floodplains in connection with the activities under its authority. To the extent possible, existing processes, such as those of the Council on Environmental Quality and the Water Resources Council, shall be utilized to fulfill the requirements of this Order. Agencies shall prepare their procedures in consultation with the Water Resources Council, the Federal Insurance Administration, and the Council on Environmental Quality, and shall update such procedures as necessary.

SEC. 3. In addition to the requirements of Section 2, agencies with responsibilities for Federal real property and facilities shall take the following measures:

(a) The regulations and procedures established under Section 2(d) of this Order shall, at a minimum, require the construction of Federal structures and facilities to be in accordance with the standards and criteria and to be consistent with the intent of those promulgated under the National Flood Insurance Program. They shall deviate only to the extent that the standards of the Flood Insurance Program are demonstrably inappropriate for a given type of structure or facility.

(b) If, after compliance with the requirements of this Order, new construction of structures or facilities are to be located in a floodplain, accepted floodproofing and other flood protection measures shall be applied to new construction or rehabilitation. To achieve flood protection, agencies shall, wherever practicable, elevate structures above the base flood level rather than filling in land.

(c) If property used by the general public has suffered flood damage or is located in an identified flood hazard area, the responsible agency shall provide on structures, and other places where appropriate, conspicuous delineation of past and probable flood height in order to enhance public awareness of and knowledge about flood hazards.

(d) When property in floodplains is proposed for lease, easement, right-of-way, or disposal to non-Federal public or private parties, the Federal agency shall (1) reference in the conveyance those uses that are restricted
under identified Federal, State or local floodplain regulations; and (2) attach other appropriate restrictions to the uses of properties by the grantee or purchaser and any successors, except where prohibited by law; or (3) withhold such properties from conveyance.

SEC. 4. In addition to any responsibilities under this Order and Sections 202 and 205 of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4106 and 4128), agencies which guarantee, approve, regulate, or insure any financial transaction which is related to an area located in a floodplain shall, prior to completing action on such transaction, inform any private parties participating in the transaction of the hazards of locating structures in the floodplain.

SEC. 5. The head of each agency shall submit a report to the Council on Environmental Quality and to the Water Resources Council on June 30, 1978, regarding the status of their procedures and the impact of this Order on the agency's operations. Thereafter, the Water Resources Council shall periodically evaluate agency procedures and their effectiveness.

SEC. 6. As used in this Order:

(a) The term 'agency' shall have the same meaning as the term 'Executive agency' in Section 105 of Title 5 of the United States Code and shall include the military departments; the directives contained in this Order, however, are meant to apply only to those agencies which perform the activities described in Section 1 which are located in or affecting floodplains.

(b) The term 'base flood' shall mean that flood which has a one percent or greater chance of occurrence in any given year.

(c) The term 'floodplain' shall mean the lowland and relatively flat areas adjoining inland and coastal waters including floodprone areas of offshore islands, including at a minimum, that area subject to a one percent or greater chance of flooding in any given year.

SEC. 7. Executive Order No. 11296 of August 10, 1966, is hereby revoked. All actions, procedures, and issuances taken under that Order and still in effect shall remain in effect until modified by appropriate authority under the terms of this Order.

SEC. 8. Nothing in this Order shall apply to assistance provided for emergency work essential to save lives and protect property and public health and safety, performed pursuant to Sections 305 and 306 of the Disaster Relief Act of 1974 (88 Stat. 148, 42 U.S.C. 5145 and 5146).

SEC. 9. To the extent the provisions of Section 2(a) of this Order are applicable to projects covered by Section 104(h) of the Housing and Community Development Act of 1974, as amended (88 Stat. 640, 42 U.S.C. 5304(h)), the responsibilities under those provisions may be assumed by the appropriate applicant, if the applicant has also assumed, with respect to such projects, all of the responsibilities for environmental review, decisionmaking, and action pursuant to the National Environmental Policy Act of 1969, as amended.

JIMMY CARTER -
THE WHITE HOUSE,
- May 24, 1977. -

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END OF DOCUMENT
EXECUTIVE ORDERS

trails of the public lands, immediately close such areas or trails to the type of off-road vehicle causing such effects, until such time as he determines that such adverse effects have been eliminated and that measures have been implemented to prevent future recurrence.

"(b) Each respective agency head is authorized to adopt the policy that portions of the public lands within his jurisdiction shall be closed to use by off-road vehicles except those areas or trails which are suitable and specifically designated as open to such use pursuant to Section 3 of this Order."

THE WHITE HOUSE,
May 24, 1977.

JOHN CARTER

No. 11990

May 24, 1977, 42 F.R. 26951

PROTECTION OF WETLANDS

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), in order to avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative, it is hereby ordered as follows:

Section 1. (a) Each agency shall provide leadership and shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency’s responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; and (2) providing Federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.

(b) This Order does not apply to the issuance by Federal agencies of permits, licenses, or allocations to private parties for activities involving wetlands on non-Federal property.

Sec. 2. (a) In furtherance of Section 101(b)(3) of the National Environmental Policy Act of 1969 (42 U.S.C. 4321(b)(3)) to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may attain the widest range of beneficial uses of the environment without degradation and risk to health or safety, each agency, to the extent permitted by law, shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. In making this finding the head of the agency may take into account economic, environmental and other pertinent factors.

(b) Each agency shall also provide opportunity for early public review of any plans or proposals for new construction in wetlands, in accordance with Section 3(b) of Executive Order No. 11514, as amended, including the development of procedures to accomplish this objective for Federal actions whose impact is not significant enough to require the preparation of an environmental impact statement under Section 150(2)(C) of the National Environmental Policy Act of 1969, as amended.
EXECUTIVE ORDERS

Sec. 2. Any requests for new authorisations or appropriations transmitted to the Office of Management and Budget shall indicate, if an action to be proposed will be located in wetlands, whether the proposed action is in accord with this Order.

Sec. 4. When Federally-owned wetlands or portions of wetlands are proposed for lease, assessment, right-of-way or disposal to non-Federal public or private parties, the Federal agency shall (a) reference in the conveyance those uses that are restricted under identified Federal, State or local wetlands regulations; and (b) attach other appropriate restrictions to the uses of properties by the grantee or purchaser and any successor, except where prohibited by law; or (c) withhold such properties from disposal.

Sec. 8. In carrying out the activities described in Section 1 of this Order, each agency shall consider factors relevant to a proposal’s effect on the survival and quality of the wetlands. Among these factors are:
(a) activities related to public health, safety, and welfare, including water supply, quality, recharge and discharge; pollution; flood and storm hazards; and sediment and erosion;
(b) maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber, and food and fiber resources; and
(c) other uses of wetlands in the public interest, including recreational, scientific, and cultural uses.

Sec. 6. As allowed by law, agencies shall issue or amend their existing procedures in order to comply with this Order. To the extent possible, existing processes, such as those of the Council on Environmental Quality and the Water Resources Council, shall be utilized to fulfill the requirements of this Order.

Sec. 7. As used in this Order:
(a) The term “agency” shall have the same meaning as the term “Executive agency” in Section 105 of Title 5 of the United States Code and shall include the military departments; the directives contained in this Order, however, are meant to apply only to those agencies which perform the activities described in Section 1 which are located in or affecting wetlands.
(b) The term “new construction” shall include draining, dredging, channelization, filling, sinking, impounding, and related activities and any structures or facilities begun or authorized after the effective date of this Order.
(a) The term “wetlands” means those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.

Sec. 8. This Order does not apply to projects presently under construction, or to projects for which all of the funds have been appropriated through Fiscal Year 1977, or to projects and programs for which a draft or final environmental impact statement will be filed prior to October 1, 1977. The provisions of Section 3 of this Order shall be implemented by each agency not later than October 1, 1977.

Sec. 9. Nothing in this Order shall apply to assistance provided for emergency work, essential to save lives and protect property and public health and safety, performed pursuant to Sections 205 and 206 of the Disaster Relief Act of 1974 (38 Stat. 148, 49 U.S.C. 5145 and 5146).

Sec. 10. To the extent the provisions of Sections 5 and 6 of this Order are applicable to projects covered by Section 106(b) of the Housing and Community Development Act of 1974, as amended (38 Stat.
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840, 42 U.S.C. 5304(h), the responsibilities under these provisions may be assumed by the appropriate applicant, if the applicant has also assumed, with respect to such projects, all of the responsibilities for environmental review, decisionmaking, and action pursuant to the National Environmental Policy Act of 1969, as amended.

JIMMY CARTER

THE WHITE HOUSE,
May 24, 1977.

No. 11991

May 24, 1977. 42 F.R. 26967

RELATING TO PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the purpose and policy of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), the Environmental Quality Improvement Act of 1970 (42 U.S.C. 4371 et seq.), and Section 309 of the Clean Air Act, as amended (42 U.S.C. 1867h-7), it is hereby ordered as follows:

Section 1. Subsection (h) of Section 2 (relating to responsibilities of the Council on Environmental Quality) of Executive Order No. 11514, as amended, is revised to read as follows:

"(h) Issue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(b)). 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."

Sec. 2. The following new subsection is added to Section 2 (relating to responsibilities of Federal agencies) of Executive Order No. 11514, as amended:

"(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."

JIMMY CARTER

THE WHITE HOUSE,
May 24, 1977.

Executive Order 12114

Environmental Effects Abroad of Major Federal Actions

January 4, 1979

By virtue of the authority vested in me by the Constitution and the laws of the United States, and as President of the United States, in order to further environmental objectives consistent with the foreign policy and national security policy of the United States, it is ordered as follows:

Section 1.

1-1. Purpose and Scope. The purpose of this Executive Order is to enable responsible officials of Federal Agencies having ultimate responsibility for authorizing and approving actions encompassed by this Order to be informed of pertinent environmental considerations and to take such considerations into account, with other pertinent considerations of national policy, in making decisions regarding such actions. While based on independent authority, this Order furthers the purpose of the National Environmental Policy Act and the Marine Protection Research and Sanctuaries Act and the Deepwater Port Act consistent with the foreign policy and national security policy of the United States, it is ordered as follows:

Sec. 2.

2-1. Agency Procedures. Every Federal agency taking major Federal actions encompassed hereby and not exempted herefrom having significant effects on the environment outside the geographical borders of the United States and its territories and possessions shall within eight months after the effective date of this Order have in effect procedures to implement this Order. Agencies shall consult with the Department of State and the Council on Environmental Quality concerning such procedures prior to placing them in effect.

2-2. Information Exchange. To assist in effectuating the foregoing purpose, the Department of State and the Council on Environmental Quality in collaboration with other interested Federal agencies and other nations shall conduct a program for exchange on a continuing basis of information concerning the environment. The objectives of this program shall be to provide information for use by decisionmakers, to heighten awareness of and interest in environmental concerns and, as appropriate, to facilitate environmental cooperation with foreign nations.

2-3. Actions Included. Agencies in their procedures under Section 2-1 shall establish procedures by which their officers having ultimate responsibility for authorizing and approving actions in one of the following categories encompassed by this Order, take into consideration in making decisions concerning such actions, a document described in Section 2-4(a):

(a) major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica);

(b) major Federal actions significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action;

(c) major Federal actions significantly affecting the environment of a foreign nation which provide to that nation:

(1) a product, or physical project producing a principal product or an emission or effluent, which is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious public health risk; or

(2) a physical project which in the United States is prohibited or strictly regulated by Federal law to protect the environment against
radioactive substances.

(d) major Federal actions outside the United States, its territories and possessions which significantly affect natural or ecological resources of global importance designated for protection under this subsection by the President, or, in the case of such a resource protected by international agreement binding on the United States, by the Secretary of State. Recommendations to the President under this subsection shall be accompanied by the views of the Council on Environmental Quality and the Secretary of State.

2-4. Applicable Procedures. (a) There are the following types of documents to be used in connection with actions described in Section 2-3:

(i) environmental impact statements (including generic, program and specific statements);
(ii) bilateral or multilateral environmental studies, relevant or related to the proposed action, by the United States and one or more foreign nations, or by an international body or organization in which the United States is a member or participant; or
(iii) concise reviews of the environmental issues involved, including environmental assessments, summary environmental analyses or other appropriate documents.

(b) Agencies shall in their procedures provide for preparation of documents described in Section 2-4(a), with respect to actions described in Section 2-3, as follows:

(i) for effects described in Section 2-3(a), an environmental impact statement described in Section 2-4(a)(1);
(ii) for effects described in Section 2-3(b), a document described in Section 2-4(a)(ii) or (iii), as determined by the agency;
(iii) for effects described in Section 2-3(c), a document described in Section 2-4(a)(ii) or (iii), as determined by the agency;
(iv) for effects described in Section 2-3(d), a document described in Section 2-4(a)(i), (ii) or (iii), as determined by the agency.

Such procedures may provide that an agency need not prepare a new document when a document described in Section 2-4(a) already exists.

(c) Nothing in this Order shall serve to invalidate any existing regulations of any agency which have been adopted pursuant to court order or pursuant to judicial settlement of any case or to prevent any agency from providing in its procedures for measures in addition to those provided for herein to further the purpose of the National Environmental Policy Act and other environmental laws, including the Marine Protection Research and Sanctuaries Act and the Deepwater Port Act, consistent with the foreign and national security policies of the United States.

(d) Except as provided in Section 2-5(b), agencies taking action encompassed by this Order shall, as soon as feasible, inform other Federal agencies with relevant expertise of the availability of environmental documents prepared under this Order.

Agencies in their procedures under Section 2-1 shall make appropriate provision for determining when an affected nation shall be informed in accordance with Section 3-2 of this Order of the availability of environmental documents prepared pursuant to those procedures.

In order to avoid duplication of resources, agencies in their procedures shall provide for appropriate utilization of the resources of other Federal agencies with relevant environmental jurisdiction or expertise.

2-5. Exemption and Considerations. (a) Notwithstanding Section 2-3, the following actions are exempt from this Order:

(i) actions not having a significant effect on the environment outside the United States as determined by the agency;
(ii) actions taken by the President;
(iii) actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict;
(iv) intelligence activities and arms transfers;
(v) export licenses or permits or export approvals, and actions relating to nuclear activities except actions providing to a foreign nation a nuclear production or utilization facility as defined in the Atomic Energy Act of 1954, as amended, or a nuclear waste management facility;

(vi) votes and other actions in international conferences and organizations;

(vii) disaster and emergency relief action.

(b) Agency procedures under Section 2-1 implementing Section 2-4 may provide for appropriate modifications in the contents, timing and availability of documents to other affected Federal agencies and affected nations, where necessary to:

(i) enable the agency to decide and act promptly as and when required;

(ii) avoid adverse impacts on foreign relations or infringement in fact or appearance of other nations' sovereign responsibilities, or

(iii) ensure appropriate reflection of:

(1) diplomatic factors;

(2) international commercial, competitive and export promotion factors;

(3) needs for governmental or commercial confidentiality;

(4) national security considerations;

(5) difficulties of obtaining information and agency ability to analyze meaningfully environmental effects of a proposed action; and

(6) the degree to which the agency is involved in or able to affect a decision to be made.

(c) Agency procedure under Section 2-1 may provide for categorical exclusions and for such exemptions in addition to those specified in subsection (a) of this Section as may be necessary to meet emergency circumstances, situations involving exceptional foreign policy and national security sensitivities and other such special circumstances. In utilizing such additional exemptions agencies shall, as soon as feasible, consult with the Department of State and the Council on Environmental Quality.

(d) The provisions of Section 2-5 do not apply to actions described in Section 2-3(a) unless permitted by law.

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Sec. 3.

3-1. Rights of Action. This Order is solely for the purpose of establishing internal procedures for Federal agencies of consider the significant effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action.

3-2. Foreign Relations. The Department of State shall coordinate all communications by agencies with foreign governments concerning environmental agreements and other arrangements in implementation of this Order.

3-3. Multi-Agency Actions. Where more than one Federal agency is involved in an action or program, a lead agency, as determined by the agencies involved, shall have responsibility for implementation of this Order.

3-4. Certain Terms. For purposes of this Order, 'environment' means the natural and physical environment and excludes social, economic and other environments; and an action significantly affects the environment if it does significant harm to the environment even though on balance the agency believes the action to be beneficial to the environment. The term 'export approvals' in Section 2-5(a)(v) does not mean or include direct loans to finance exports.

3-5. Multiple Impacts. If a major Federal action having effects on the environment of the United States or the global commons requires preparation of an environmental impact statement, and if the action also has effects on the environment of a foreign nation, an environmental impact statement need not be prepared with respect to the effects on the environment of the foreign nation.

JIMMY CARTER
THE WHITE HOUSE,

Exec. Order No. 12114
44 Federal Register 1957
1979 WL 25866 (Pres.)
END OF DOCUMENT
Executive Order 12372 of July 14, 1982

Intergovernmental Review of Federal Programs

By the authority vested in me as President by the Constitution and laws of the United States of America, including Section 401(a) of the Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4231(a)) and Section 301 of Title 3 of the United States Code, and in order to foster an intergovernmental partnership and a strengthened federalism by relying on State and local processes for the State and local government coordination and review of proposed Federal financial assistance and direct Federal development, it is hereby ordered as follows:

Section 1. Federal agencies shall provide opportunities for consultation by elected officials of those State and local governments that would provide the non-Federal funds for, or that would be directly affected by, proposed Federal financial assistance or direct Federal development.

Sec. 2. To the extent the States, in consultation with local general purpose governments, and local special purpose governments they consider appropriate, develop their own processes or refine existing processes for State and local elected officials to review and coordinate proposed Federal financial assistance and direct Federal development, the Federal agencies shall, to the extent permitted by law:

(a) Utilize the State process to determine official views of State and local elected officials.

(b) Communicate with State and local elected officials as early in the program planning cycle as is reasonably feasible to explain specific plans and actions.

(c) Make efforts to accommodate State and local elected officials' concerns with proposed Federal financial assistance and direct Federal development that are communicated through the designated State process. For those cases where the concerns cannot be accommodated, Federal officials shall explain the bases for their decision in a timely manner.

(d) Allow the States to simplify and consolidate existing Federally required State plan submissions. Where State planning and budgeting systems are sufficient and where permitted by law, the substitution of State plans for Federally required State plans shall be encouraged by the agencies.

(e) Seek the coordination of views of affected State and local elected officials in one State with those of another State when proposed Federal financial assistance or direct Federal development has an impact on interstate metropolitan urban centers or other interstate areas. Existing interstate mechanisms that are redesignated as part of the State process may be used for this purpose.

(f) Support State and local governments by discouraging the reauthorization or creation of any planning organization which is Federally-funded, which has a Federally-prescribed membership, which is established for a limited purpose, and which is not adequately representative of, or accountable to, State or local elected officials.

Sec. 3. (a) The State process referred to in Section 2 shall include those where States delegate, in specific instances, to local elected officials the review, coordination, and communication with Federal agencies.
(b) At the discretion of the State and local elected officials, the State process may exclude certain Federal programs from review and comment.

Sec. 4. The Office of Management and Budget (OMB) shall maintain a list of official State entities designated by the States to review and coordinate proposed Federal financial assistance and direct Federal development. The Office of Management and Budget shall disseminate such lists to the Federal agencies.

Sec. 5. (a) Agencies shall propose rules and regulations governing the formulation, evaluation, and review of proposed Federal financial assistance and direct Federal development pursuant to this Order, to be submitted to the Office of Management and Budget for approval.

(b) The rules and regulations which result from the process indicated in Section 5(a) above shall replace any current rules and regulations and become effective April 30, 1983.

Sec. 6. The Director of the Office of Management and Budget is authorized to prescribe such rules and regulations, if any, as he deems appropriate for the effective implementation and administration of this Order and the Intergovernmental Cooperation Act of 1958. The Director is also authorized to exercise the authority vested in the President by Section 401[a] of that Act (42 U.S.C. 4231[a]), in a manner consistent with this Order.

Sec. 7. The Memorandum of November 8, 1968, is terminated (33 Fed. Reg. 16187, November 13, 1968). The Director of the Office of Management and Budget shall revoke OMB Circular A-95, which was issued pursuant to that Memorandum. However, Federal agencies shall continue to comply with the rules and regulations issued pursuant to that Memorandum, including those issued by the Office of Management and Budget, until new rules and regulations have been issued in accord with this Order.

Sec. 8. The Director of the Office of Management and Budget shall report to the President within two years on Federal agency compliance with this Order. The views of State and local elected officials on their experiences with these policies, along with any suggestions for improvement, will be included in the Director's report.

THE WHITE HOUSE.
July 14, 1982.

Ronald Reagan
President's Documents

Executive Order 12416 of April 8, 1983

Intergovernmental Review of Federal Programs

By the authority vested in me as President by the Constitution and statutes of the United States of America, and in order to allow additional time for implementation by State, regional and local governments of new Federal regulations which foster and intergovernmental partnership and strengthened federalism, it is hereby ordered as follows:

Section 1. The preamble to Executive Order No. 12372 of July 14, 1982 is hereby amended by inserting, after the words "42 U.S.C. 4231(a)")", the following phrase: ", Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 (42 U.S.C. 3334)".

Sec. 2. Section 5(b) of Executive Order No. 12372 is amended by deleting "April 30, 1983" and inserting in its place "September 30, 1983."

Sec. 3. Section 8 of Executive Order No. 12372 is amended by deleting "within two years" and inserting in its place "by September 30, 1984."

THE WHITE HOUSE.
April 8, 1983.

Ronald Reagan
DEPARTMENT OF THE INTERIOR
Office of the Secretary

43 CFR Part 9

Intergovernmental Review of the Department of the Interior Programs and Activities

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: These regulations implement Executive Order 12372, "Intergovernmental Review of Federal Programs." The regulations apply to federal financial assistance and direct federal development programs and activities of the Department of the Interior. Executive Order 12372 and these regulations are intended to replace the intergovernmental consultation system developed under Office of Management and Budget (OMB) Circular A-65. They also implement section 401 of the Intergovernmental Cooperation Act.

DATE EFFECTIVE: September 30, 1983.

FOR FURTHER INFORMATION CONTACT: Office of Acquisition and Property Management, Division of Acquisition and Property Management, 6200 C Street, N.W., Washington, D.C. 20240 (202) 245-6431.

SUPPLEMENTARY INFORMATION: On January 24, 1983 (48 FR 3152), the Department of the Interior along with 25 other federal agencies, published Notices of Proposed Rulemaking (NPRM) to carry out Executive Order 12372 on notices proposing that their programs not be subject to the Order. Subsequently, two more agencies published NPRMs, bringing to 28 the total number of proposals subject to public comment. On March 24, 1983 (48 FR 12408) the Department published a notice in the Federal Register which contained a list of programs under which states may opt to use the E.O. 12372 process and a list of programs with existing consultation processes. This notice extended the comment period to April 1, 1983. The Department, in conjunction with the other 27 federal agencies and OMB, published a notice in the Federal Register on April 21, 1983 (48 FR 17101) reopening the comment period, scheduling a public meeting for May 5, 1983, and requesting comments on several tentative responses to comments.

Including comments received by OMB and other federal agencies and which were also incorporated in the Department's rulemaking docket, the Department received approximately 190 comments on government-wide issues during the comment period. In addition, the Department received 19 comments specifically related to the inclusion or exclusion of this Department's programs from the coverage of the Order or other issues pertaining only to the Department.

In preparing the final rule, the Department considered these comments as well as testimony at public meetings held in Washington on March 2, 1983, and May 5, 1983, and a hearing before the Senate Intergovernmental Relations Subcommittee on March 3, 1983.

Following consultation with OMB and the other 22 federal agencies that are issuing a final rule, the Department has made several changes from the proposed rule. The Department is fully committed to carrying out Executive Order 12372, and intends through these regulations to communicate effectively with state and local elected officials and to accommodate their concerns to the greatest extent possible.

Several state, local, and regional agencies asked that the regulations not become effective on April 30, 1983, as the NPRM had contemplated. Postponing the effective date would give state and local elected officials more time to establish the state processes and to consider which federal programs they wish to select for coverage. Responding to these requests, the President amended the Executive Order on April 8, 1983, extending the effective date of these final regulations until September 30, 1983 (48 FR 5587, April 11, 1983). The Department's existing requirements and procedures under OMB Circular A-65 will continue in effect until September 30, 1983.

Introduction to the Rules

The President signed Executive Order 12372, "Intergovernmental Review of Federal Programs," on July 14, 1982 (47 FR 30959, July 18, 1982). The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened Federalism by relying on state and local processes for state and local government coordination and review of proposed federal financial assistance and direct federal development. The Executive Order:

- Allows states, after consultation with local officials, to establish their own process for review and comment on proposed federal financial assistance and direct federal development;
- Increases federal responsiveness to state and local officials by requiring federal agencies to accommodate state and local views or explain why not;
- Allows states to simplify, consolidate, or substitute state plans; and,
- Revoke OMB Circular No. A-95.

Salient Features of the Policies Implementing E.O. 12372

Three major elements comprise the scheme for implementing the Executive Order. These are the state process, the single point of contact, and the federal agency’s “accommodate or explain” response to state and local comments submitted in the form of a recommendation.

State Process

The state process is the framework under which state and local officials carry out intergovernmental review activities under the Executive Order. The rule requires only two components for the state process: (1) a state must tell the federal agency which programs and activities are being included under the state process, and (2) a state must provide an assurance that it consults with local officials whenever it changes the list of selected programs and activities. (The Executive Order provides that states are also to consult with local governments when establishing the state process.) Any other components are at the discretion of the state. The lack of prescriptiveness gives states and local officials the flexibility to design a process that responds to their interests and needs.

A state is not required to establish a state process. However, if no process is established, the provisions of the Executive Order and the implementing rules (other than indicating how federal agencies will operate under such situations) are not applied. Existing consultation requirements of other statutes or regulations (except Circular A-65) would continue in effect, including those of the Intergovernmental Cooperation Act of 1966 and the Demonstration Cities and Metropolitan Development Act of 1966. The intergovernmental consultation provisions of Circular A-65 end as of September 30, 1983.

While not required by the rule, most states have established the following components:

- A designated single point of contact;
- Delegations of review and comment responsibilities to particular state, county, regional, or local entities;
- Procedures to coordinate and manage the review and comment on proposed federal financial assistance or direct federal development, and to aid in reaching a state process recommendation;
- A means of consulting with local officials, and...
A means of giving notice to prospective applicants for federal assistance as to how an application is to be managed under the state process.

Federal agencies will list those programs and activities eligible for selection under the requirements of the Order. After consulting with local elected officials, the state selects which of these federal programs and activities are to be reviewed through the state process and sends OMB the initial list of selected programs and activities. Subsequent changes to the list are provided directly to the appropriate federal agencies.

The federal agency provides the state process with notice of proposed actions for selected programs and activities. For any proposed action under a selected program or activity, the state has among its options those of: Preparing and transmitting a state process recommendation through the single point of contact; forwarding the views of commenting officials and entities without a recommendation; and not subjecting the proposed action to state process procedures. For proposed actions under programs or activities not selected, the federal agency would provide notice, opportunities for review, and consideration of comments consistent with the provisions of other applicable statutes or regulations.

"Single Point of Contact"

The single point of contact, which may be an official or organization, is the only party that can initiate the "accommodate or explain" response by federal agencies. The single point of contact does so by transmitting a state process recommendation. (The terms "accommodate or explain" and state process recommendation are explained later.) As indicated, there is to be only one single point of contact. The other functions undertaken by the single point of contact are submitting for federal agency consideration any views differing from a state process recommendation, and receiving a written explanation of a federal agency's nonaccommodation. No other responsibilities are prescribed by the Federal Government for the single point of contact, although a state could choose to broaden the single point of contact role.

The single point of contact need not submit for federal agency consideration those views sent to the single point of contact by commenting officials and entities regarding proposed actions that do not have a state process recommendation. Commenting officials and entities can submit such views directly to the federal agency.

A state need not designate a single point of contact. However, if a state fails to designate a single point of contact, no other entity or official can transmit recommendations and be assured of an accommodate or explain response by the federal agency. Comments or views may be transmitted by these other entities or officials, but need only be considered by the federal agency in accordance with Section 401 of the Intergovernmental Cooperation Act and other relevant statutory provisions.

"Accommodate or Explain"

When a single point of contact transmits a state process recommendation, the federal agency receiving the recommendation must either: (1) Accept the recommendation; (2) reach a mutually agreeable solution with the parties preparing the recommendation; or (3) provide the single point of contact with a written explanation that the recommendation or reaching a mutually agreeable solution, i.e., nonaccommodation.

If there is no accommodation, the federal agency is generally required to wait 15 days after sending an explanation of the nonaccommodation to the single point of contact before taking final action.

A "state process recommendation" is developed by commenting state, regional, and local officials and entities participating in the state process and transmitted by the single point of contact. The recommendation can be a consensus, or views may differ. A state process recommendation which is a consensus, i.e., the unanimous recommendation of the commenting parties—of state, regional, and local officials and entities can be transmitted. All directly affected levels of government need not comment on the proposed action being reviewed to form a state process recommendation. Also, the state government need not be party to a state process recommendation. A state process recommendation can be transmitted on proposed actions under either selected or nonselected programs or activities.

Section-by-Section Analysis

In making changes from the NPRM to this final rule, the Department altered the section and paragraph numbers of various portions of the rule. So that these changes will be easier to follow, we are providing a table showing where each portion of the proposed rule is covered in the final rule:

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<tr>
<th>Proposed rule (section)</th>
<th>Final rule (section)</th>
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Portions of the final rule not listed in this table (§ §9.1, 9.8(a), (b) and (c)) are new.

Section 9.1 What is the purpose of these regulations?

There is only one substantive change to this section, but it is an important one. The NPRM, while citing Section 401 of the Intergovernmental Cooperation Act as authority, did not specifically contain provisions to implement some of its requirements.

The text of Section 401 is printed in the Department of Agriculture's final rule published elsewhere in this issue (See Supplementary Information Section USDA's document). A broad spectrum of commenters, including state, local, and regional agencies, interest groups, and members of Congress, said that the regulations implementing Executive Order 12372 should also provide that federal agencies carry out their responsibilities under this statute in response. Paragraph (a) of this section (as well as the authority citation for the entire regulation) now cites not only the Executive Order but also Section 401 of the Intergovernmental Cooperation Act. Other provisions in these regulations carry out the Department's responsibilities under these statutory provisions.

Section 401 emphasizes that federal actions should be as consistent as possible with planning activities and decisions at state, regional, and local levels. The Department, when considering and making efforts to accommodate comments and recommendations it receives under these regulations, recognizes its responsibilities under this section. A few commenters suggested deleting the language in paragraph (c) of this section which says that the regulations were not intended to create any right of judicial review. The rule retains this language. Clearly, the purpose of the Executive
Order and these regulations is to foster improved cooperation between the Department and other federal agencies on one hand, and state and local elected officials on the other. The Order and these regulations presuppose, and rely on, the good faith of federal, state, and local officials in communicating with one another and seeking to understand one another’s concerns. To regard these regulations as rigid procedures intended to provide new opportunities for litigation would be wholly contrary to their purpose. Agencies have statutory responsibility under the laws on which these rules are based. In some cases, courts have held agency actions to be judicially reviewable under these statutes. By retaining paragraph (c) in the regulation, the Department is stating only that these regulations are not grounds for judicial review of agency action beyond those afforded by the underlying statutes.

Section 9.2 What definitions apply to these regulations?

Commenters did not object to the definitions in the proposed rule. However, a few commenters asked that additional terms be defined. The Department does not believe that it is necessary to define any of those terms. The term “environmental impact statement” is a well-known term of art in environmental law and planning, is mentioned in the National Environmental Policy Act, and is discussed in numerous court decisions. This term is not used in the regulation. In any event, the Department would not use the term in any but its commonly understood sense. The Department chose not to include a definition of “state plan,” “direct federal development,” or “federal financial assistance.” Experience in other regulatory areas (e.g., civil rights regulations with respect to federal financial assistance) has shown that it is difficult to craft a concise, understandable, and comprehensive definition. An abstract definition always carries with it the danger of inadvertently leaving something in that should be excluded or leaving something out that should be included. Moreover, in these cases, the lists of state plans and program inclusions accompanying this rulemaking provide adequate operational information upon which state and local elected officials can act.

The Department also decided not to try defining “emergency” and “unusual circumstances.” With respect to terms like these, the dangers of overinclusiveness and underinclusiveness are particularly great. The purpose of an emergency waiver provision or discretion to deviate from certain requirements in unusual circumstances is to give federal agencies flexibility to deal with unforeseen situations and other problems beyond the agency’s control. As included in the preamble to the proposed rules, the Department expects to use such provisions sparingly, and only when absolutely necessary. Thus it would be counterproductive to attempt, through a definition, to limit this flexibility by anticipating all possible circumstances when it might be needed.

The Department also does not believe a definition of “accommodate” is necessary. The concept of accommodation is discussed in § 8.10. In this section, the Secretary accepts the state process recommendation or reaches a mutually acceptable solution. If the Department does not provide an accommodation in one of these two ways, it must provide an explanation. Since the Department believes the section describes sufficiently what is meant by accommodation, a further definition of the term is not helpful.

Finally, the Department considered whether to include a definition of the term “state process recommendation.” The Department concluded that a definition of this term would not materially help clarify those situations in which the Department has an obligation to “accommodate or explain” in response to comments and recommendations. The term’s function is discussed at great length in earlier and subsequent sections of this preamble, and this should provide sufficient information as to its meaning.

Section 9.3 What programs and activities of the Department are subject to these regulations?

Paragraphs (a) and (b) of this section are substantively very similar to paragraphs (a) and (c) of the NPRM. A substantial number of commenters argued that it was contrary to the intent of the Order for the Federal Government to exclude any programs or activities from coverage under the Order and these regulations, and that elected officials participating through the state process must be the only parties to decide what should be excluded from the state process. Other commenters objected to the various criteria used by the federal agencies in developing their lists of programs and activities that were being proposed for exclusion. The Order does not purport to cover all federal programs and activities. Its scope is limited to federal financial assistance and direct federal development programs and activities, and the Order mandates consultation only when state and local governments provide non-federal funds for, or are directly affected by, the proposed federal action. Programs and activities not falling into one of these categories are clearly outside the scope of the Order (e.g., Coast Guard search and rescue activities, procurement of military weapon systems). It is appropriate for federal agencies to decide which of their activities are federal financial assistance or direct federal development.

There are also sections related to federal financial assistance or direct federal development activities where review and comment as provided by the Executive Order would be superfluous or futile. Certain basic Federal Government functions either have public participation procedures of their own (e.g., rulemaking under the Administrative Procedure Act) or are internal government processes in which state and local coordination and consultation are not appropriate (e.g., formulation of the Department’s budget proposals transmitted to OMB, or OMB’s recommendations to the President concerning budget formulation).

Because various programs and activities are not appropriate for coverage under the Order in any circumstance, the Department believes that these should continue to be excluded from the listing of programs and activities which are eligible for selection for a state process. While the Department did not propose any exclusions, we did propose to continue existing consultation processes and published a list of programs and activities with such processes on March 24, 1983 (48 FR 12408). Based on comments received by the Department and discussed in detail in that section of the preamble covering scope issues, the Department’s rule continues to require use of existing consultation processes as proposed. To provide information on the activities and programs eligible for selection using this rule, the Department is publishing a list of programs and activities eligible for E.O. 12372 process use. This information is being published as a separate list rather than as part of this rule to allow future changes to be made more conveniently. The Department will seek public comment on proposed future program or activity exclusions as these occur.
Section 9.4 [Reserved]

Section 9.5 What is the Secretary's obligation with respect to federal interagency coordination?

Some comments, including those suggesting a federal single point of contact, asked the Department and other federal agencies to do more in ensuring that federal agencies communicate not only with state and local elected officials but also with each other. The Department believes that this point is well taken. Many programs and projects require information or approvals from a number of federal agencies, and federal interagency communication is as important in many cases, as intergovernmental communication. Consequently, the Department is adding a new section, the language of which is derived from subsection 401(d) of the Intergovernmental Cooperation Act. The section provides that the Secretary, to the extent practicable, will consult with and seek advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

Section 9.6 What procedures apply to the selection of programs and activities under these regulations?

Paragraph (a) of this section is new. It makes clear that any program or activity published in the Federal Register list prescribed by §9.3 is eligible for selection for a state process. The section also clarifies, more explicitly than the NPRM, that states are required to consult with local elected officials before selecting programs and activities for coverage. This addition responds to comments that asked that the states' obligations in this regard, as well as in the establishment of a state process, be spelled out in the rule. OMB previously wrote the Governors suggesting each to provide such an assurance when the state submits its initial list of selected programs and activities.

Several comments also suggested that these regulations should more firmly require local involvement (e.g., a letter of concurrence) in the establishment of state processes. The Executive Order requires, and OMB's letter to the Governors has reiterated, that there must be consultation between state and local elected officials in the establishment of the process. The Order clearly contemplates that official processes under the Order are established by state and local elected officials in cooperation and consultation with one another. The Department believes that these requirements are clear and that further administrative requirements imposed by regulations are unnecessary and would, in many cases, delay or interfere with the establishment of a state process. In particular, the Department does not believe that the Order contemplates so rigid a requirement as a sign-off by an official of each local jurisdiction in a state before a process may be valid.

Paragraphs (b), (c), and (d) of this section derive from paragraphs (a), (c), and (b), respectively, of §9.5 of the NPRM. Language added to paragraph (c) of the final rule specifies that the states must submit to the Secretary with each change in its program selection an assurance that local elected officials were consulted about the change. This language emphasizes the continuing obligation of states to involve local elected officials in decisions concerning what programs are selected for the state process. The paragraph also allows the Department to establish deadlines for states to inform the Secretary of changes in program selections. The primary reason for this provision is to expedite processing of assistance applications and to reach decisions on projects at times of heavy workload such as the end of the fiscal year. For example, deadlines could be set to avoid having to make, or short notice, midstream changes in coordination procedures. In addition, the Department has made some editorial changes for better clarity.

A number of comments asked what procedures apply when a state chooses not to adopt a process under the Order or when a particular program or activity is not selected for a state process. This question is answered in paragraph (b) of §9.7, discussed below.

Section 9.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?

Paragraph (a) incorporates materials from §§9.3(b) and 9.6(b) of the NPRM, except that the final regulation specifies that the Secretary's obligation to communicate with state and local elected officials applies to programs and activities subject of the Order that are covered by a state process. This change is intended to emphasize that it is with the state process, not just a Governor's office or other state government entity, that the Secretary will communicate.

The notice provided for by this section is not negative. For example, many programs and activities have independent consultation or notification requirements, which apply even if a program is not selected for a state process. The Department must pursue such notification and consultation practices under these authorities even when the program or activity is selected for a state process. The Department may also take the initiative at any time to contact any interested person or entity about one of the Department's programs or activities. Further, the Department need not rely on the state process or the single point of contact to bring about this communication or consultation.

When the Department notifies the state of a proposed action concerning a program or activity that has been selected for the state process, notification of area-wide, regional, and local entities for purposes of Section 401 is the responsibility of the state process. The single point of contact could be the information channel for this purpose. The Department need not notify area-wide, regional, and local entities separately in this situation, but may do so.

Paragraph (b) is new, and is intended to respond to concerns expressed by commenters on how the Department communicates with local elected officials in situations where a state does not have a state process or where the state process does not cover a particular program or activity. The Department will carry out its responsibilities in these situations by providing notice to state, area-wide, regional or local officials or entities that would be directly affected by the proposed federal financial assistance or direct federal development. This notice may be either through publication (e.g., a notice in the Federal Register or in a publication available in Washington or one potentially affected by the proposed federal action) or direct (e.g., a letter to the mayor of an affected city). The notice will alert the directly affected entities concerning the proposed action and identifying who in the Department should be contacted for more information.

Section 9.8 How does the Secretary provide the opportunity of commenting on proposed federal financial assistance or direct federal development?

More commenters—over a third of the total—addressed §9.6(c) of the NPRM (designated §9.8(a) in the final rule) than any other provision in the proposed regulation. The NPRM proposed that, except in unusual circumstances, the Secretary would give states at least 30 days to comment on any proposed federal financial assistance or direct federal development. Almost all commenters discussing this point felt 30
days was too brief a period to develop comments, particularly when disagreements among various interested parties within the state need to be resolved. Commenters requested a number of longer comment periods, including 35, 45, 50, and 60 days. Some commenters suggested an additional period—normally between 15 and 30 days—be available to states either at their discretion or when disputes needed to be resolved.

In response to these comments, the Department has decided to lengthen the comment period to 90 days in all cases (including interstate matters) except with respect to federal financial assistance in the form of noncompeting continuation awards, for which the comment period would remain 30 days.

The Secretary will establish, by notice to the single point of contact or to directly affected entities, a date from which the 30 to 60 day comment period will begin to run. This information could be provided, for example, in program specific announcements concerning the availability of grants. Where a program or activity is not selected for the state process, the Department will provide notice, including any adjustments to the comment period that may be necessary, to directly affected state, area-wide, regional or local entities regarding the proposed federal action. Because paragraphs (a) and (b) now provide that the Secretary will establish this starting date, language of the NPRM permitting the Secretary to establish deadlines for submission of various materials is no longer necessary and has been deleted. When establishing deadlines, the Secretary will ensure that commenting parties under the state process are afforded adequate time to review and comment on an application or project proposal.

Paragraph (b) of this section is derived from §9.9(a) of the NPRM. The provisions of this section apply to cases in which review, coordination, and communication with the Department have been delegated. This paragraph is intended to make clear that when this responsibility is delegated, these procedures apply just as if the matter were handled at the state level.

The Department encourages applicants at an early stage to notify and talk with officials and entities who have the opportunity to review and comment on the application.

Paragraph (e) of §9.6 of the NPRM has been dropped. A new §9.9 of the final rule describes how the Secretary receives and responds to comments.

Section 9.9 How does the Secretary receive and respond to comments?

This new section replaces §9.6(e) of the NPRM and elaborates in substantially greater detail the Secretary's obligations concerning the receipt of and response to comments. Section 9.6(e) had provided that the Secretary would respond as provided in the Order to all comments from a state that are provided through a state office or official that acts as a single point of contact under the Order between the state and the federal agencies.

About a quarter of all comments received discussed this "single point of contact" concept, with a majority of those comments opposing the required establishment of a single point of contact of expressing serious concerns about how it would work. Some of these comments wanted to prohibit multiple points of contact within a state instead of only one. The reasons expressed for this opposition of concern fell into two major categories. First, some commenters felt that a single point of contact would be an unnecessary extra layer of bureaucracy imposed on their state process. Second, some commenters felt that the single point of contact could, in effect, veto recommendations made by local or regional entities or reduce the comments of such entities to second-class status. In other words, their view was that using a single point of contact would inhibit, rather than facilitate, transmission to federal agencies of the concerns of local elected officials and regional and area-wide entities.

In response to these comments, and consistent with the amended Executive Order and the Department's decision to explicitly implement these regulations, Section 9.9 of the Intergovernmental Cooperation Act, the Department has made substantial changes to this paragraph.

Nonetheless, the concept of the single point of contact is being retained. Satisfactory implementation of the Executive Order requires a means of handling the communication and information flow between federal/state/local and state/local/federal entities and officials in as simple and understandable a way as possible. Designating a single point of contact will serve this end better, in our view, than a multiplicity of communications channels. If all federal agencies and all parties within a state know that a particular office or official performs this state/local/federal communications link for the state process, much confusion and guesswork which otherwise could occur can be eliminated.

We emphasize that, from our perspective, the primary role of the single point of contact is to serve as a conduit—a means of transmission—for the comments of state and local elected officials on proposed federal actions. It does not matter to the Department whether this single point of contact also has a substantive role in preparing comments. That is up to the state and local elected officials who establish each state process. The Department is concerned only that the single point of contact communicate those comments and recommendations to the Department.

Paragraph (a) obligates the Secretary to follow the "accommodate or explain" procedures of §9.10 if two conditions are met. First, the state must have designated a single point of contact. Second, the single point of contact must have transmitted a state process recommendation. (The single point of contact, and not the applicant, must transmit the recommendation to the Department.) If these conditions are not met, the Secretary will still consider all comments received, but the "accommodate or explain" obligation will not apply.

The state process recommendation provision is intended to clarify the reciprocal responsibilities of the state and federal agencies under the Executive Order. The Order is an important part of the Administration's Federalism policy. Federalism means, among other things, that federal agencies should give greater deference to, and make greater efforts to accommodate, the concerns of state and local elected officials than has sometimes been the case in the past. But Federalism also means, in the Administration's view, that state and local officials themselves have a responsibility to attempt to solve intrastate problems without resort to intervention from Washington. Where states and other directly affected parties carry out these responsibilities by forging a state process recommendation, it is highly appropriate for the Federal Government to give these recommendations the increased attention that the "accommodate or explain" process provides. We wish to emphasize that, in any case, the Department will always fully consider all comments it receives under these regulations.

The Department's practical, as well as theoretical, reasons for stressing consensus building were described in the NPRM. We expect that carrying out the Department's "accommodate or explain" responsibility will be greatly
programs that are not selected for a state process. Paragraph (c) provides that in the absence of a state process or if the single point of contact does not transmit a state process recommendation, state, regional and local officials and entities may submit comments to the Department. The Department is obligated to consider these comments. Paragraph (d) makes a similar provision for situations where the state process does not cover a particular program or activity of the Department.

Paragraph (e) simply reiterates the Department's obligation to consider all comments it receives from state, area-wide, regional and local officials and entities under these regulations, whether they are transmitted through a single point of contact or otherwise provided to the Department. This obligation derives directly from Section 401. A number of commenters suggested that the Department and other federal agencies impose various administrative requirements with respect to financial assistance programs. Among the suggestions were that federal agencies tell applicants about the requirements of each state process, that comments from the state process should be sent to the applicant before the application is forwarded and that the applicant should attach these to the application, that the state process should be able to require a "notice of intent," that federal agencies should not act on an application before receiving comments from the state process, that federal agencies require applicants to submit materials requested by the state process, and that federal agencies should have applicants themselves contact interested local parties.

Although the Department recognizes a responsibility to work with applicants so that this new Intergovernmental consultation system functions smoothly, the Department does not believe it is appropriate to impose specific regulatory requirements regarding administrative details of this kind. The Department believes that each state process should establish the "paper flow" procedures best suited to its situation. Where the state process decides to send comments to the applicant, the Department will expect the applicant to forward those comments with its application to the Department. However, this does not obviate the necessity for transmitting the state process recommendation to the Department through the single point of contact. The point here is that state processes have the option of also sending comments through the applicant to the Federal Government with each application, and thus alleviate concerns that the application and comments might otherwise fail to be joined together by the Department.

Section 9.10 How does the Secretary make efforts to accommodate intergovernmental concerns?

Paragraph (a) of this section now provides that if a state process provides a state process recommendation to the Department through a single point of contact, the Department becomes obligated to accommodate or explain. This means that the Department need not accommodate or explain comments that: (1) do not constitute or form the state process recommendation, or (2) are not provided through a single point of contact. The Department will fully consider all such comments, but there will be no "accommodate or explain" obligation.

As under the proposed regulations, "accommodating" a state process recommendation means either accepting that recommendation or reaching a mutually agreeable solution with the state process. In response to a substantial number of comments, paragraph (a)(3) of the final rule provides that all explanations of nonaccommodation will be in writing. This is not to say that the Department may not also inform the single point of contact of a nonaccommodation by telephone, other communication, or in a personal meeting. However, whether or not such a conversation or communication occurs, the Department will always send a written explanation of the nonaccommodation.

As under the proposed rule, the Department will not implement a decision for ten days after the single point of contact receives the explanation. A few commenters suggested that this waiting period should be longer than ten days; however, the Department believes that ten days will be adequate time for the state process to formulate an appropriate political response if the issue is sufficiently important within the state.

The Department has included a new paragraph (c) in the regulation to clarify when the ten-day waiting period begins to run. If the Department has made a telephone call (or other oral communication) to the single point of contact advising of the nonaccommodation and providing an explanation, the ten-day period begins to run from the date of the
communication, even though the written explanation arrives later. If the Department sends a letter but does not make a telephone call, the ten-day period begins on the date the single point of contact is presumed to have received it. This presumptive date of receipt is five days from the date on which the letter is sent; a period consistent with the longstanding successful practice of the Social Security Administration and longer than that used for presumptive receipt of official papers in many other legal contexts. In effect, the Department will be free to begin carrying out its decision on the sixteenth day after the day the Department sent the letter.

Some commenters indicated that what they sought most was federal agency responsiveness to their comments. These commenters felt the lack of responsiveness was a significant failing of the intergovernmental process under OMB Circular A-95. In providing explanations of nonaccommodation, the Department will make an effort to be as responsive as practicable consistent with the Department's responsibilities to accomplish program objectives and to expend funds in a sound financial manner.

Section 9.11 What are the Secretary's obligations in interstate situations?

This section is based on § 9.8 of the NPRM. One feature of the NPRM section—the provision of 45 days for comment in interstate situations—has been dropped because the comment period in the final rule is 60 days in all cases except noncompeting continuation awards.

The Department received several comments on its handling of interstate situations. Most of these comments asked for greater federal guidance or involvement in interstate situations, especially when various affected states did not agree with one another.

The Department does not believe that it is necessary to change the proposed regulation to provide any particular procedure for resolving interstate conflicts. It is clear in the Department's interest to have affected states mutually agree on the Department's programs and projects that affect interstate situations. On a case-by-case basis, as appropriate, the Department will work with officials of states involved in an interstate situation in an attempt to secure this agreement. This should not be a regulatory requirement, however.

The Department believes that designated area-wide agencies in interstate metropolitan areas have an important role to play. Consequently, paragraph [a][1] now specifically mentions designated area-wide entities among those which the Department will make efforts to notify in interstate situations. OMB will periodically provide the Department with a list of designated interstate area-wide entities. Paragraph [a][1] provides that the recommendation of a designated interstate area-wide entity will be given "accommodate or explain" treatment by the Department if it is sent through a state single point of contact, and if the area-wide entity has been delegated a review and comment role for the program or activity being commented on by a state process.

For example, the Metropolitan Washington, D.C. Area Council of Governments represents jurisdictions in an interstate area including parts of Maryland, Virginia, and the District of Columbia. If that Council of Governments has been delegated a specific review role and makes a recommendation on a proposed action by the Department, and that recommendation is transmitted to the Department through the single point of contact of either Maryland, Virginia, or the District of Columbia, the Department is obligated to accommodate or explain. If a state process recommendation differing from the Washington, D.C. COG recommendation is also transmitted by another state's single point of contact, the Department would also accommodate or explain that recommendation as well.

Section 9.12 How may a state simplify, consolidate or substitute Federally required state plans?

This section is unchanged from the NPRM. The Department did receive a number of comments on this section, however. Several commenters stated that states should be able to simplify state plans, but objected to allowing states to consolidate their plans. The reasons for these objections differed; most appeared to be from those who feared that consolidation of state plans would cause the interests of particular groups or particular programs to be ignored. As this section merely implements the requirement of the Order that Federal agencies allow the consolidation of state plans, the Department had little discretion in developing this provision. In addition, the Department has the obligation to ensure that any simplified or consolidated state plan continues to meet all federal requirements. For example, a consolidated plan that failed to meet statutory or regulatory requirements for a particular program would not be accepted.

One commenter recommended that an appeals process be established to deal with situations in which federal agencies disapprove modified state plans. The Department believes that such a process is not necessary, because if a federal agency disapproves a modified plan for failure to meet federal requirements, the state can appeal the decision through normal agency mechanisms. In any event, during the review process before disapproval, the Department will work with states to resolve problems that could impede approval.

A few commenters recommended that there be a federal "single point of contact" for state plans or other purposes. The Department believes this idea would not work, because of differing agency responsibilities under the wide variety of program statutes that various federal agencies carry out. In addition, federal agencies need to retain existing delegations of state plan approval authority. However, the Department and other federal agencies will each designate a focal point with whom states can deal on state plan matters. In addition, the federal agencies having state plans intend to establish an informal interagency steering group, which will meet quarterly to discuss state plan matters. Through this steering group, as well as by interagency contacts in specific situations, federal agencies will coordinate with each other in cases where states consolidate plans across federal lines. This coordination should promote consistent determinations among and within agencies on state plans.

Finally, one commenter suggested that the federal agencies develop a model state plan format that could be used by the states. While we are willing to provide suggestions in response to specific state questions (including providing formats that have been used successfully by other states), we believe that states should be free to develop their own formats to reflect their own situations. Consequently, the Department will not develop model formats, since formats developed as models for the voluntary uses of states could come to be regarded, either by federal agencies or by states, as required.

A list of state plans that may be simplified, consolidated, or substituted for, appears elsewhere in today's Federal Register and will be updated periodically.
Section 9.13 May the Secretary waive any provision of these regulations?

This provision is unchanged from the NPRM, although the section number is changed. A few commenters objected to this waiver provision, apparently in the belief that it was a loophole allowing federal noncompliance with the Executive Order. The Department is strongly committed to compliance with the Order, and will use the emergency waiver provision only in those rare instances where an unanticipated situation makes prompt action necessary without full compliance with all provisions of these regulations. If the Department uses the emergency waiver provision, the Department will attempt, to the extent feasible and meaningful, to involve the state process in subsequent decisionmaking concerning the matter about which the waiver was used. In addition, the Department will keep records of all situations in which the emergency waiver was used.

Other Comments

In addition to comments specifically pertaining to various features of these regulations, there are several other comments made to the Department to which the Department would like to respond. Several commenters said that the Office of Management and Budget should have a stronger oversight role, thus ensuring that federal agencies carry out their obligations under the Order and these regulations. Behind these comments seems to be a concern that federal agencies are not really interested in consulting with state and local governments and a view that, in the absence of OMB's "policing" role, agencies would tend to ignore these obligations.

The Department wants to state unequivocally that it is fully committed to implementing all of the provisions of the Order and these regulations, and will act quickly to respond to complaints from state, areawide, regional and local officials and entities that mistakes or omissions have been made with respect to the Department's obligations. Carrying out this Order faithfully and forcefully is an important part of the Administration's Federalism policy and the Administration's policymaking officials intend the policy to be carried out fully by everyone in their agencies.

OMB will have a general oversight role with respect to federal agency implementation of the Order, including the required preparation of a report in late 1984 concerning the operation of the new process. OMB will periodically review agency records of nonaccommodations and waivers. OMB has advised the agencies, however, that a detailed operating review or "policing" relationship would not be consistent with the role of OMB vis-a-vis the other federal agencies. OMB is not intended to have day-to-day operational responsibilities with respect to federal programs. Concerning these regulations, as with respect to other agency operational responsibilities, the officials of this Department are responsible to the Secretary, who in turn is responsible to the President for carrying out important Administration policy.

Finally, a number of commenters reminded the Department and other agencies that we should continue to follow existing statutory requirements that affect many federal agencies, with respect to environmental impact statements, historic preservation, civil rights, etc. The Department will continue to follow all such crosscutting requirements and other independent consultation requirements. To the extent that it is feasible to do so, the Department will work with states to integrate handling of some of these crosscutting requirements with the official state process. However, regardless of the structure of a state's process or whether there is a state process at all, the Department will continue to meet all legal requirements in these areas.

In a related question, some commenters asked how certain requirements concerning environmental impact statements and coastal zone management would be handled administratively under these regulations. When a new OMB system, clearinghouses often coordinated responses to Federal agencies relating to these matters. Under the Executive Order system, a state could, if it wished, designate the single point of contact or other entity to audit documents and to bear the administrative responsibility for coordination and review. Federal agencies could also continue any arrangements or relationships with entities in the state that now exist to facilitate this review and comment. Where it is feasible, we encourage a coordinated response under these regulations and other coordination requirements.

Scope

The Department received 19 comments dealing specifically with the programs of the Department or the scope of those programs as treated in the proposed rules. Of these 19 comments, three commenters contributed a total of six comments, each of them submitting two separate comments. The comments ranged from local governments to State governments.

Seven commenters wrote to the Department before its lists of programs were available, essentially asking for the lists. The Department's lists were published in the Federal Register on March 24, 1983 (48 FR 12409). One of these commenters later said that it agreed with the list of programs, and with those which it could use under Executive Order 12372, and agreed to incorporate existing consultation processes in its own State process. Two of the commenters included separate, but identical, lists of programs which they suggested should be available for use under the Executive Order process. The Department's list of programs under the process included all of those programs. Another of the commenters suggested that the list when finally published be standardized. Since programs vary from agency to agency, the Department does not believe that a standardized list can serve any useful purpose toward the implementation of the Executive Order. Finally, one of these commenters later stated that it would like to reserve the right to integrate or suggest adaptations to existing processes so as to include them within its State's process. The Department is not adverse to discussing these concepts in cases where existing processes actually do not meet the intent of the Executive Order.

One commenter suggested that the Department include section 9.4 in its rules as other agencies proposed to do, rather than reserve it. This section was an additional section, and its contents were proposed for inclusion in sections 3b and 5b. The Department has decided not to change its choice.

One commenter requested the exclusion of Indian programs from coverage of the Executive Order. Since its inception, the Executive Order has been conceived as exempting federally recognized tribes from its coverage. In its proposed rule making, the Department assumed that this was understood. In the interest of clarity, however, the Department is excluding all programs for the benefit of Indian tribes. In addition, those programs which are designed solely for the benefit of the territories of the United States and the Trust Territory of the Pacific Islands are similarly excluded. Those programs affecting the territories are ones in which there is close cooperation between the individual territories and the Department through the Federal budgeting process. The territories submit budgets to the United States.
which are then passed through the President's Budget to the Congress and acted on by that body. This money is then passed back to the territories through the Department. It is the Department's belief that this process works well, and it was not the intent of the Executive Order to change this process. The Indian and Territories programs so excluded will be published in a separate Federal Register notice at a later date.

A number of commenters agreed with the Department's proposal for coverage of programs; that is, those programs with existing consultation requirements which meet the intent and spirit of the Executive Order should continue to be operated using the existing consultation processes. One of these commenters questioned the effectiveness of consultation in a few programs on some of which the Department is desirous of continued good relations with State and local governments, and wishes to have the existing consultation requirements continue to be effective to this end. The Department intends to work with this commenter and any other State or local government which believes that consultation processes already in place are not being followed in a satisfactory manner.

A smaller number of commenters indicated disagreement with the concept of using existing consultation procedures as proposed by the Department. Of these, one organization commented twice stating that under Interior's concept, the State would lose the opportunity for accommodation or explanation of nonaccommodation and that the Department would lose the advantage of having single focus comments from the States. In addition, the commenter returned to us a list of programs with existing consultation processes which it would choose to include within the E.O. 12372 process. We are somewhat confused by the statement of the commenter and the list returned to us since many of the programs they choose to cover not only can be said to have accommodation, but may also be implemented without the Government's or some other State agency's approval. In addition, some of the programs are limited in geographic scope such that they are not available to the commenter. A second commenter whose comment was dated prior to publication of our list indicated disagreement with the Department's proposal. As an example of the insufficiency of existing consultation, he cited a Department regulation which he contends is in violation of Federal statutes. We do not understand why the commenter did not bring this alleged violation to the Department's attention earlier. It does not require a formal consultation process to alert a Federal agency to a potential violation of law.

Since the program cited by the commenter is one which is available for the States to include within the Executive Order 12372 process, and since the commenter provided no other examples, it may be that this commenter's concerns have been covered. It is the Department's intention to continue existing consultation processes insofar as they meet with the spirit and intent of the Executive Order. It is not the Department's intent to thwart the clear benefit of federalism as expressed in the Executive Order. As stated in the preamble to our proposed rule, the Department believes that the existing procedures meet that intent while providing for State and local governments with meaningful opportunities to comment and to share in the planning and implementation of the Department's programs and activities. By asking for comments on this concept and soliciting comments on the individual programs once the list was published, the Department wished to find out if its perceptions were correct or, alternatively, if there were widespread problems with the existing consultation processes. From the comments received, the Department believes there may be some individual instances where Departmental bureaus have not followed existing processes or where a State or local government perceives a lack of preferred involvement in the Department's programs and activities. The comments do not, however, indicate a widespread dissatisfaction with those processes, whether they be processes required by statute or regulation or informal processes. While we are retaining our scope regulation as originally published and the list of programs as published, the Department invites individual States to discuss the implementation of consultation in individual programs.

Four commenters provided us with a list of programs that they indicated should be covered by the process under the Executive Order. All of the programs mentioned by two commenters are covered. One commenter listed four Indian programs which have been discussed above, one program with an existing consultation process (which is impracticable) and seven programs which may be included within a State process under the Executive Order. The fourth commenter, as discussed earlier, listed programs not applicable in its area; therefore, we intend to work with the commenter as it develops its internal process.

Executive Order 12391, Paperwork Reduction Act, and Regulatory Flexibility Act

The Department has determined that this is not a major rule under Executive Order 12391. The rule will simplify consultation with the Department and allow State and local governments to establish cost-effective consultation procedures. For this reason, the Department believes that any economic impact the regulation will have on private individuals will be insignificant. Consequently, the Department certifies, under the Regulatory Flexibility Act, that this rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to Section 204 of the Paperwork Reduction Act, since it does not require the collection or retention of information.

List of Subjects in 43 CFR Part 9

Intergovernmental relations.

For the reasons set out in the preamble, the Department of Interior amends Title 43, Code of Federal Regulations, by adding a new Part 9, as follows:

Dated: June 9, 1983.

Richard R. minorities.

Deputy Assistant Secretary of the Interior.

PART 9—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF THE INTERIOR PROGRAMS AND ACTIVITIES

Sec.

9.1 What is the purpose of these regulations?

9.2 What definitions apply to these regulations?

9.3 What programs and activities of the Department are subject to these regulations?

9.4 [Reserved]

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Section 9.10 How does the Secretary make efforts to accommodate intergovernmental concerns?

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9.12 How may a state simplify, consolidate, or substitute federally required state plans?

9.13 May the Secretary waive any provision of these regulations?


§ 9.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, "Intergovernmental Review of Federal Programs," issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of section 401 of the Intergovernmental Cooperation Act of 1968.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on state processes and on area, regional and local coordination for review of proposed federal financial assistance and direct federal development.

These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

§ 9.2 What definitions apply to these regulations?

"Department" means the U.S. Department of the Interior.

"Order" means Executive Order 12372, issued July 14, 1982, and amended April 8, 1983 and titled "Intergovernmental Review of Federal Programs."

"Secretary" means the Secretary of the U.S. Department of the Interior or an official or employee of the Department acting for the Secretary under a delegation of authority.

"State" means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

§ 9.3 What programs and activities of the Department are subject to these regulations?

(a) The Secretary publishes in the Federal Register a list of the Department's programs and activities that are subject to these regulations and a list of programs and activities that have existing consultation processes.

(b) With respect to programs and activities that a state chooses to cover, and that have existing consultation processes, the state must agree to adopt those existing processes.

§ 9.4 (Reserved)

§ 9.5 What is the Secretary's obligation with respect to federal interagency coordination?

The Secretary, to the extent practical, consults with and seeks advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

§ 9.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A state may select any program or activity published in the Federal Register in accordance with § 9.3 of this Part for intergovernmental review under these regulations. Each state, before selecting programs and activities, shall consult with local elected officials.

(b) Each state that adopts a process shall notify the Secretary of the Department's programs and activities selected for that process.

(c) Each state may notify the Secretary of changes in its selections at any time. For each change, the state shall submit to the Secretary an assurance that the state has consulted with local elected officials regarding the change. The Department may establish deadlines by which states are required to inform the Secretary of changes in their program selections.

(d) The Secretary uses a state's process as soon as feasible, depending on individual programs and activities, after the Secretary is notified of its selections.

§ 9.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?

(a) For those programs and activities covered by a state process under § 9.6, the Secretary, to the extent permitted by law:

(1) Uses the state process to determine views of state and local elected officials; and,

(2) Communicates with state and local elected officials, through the state process, as early in a program planning cycle as is reasonably feasible to explain specific plans and actions.

(b) The Secretary provides notice to directly affected state, area, regional, and local entities in a state of proposed federal financial assistance or direct federal development if:

(1) The state has not adopted a process under the Order; or

(2) The assistance or development involves a program or activity not selected for the state process.

This notice may be made by publication in the Federal Register or other appropriate means, which the Department in its discretion deems appropriate.

§ 9.8 How does the Secretary provide states an opportunity to comment on proposed federal financial assistance and direct federal development?

(a) Except in unusual circumstances, the Secretary gives states processes or directly affected state, area, regional and local officials and entities:

(1) At least 30 days from the date established by the Secretary to comment on proposed federal financial assistance in the form of noncompeting continuation awards; and

(2) At least 60 days from the date established by the Secretary to comment on proposed direct federal development or federal financial assistance other than noncompeting continuation awards.

(b) This section also applies to comments in cases in which the review, coordination, and communication with the Department have been delegated.

§ 9.9 How does the Secretary receive and respond to comments?

(a) The Secretary follows the procedures in § 9.10 if:

(1) A state office or official is designated to act as a single point of contact between a state process and all federal agencies, and

(2) That office or official transmits a state process recommendation for a program selected under § 9.6.

(b) (1) The single point of contact is not obligated to transmit comments from state, area, regional, or local officials and entities where there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, area, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, area, regional, and local officials and entities may submit comments either to the applicant or to the Department.
[d] If a program or activity is not selected for a state process, state, area-wide, regional and local officials and entities may submit comments either to the applicant or to the Department. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the Department by a single point of contact, the Secretary follows the procedures of §9.10 of this Part.

(e) The Secretary considers comments which do not constitute a state process recommendation submitted under these regulations and for which the Secretary is not required to apply the procedures of §9.10 of this Part, when such comments are provided by a single point of contact, by the applicant, or directly to the Department by a commenting party.

§9.10 How does the Secretary make efforts to accommodate intergovernmental concerns?

(a) If a state process provides a state process recommendation to the Department through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with such written explanation of the decision, as the Secretary in his or her discretion deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of the section, the Secretary informs the single point of contact that:

(1) The Department will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of such notification.

§9.11 What are the Secretary's obligations in interstate situations?

(a) The Secretary is responsible for:

(1) Identifying proposed federal financial assistance and direct federal development that have an impact on interstate areas;

(2) Notifying appropriate officials and entities in states which have adopted a process and which select the Department's program or activity;

(3) Making efforts to identify and notify the affected state, area-wide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select the Department's program or activity;

(4) Responding pursuant to §9.10 of this Part if the Secretary receives a recommendation from a designated area-wide agency transmitted by a single point of contact. In cases in which the review, coordination, and communication with the Department have been delegated.

(b) The Secretary uses the procedures in §9.10 if a state process provides a state process recommendation to the Department through a single point of contact.

§9.12 How may a state simplify, consolidate, or substitute Federally required state plans?

(a) As used in this section:

(1) “Simplify” means that a state may develop its own format, choose its own submission date, and select the planning period for a state plan.

(2) “Consolidate” means that a state may meet statutory and regulatory requirements by combining two or more plans into one document and that the state can select the format, submission date, and planning period for the consolidated plan.

(3) “Substitute” means that a state may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a state may decide to try to simplify, consolidate, or substitute Federally required state plans without prior approval by the Secretary.

(c) The Secretary reviews each state plan that a state has simplified, consolidated, or substituted and accepts the plan only if its contents meet Federal requirements.

§9.13 May the Secretary waive any provision of these regulations?

In an emergency, the Secretary may waive any provision of these regulations.

[FR Doc. 83-15711 Filed 6-23-83 8:45 am]
BILLING CODE 4310-10-M
amount of the second mortgage will be zero if the teacher sells the home, does not continue to live in the home as his or her sole residence, or becomes an owner of any other residential real property before the three-year residency requirement is complete, he or she will owe HUD the amount due on the second mortgage.

(d) FHA mortgage insurance. If the home is eligible for an FHA-insured mortgage, the teacher may choose to finance the home with an FHA-insured mortgage. In this case, the downpayment for the home will be $100.

(e) Local governments, school districts, and nonprofit organizations. Local governments, school districts, and private nonprofit organizations may purchase homes through the TND Initiative, if they intend to resell these homes directly to eligible teachers under the terms and conditions of the TND Initiative. To avoid the cost of a dual closing, local governments, school districts, and private nonprofit organizations will have to assign the sales contract to an eligible teacher before, or at the time of, closing or participate in a three-party closing with the eligible teacher.

(f) Real estate brokers. Teachers may use the services of a real estate broker. Any fee required by the broker, however, will be deducted from the 50% discount on the home.

(g) Single-unit homes. Only single-unit homes are eligible under the TND Initiative. Detached homes, condominiums, and townhouses are all eligible under the Initiative.

(h) Revitalization areas. Homes purchased through the TND Initiative must be located in HUD-designated revitalization areas.

(i) One-year program. The TND Initiative is a temporary program that will operate from November 1999 to November 2000.

IV. For More Information About the TND Initiative

Teachers, local governments, public school districts, private nonprofit organizations, and other interested persons can receive a brochure about the TND Initiative by calling (800) 483-7342, or by visiting HUD's Web site at http://www hud.gov.

Dated: November 30, 1999.

William C. Appar
Assistant Secretary for Housing—Federal Housing Commissioner.

DEPARTMENT OF THE INTERIOR
Office of the Secretary

Relationship of Interior Programs to E.O. 12372 Process; Intergovernmental Review of the Department of the Interior Programs and Activities

AGENCY: Office of the Secretary, Interior.

ACTION: Notice.

SUMMARY: This notice contains revisions being made to a list of programs and activities eligible for E.O. 12372, "Intergovernmental Review of Federal Programs" and a list of programs and activities with existing consultation processes. This list was originally published as a notice in the Federal Register on June 24, 1983 (49 FR 29235-29236) and was subsequently revised in Federal Register notices published on March 7, 1984 (49 FR 8495), February 7, 1985 (50 FR 5316-5317), and March 18, 1997 (62 FR 12835-12838). These publications should be referred to and except for the changes indicated in today's notice, there are no further changes being made at this time. Updated names of bureau and office Intergovernmental Review Coordinators are included in the section below for contacts for further information. These names are also listed on the Internet at http://www.ios.ost.gov/pam/pam40.html.

EFFECTIVE DATES: This notice shall become effective on December 7, 1999.


What Are the Changes to the List of Programs Under Which States May Opt To Use the E.O. 12372 Process?

Administering Bureau: Office of Surface Mining Reclamation and Enforcement

Catalog No. 15.253
15.253, "Not-for-Profit AMD Reclamation" is added to the list.

Administering Bureau: Bureau of Reclamation
Catalog No. 15.506
15.506, "Water Desalination Research and Development Program" is added to the list.

Administering Bureau: U.S. Fish and Wildlife Service
Catalog Nos. 15.622 and 15.623

Administering Bureau: National Park Service
Catalog Nos. 15.923 and 15.926
Program No. 15.923, "National Center for Preservation Technology and Training," and 15.926, American Battlefield Protection," are added to the list.

What Are the Changes to the List of Interior Programs With Existing Consultation Processes?

Bureau: Bureau of Reclamation
The entry for "Desalination Research and Development—42 U.S.C. 7815-18" should be removed from the list.

This activity is covered under 15.506 which is being added to the list of covered programs.


John Berry.
Assistant Secretary—Policy, Management and Budget.

DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs

Tribal Self-Governance Program Information Collection

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Proposed agency information collection activities; comment request.

SUMMARY: The Bureau of Indian Affairs is seeking comments from the public on an extension of an information collection from current and potential Self-Governance Tribes, as required by the Paperwork Reduction Act. The information collected under OMB Clearance Number, 1076-0143, will be used to establish requirements for entry into the pool of qualified applicants for self-governance, to provide information for awarding grants, and to meet reporting requirements of the Self-Governance Act.
Special Notice: OMB Desk Officer designated at the following address: OMB Human Resources and Housing Branch Attention: Allison Eydt. New Executive Office Building, Room 10335 Washington, D.C. 20503.


Edwin I. Glatzel,
Director Management Analysis and Planning Staff, Office of Financial and Human Resources, Health Care Financing Administration.

[FR Doc. 97-6925 Filed 3-17-97; 8:45 am]
BILDCODE: 4305-03-P

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Public Health Service

Second Food and Nutrition Board Workshop on B Vitamins

AGENCY: Office of Disease Prevention and Health Promotion, Public Health Service, DHHS.

ACTION: Second Food and Nutrition Board Workshop on B Vitamins; notice of meeting and request for information.

SUMMARY: The Food and Nutrition Board (FNB), Institute of Medicine, National Academy of Sciences, under the auspices of the Standing Committee on the Scientific Evaluation of Dietary Reference Intakes, will hold an open workshop to address the nutrients thiamin, riboflavin, niacin, vitamin B-6, pantothenic acid, and biotin.

DATES: The open meeting will be held from 12:30 until 5:30 p.m. P.D.T. on May 20, 1997, and from 8:00 a.m. until 12:30 p.m. P.D.T. on March 21, 1997, at the Arnold and Mabel Beckman Center Auditorium, National Academy of Sciences and Engineering, 100 Academy Drive, Irvine, California. The meeting is open to the public.

FOR FURTHER INFORMATION CONTACT: Diane Johnson, Program Assistant, Food and Nutrition Board, 2101 Constitution Avenue, N.W., Washington, DC 20418, (202) 334-1312, or send an e-mail to FNBNAS.EDU.

SUPPLEMENTARY INFORMATION: Speakers have been invited to present evidence bearing on requirements and adverse effects, if any, of high levels of intake of thiamin, riboflavin, niacin, vitamin B-6, pantothenic acid, and biotin. Information presented will be considered by the committee in its development of Dietary Reference Intakes for these nutrients. Interested individuals and organizations are encouraged to provide written scientific information for the committee's use.

Those wishing to be considered for a brief oral presentation should submit an abstract with references to FNB, 2101 Constitution Ave., N.W., Washington, DC 20418 by May 2, 1997. The study for which this meeting is being held is supported by the Department of Health and Human Services (Office of Disease Prevention and Health Promotion, Office of Public Health and Science; Division of Nutrition and Physical Activity, National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention; and Office of Dietary Supplements, Office of Disease Prevention, National Institutes of Health). The meeting is open to the public; however seating is limited. If you will require a sign language interpreter, please call Diane Johnson at (202) 334-1312 by 4:30 p.m. E.D.T. on May 12, 1997.

Claude Earl Fox,
Deputy Assistant Secretary for Health (Disease Prevention and Health Promotion), U.S. Department of Health and Human Services.

[FR Doc. 97-6709 Filed 3-17-97; 8:45 am]
BILDCODE: 4306-17-M

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DEPARTMENT OF THE INTERIOR
Office of the Secretary

Relationship of Interior Programs to E.O. 12372 Process; Intergovernmental Review of the Department of the Interior Programs and Activities

AGENCY: Office of the Secretary, Interior.

ACTION: Notice.

SUMMARY: This notice contains revisions being made to a list of programs and activities eligible for E.O. 12372, “Intergovernmental Review of Federal Programs” process use and a list of programs and activities with existing consultation processes. This list was originally published as a notice in the Federal Register on June 24, 1983 (48 FR 29235-29236) and was subsequently revised in Federal Register notices published on March 7, 1984 (49 FR 9495) and February 7, 1985 (50 FR 5310-5317). These publications should be referred to and except for the changes indicated in today's notice, there are no further changes being made at this time. Updated names of bureau and office Intergovernmental Review Coordinators are included in the section below for contacts for further information.

EFFECTIVE DATES: This notice shall become effective on March 18, 1997.


Programs Under Which States May Opt to Use E.O. 12372 Process

Administering Bureau: National Park Service


The above referenced programs should be deleted because the Budget authority has expired.

Administering Bureau: Bureau of Reclamation.


The above referenced programs should be deleted from the list because they are no longer functional and have been removed from the Catalog of Federal Domestic Assistance.


Catalog No. 15.603.

The Program name should be corrected to state, “Sport Fish Restoration,” to be consistent with the new title in the Catalog of Federal Domestic Assistance.

Catalog Nos. 15.600 and 15.612.

The above referenced programs should be deleted from the list because the Budget authority for them has expired and they have been removed from the Catalog of Federal Domestic Assistance.

Catalog Nos. 15.614, 15.615, 15.616, 15.617, and 15.618.

for Federal Aid in Sport Fish and Wildlife Restoration" are added to the list in order to be consistent with covered programs included in the Catalog of Federal Domestic Assistance.

Interior Programs With Existing Consultation Programs

Bureau: Fish and Wildlife Service

The entries for Established Research and Development Units should be deleted since these activities are no longer the responsibility of the U.S. Fish and Wildlife Service.

Bureau: Bureau of Mines

The entry for the Bureau of Mines, "State Mining and Mineral Resources," should be deleted from the list because the budget authority has expired and the program has been removed from the Catalog of Federal Domestic Assistance.

Bureau: Bureau of Reclamation

The following programs should be added to the list of programs administered by this bureau:


Robert J. Lamb,
Acting Assistant Secretary—Policy, Management, and Budget.

FR Doc. 97-6744 Filed 3-17-97 8:45 am
BILIND CODE 419-MA

Bureau of Land Management

[Wy-420-07-1320-00]

Powder River Regional Coal Team Activities; Schedule of Public Meeting

AGENCY: Department of the Interior, Wyoming.

ACTION: Notice of schedule of public meeting.

SUMMARY: The Powder River Regional Coal Team (RCT) announces that it has scheduled its annual public meeting for April 23, 1997 for the following purposes: (1) review current and proposed activities in the Powder River Coal Region, (2) review new and pending coal lease applications (LBA), and (3) make recommendations on new coal lease applications.

DATES: The RCT meeting will begin at 9:00 a.m. MDT on Wednesday, April 23, 1997, at the Wyoming Conservation Commission's Meeting Room, 777 West 1st Street, Casper, Wyoming. The meeting is open to the public.

ADDRESS: The meeting will be held at the Wyoming Conservation Commission's Meeting Room, 777 1st Street, Casper, Wyoming. Attendees may wish to make their room reservations before April 11, 1997. A block of rooms has been reserved for team members and guests at the Casper Hilton Inn through April 11, 1997. For room reservations, call 1-307-268-6000.

FOR FURTHER INFORMATION CONTACT: Pam Hernandez or Eugene Jordan, Wyoming State Office, 2nd Floor, Box 1828, Cheyenne, Wyoming 82003; telephone (307) 775-6270 or 775-6257.

SUPPLEMENTARY INFORMATION: Primary purpose of the meeting is to discuss pending and new coal lease applications (LBA) from Evergreen Enterprises—(Wyoming); filed on May 13, 1996, for an area on a 677 million tons and 7.041 acres, and the Antelope Coal Company (Wyoming); filed February 14, 1997, for an area on 177 million tons and 1.47 acres. This is the initial public notification of these applications for the purpose of obtaining public comment and suggestions. Generally, the meetings will be advisory to the Department, and no formal decision-making will occur.

The meeting will be open to the public, and the meeting is open to the public.

''The meeting is open to the public.

SUMMARY: This order revokes an Executive order insofar as it affects 1.77 acres of public land withdrawn for use by the U.S. Coast Guard for lighthouse purposes. The land is no longer needed for lighthouse purposes. This action will open the land to surface entry. The land has been and remains open to mineral leasing.
Cristy. Reports Management Officer for
the Department. His address and
telephone number are listed above.
Comments regarding the proposal
should be sent to the OMB Desk Officer
at the address listed above.
The proposed information collection
requirement is described as follows:

Notice of Submission of Proposed
Information Collection to OMB

Proposal: Section 8 Housing Assistance
Payments Program
Office: Housing
Form Nos.: HUD-52663, 52672, 52673,
and 53681.
Frequency of Submission: Annually
Affected Public: State or Local
Governments
Estimated Burden Hours: 31,880
Status: New
Contact: Myra Newbill, HUD, (202) 755-
7707 and Robert Neal, OMB, (202) 355-
7318.
Authority: Section 3507 of the Paperwork
Reduction Act, 44 U.S.C. 3507, sec. 7(d) of the
Department of Housing and Urban
Development Act, 42 U.S.C. 3535(d).

Proposal: Request for Local Code
Review, 24 CFR 200.35(d) (1) and (2)
Office: Housing
Form No.: None
Frequency of Submission: On Occasion
Affected Public: Businesses or Other
For-Profit and Small Businesses or
Organizations
Estimated Burden Hours: 12,150
Status: Revision
Contact: Mark W. Holman, HUD, (202) 755-
5590 and Robert Neal, OMB, (202) 355-
7318.
Authority: Section 3507 of the Paperwork
Reduction Act, 44 U.S.C. 3507, sec. 7(d) of the
Department of Housing and Urban
Development Act, 42 U.S.C. 3535(d).

Proposal: Schedule of Pooled Project
Mortgage and Tandem Project Loan
Pool Compensation of GNMA Guaranty
Fee
Office: Governmental National
Mortgage Association
Form Nos.: HUD 11721 and 11745
Frequency of Submission: On Occasion
Affected Public: Business or Other For-
Profit
Estimated Burden Hours: 55
Status: Revision
Contact: Patricia Gifford, HUD, (202) 755-
5550 and Robert Neal, OMB, (202) 355-
7318.
Authority: Section 3507 of the Paperwork
Reduction Act, 44 U.S.C. 3507, sec. 7(d) of the
Department of Housing and Urban
Development Act, 42 U.S.C. 3535(d).
Dated: January 24, 1985.

Proposal: Schedule of Pooled Loans—
Manufactured Home Loans and Issuer
Certification of Pool Composition—
Manufactured Home Loans
Office: Government National Mortgage
Association
Form Nos.: HUD-11725 and 11739
Frequency of Submission: On Occasion
Affected Public: Businesses or Other
For-Profit
Estimated Burden Hours: 900
Status: Revision
Contact: Patricia Gifford, HUD, (202) 755-
5550 and Robert Neal, OMB, (202) 355-
7318.
Authority: Section 3507 of the Paperwork
Reduction Act, 44 U.S.C. 3507, sec. 7(d) of the
Department of Housing and Urban
Development Act, 42 U.S.C. 3535(d).

Proposal: Schedule of Subscribers and
GNMA II Contractual Amendment, and
Schedule of Subscribers Addendum
for Construction Loan Certification
Office: Government National Mortgage
Association
Form Nos.: HUD-11705 and 1735
Frequency of Submission: On Occasion
Affected Public: Businesses or Other
For-Profit
Estimated Burden Hours: 2,155
Status: Revision
Contact: Patricia Gifford, HUD, (202) 755-
5550 and Robert Neal, OMB, (202) 355-
7318.
Authority: Section 3507 of the Paperwork
Reduction Act, 44 U.S.C. 3507, sec. 7(d) of the
Department of Housing and Urban
Development Act, 42 U.S.C. 3535(d).

Proposal: Certification Regarding
Adjustment for Damage or Neglect
Pursuant to 24 CFR 203.378
Office: Housing
Form No. None
Frequency of Submission: On Occasion
Affected Public: Businesses or Other
For-Profit

Estimated Burden Hours: 500
Status: New
Contact: Sally McCormick, HUD, (202) 755-
6672 and Robert Neal, OMB, (202) 355-
7318.
Authority: Section 3507 of the Paperwork
Reduction Act, 44 U.S.C. 3507, sec. 7(d) of the
Department of Housing and Urban
Development Act, 42 U.S.C. 3535(d).

DEPARTMENT OF THE INTERIOR
Office of the Secretary

Alaska Land Use Council; Meeting
Postponement

The quarterly meeting of the Alaska
Land Use Council scheduled for
February 14, 1985 in Juneau, Alaska has
been postponed. A new time and date
for the meeting will be published in the
Federal Register as soon as it is
determined. For further information
contact:
Bill Sheffield, Governor, State
Co-Chairman
Vernon R. Wiggins, Federal Co-Chairman
P.O. Box 100120, Anchorage, Alaska
99510-0120, (907) 272-3422, (907) 271-
5485 (FTS).

Update of List of Programs Under
Which States May Opt To Use E.O.
12372 Process; Intergovernmental
Review of the Department of the
Interior Programs and Activities

Agency: Office of the Secretary, Interior.
Action: Notice.

Summary: This notice updates a list of
programs and activities under which
States may opt to use E.O. 12372.
"Intergovernmental Review of Federal
Programs" process. The original list
appears in the Federal Register on June
24, 1983 (48 FR 29223). These changes
are being published as a notice pursuant
to the requirements of 43 CFR 9.3.

Effective Date: This notice shall be
effective on February 7, 1985.

For further information contact:
Office of Acquisition and Property
Conveyance; Arizona


Notice is hereby given that, pursuant to sections 203 and 209 of the Act of October 21, 1976 (43 U.S.C. 1716) the following tracts were conveyed out of Federal ownership.

**Principal Meridian, Montana**

T. 14 N., R. 1 E., Sec. 24, NE\(\frac{1}{4}\)SW\(\frac{1}{4}\).
T. 13 N., R. 2 E., Sec. 20, N\(\frac{1}{4}\)ESE\(\frac{1}{4}\).
T. 12 N., R. 3 E., Sec. 6, SW\(\frac{1}{4}\)E.
T. 9 N., R. 4 E., Sec. 12, SE\(\frac{1}{4}\)SW\(\frac{1}{4}\), 3/8 SE, SW\(\frac{1}{4}\)SE.
T. 8 N., R. 5 E., Sec. 2, lots 3 and SW\(\frac{1}{4}\)SW.
T. 12 N., R. 5 E., Sec. 6, lot 3, SE\(\frac{1}{4}\)NE, NE\(\frac{1}{4}\)SW\(\frac{1}{4}\) and NE\(\frac{1}{4}\)SE\(\frac{1}{4}\).
Sec. 10, lots 1, 2, 9 and 10.
T. 13 N., R. 3 E.,
Sec. 32, NE\(\frac{1}{4}\)NE\(\frac{1}{4}\) and SE\(\frac{1}{4}\)SE\(\frac{1}{4}\).
T. 17 N., R. 6 E., Sec. 35, SW\(\frac{1}{4}\)NE\(\frac{1}{4}\).
T. 8 N., R. 7 E., Sec. 32, NE\(\frac{1}{4}\)NE\(\frac{1}{4}\) and SW\(\frac{1}{4}\)SE\(\frac{1}{4}\).
T. 10 N., R. 8 E., Sec. 4, lot 1 and NW\(\frac{1}{4}\)SW\(\frac{1}{4}\).
T. 6 N., R. 9 E., Sec. 4, lot 4.
T. 10 N., R. 9 E., Sec. 19, lot 8.
Sec. 20, lots 3 through 7.
Sec. 28, lots 2 through 6. 11, 12 and 14 through 21.
T. 8 N., R. 10 E., Sec. 12, NE\(\frac{1}{4}\)SW\(\frac{1}{4}\).
Sec. 24, NE\(\frac{1}{4}\)NE\(\frac{1}{4}\) and SE\(\frac{1}{4}\)NW\(\frac{1}{4}\).
T. 7 N., R. 11 E., Sec. 6, lot 7.
T. 10 N., R. 11 E., Sec. 14, NE\(\frac{1}{4}\)SW\(\frac{1}{4}\).
Sec. 21, lots 1 and 6.
Sec. 22, lots 1, 3 and 4.
Sec. 23, lot 3.
T. 12 N., R. 12 E., Sec. 1, lots 1 and 4, E\(\frac{1}{4}\)SW\(\frac{1}{4}\).
T. 13 N., R. 12 E., Sec. 11, W\(\frac{1}{4}\)W\(\frac{1}{4}\).
Sec. 15, NW\(\frac{1}{4}\)NW\(\frac{1}{4}\).
Sec. 25, SE\(\frac{1}{4}\)SE\(\frac{1}{4}\).
T. 12 N., R. 13 E., Sec. 3, SW\(\frac{1}{4}\)W\(\frac{1}{4}\) and NW\(\frac{1}{4}\)SE\(\frac{1}{4}\).
Sec. 6, lot 5.
Sec. 17, SW\(\frac{1}{4}\)E.
T. 13 N., R. 13 E., Sec. 6, E\(\frac{1}{4}\)W\(\frac{1}{4}\).
Sec. 17, W\(\frac{1}{4}\)W\(\frac{1}{4}\).
Sec. 16, NW\(\frac{1}{4}\)NW\(\frac{1}{4}\).
Sec. 20, SW\(\frac{1}{4}\)W\(\frac{1}{4}\).
Sec. 30, NW\(\frac{1}{4}\)NW\(\frac{1}{4}\).
Sec. 33, SW\(\frac{1}{4}\)W.
T. 14 N., R. 13 E., Sec. 31, SW\(\frac{1}{4}\)W\(\frac{1}{4}\).
T. 29 N., R. 19 E., Sec. 15, SW\(\frac{1}{4}\)W\(\frac{1}{4}\).
T. 17 N., R. 3 W., Sec. 18, lot 2.
Sec. 33, SW\(\frac{1}{4}\)W\(\frac{1}{4}\).
Aggregating 2,539.47 acres.

In exchange for the above land, the United States acquired the following described land in Teton County, Montana:

**Principal Meridian, Montana**

T. 24 N., R. 8 W., Sec. 5, that part of lot 1 described as follows: beginning at the northeast corner of section 5, thence due West along the township line a distance of 900 feet, thence South 200 feet, thence East 500 feet, thence South 1061.9 feet to the south line of said lot 1, thence East 400 feet to the east line of said lot 1, thence North 1251.9 feet to the point of beginning; and lots 2, 8, SW\(\frac{1}{4}\)W\(\frac{1}{4}\), SE\(\frac{1}{4}\)W\(\frac{1}{4}\), NW\(\frac{1}{4}\)W\(\frac{1}{4}\) and NW\(\frac{1}{4}\)SE\(\frac{1}{4}\).
Sec. 6, NE\(\frac{1}{4}\)NW\(\frac{1}{4}\) and SW\(\frac{1}{4}\)SE\(\frac{1}{4}\), SW\(\frac{1}{4}\)W\(\frac{1}{4}\), SE\(\frac{1}{4}\)SW\(\frac{1}{4}\), SE\(\frac{1}{4}\)NW\(\frac{1}{4}\) and SE\(\frac{1}{4}\).
Sec. 7, lots 1 and 2, NE\(\frac{1}{4}\), NW\(\frac{1}{4}\).
Sec. 8, SW\(\frac{1}{4}\)W\(\frac{1}{4}\).
Aggregating 944.87 acres.
Title 3—
The President

Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1–1. Implementation.

1–101. Agency Responsibilities. To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.

1–102. Creation of an Interagency Working Group on Environmental Justice. (a) Within 3 months of the date of this order, the Administrator of the Environmental Protection Agency (“Administrator”) or the Administrator’s designee shall convene an interagency Federal Working Group on Environmental Justice (“Working Group”). The Working Group shall comprise the heads of the following executive agencies and offices, or their designees: (a) Department of Defense; (b) Department of Health and Human Services; (c) Department of Housing and Urban Development; (d) Department of Labor; (e) Department of Agriculture; (f) Department of Transportation; (g) Department of Justice; (h) Department of the Interior; (i) Department of Commerce; (j) Department of Energy; (k) Environmental Protection Agency; (l) Office of Management and Budget; (m) Office of Science and Technology Policy; (n) Office of the Deputy Assistant to the President for Environmental Policy; (o) Office of the Assistant to the President for Domestic Policy; (p) National Economic Council; (q) Council of Economic Advisers; and (r) such other Government officials as the President may designate. The Working Group shall report to the President through the Deputy Assistant to the President for Environmental Policy and the Assistant to the President for Domestic Policy.

(b) The Working Group shall: (1) provide guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(2) coordinate with, provide guidance to, and serve as a clearinghouse for, each Federal agency as it develops an environmental justice strategy as required by section 1–103 of this order, in order to ensure that the administration, interpretation and enforcement of programs, activities and policies are undertaken in a consistent manner;

(3) assist in coordinating research by, and stimulating cooperation among, the Environmental Protection Agency, the Department of Health and Human Services, the Department of Housing and Urban Development, and other agencies conducting research or other activities in accordance with section 3–3 of this order;

(4) assist in coordinating data collection, required by this order;

(5) examine existing data and studies on environmental justice;
(6) hold public meetings as required in section 5–502(d) of this order; and

(7) develop interagency model projects on environmental justice that evidence cooperation among Federal agencies.

1–103. Development of Agency Strategies. (a) Except as provided in section 6–605 of this order, each Federal agency shall develop an agency-wide environmental justice strategy, as set forth in subsections (b)–(e) of this section that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The environmental justice strategy shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to, at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations. In addition, the environmental justice strategy shall include, where appropriate, a timetable for undertaking identified revisions and consideration of economic and social implications of the revisions.

(b) Within 4 months of the date of this order, each Federal agency shall identify an internal administrative process for developing its environmental justice strategy, and shall inform the Working Group of the process.

(c) Within 6 months of the date of this order, each Federal agency shall provide the Working Group with an outline of its proposed environmental justice strategy.

(d) Within 10 months of the date of this order, each Federal agency shall provide the Working Group with its proposed environmental justice strategy.

(e) Within 12 months of the date of this order, each Federal agency shall finalize its environmental justice strategy and provide a copy and written description of its strategy to the Working Group. During the 12 month period from the date of this order, each Federal agency, as part of its environmental justice strategy, shall identify several specific projects that can be promptly undertaken to address particular concerns identified during the development of the proposed environmental justice strategy, and a schedule for implementing those projects.

(f) Within 24 months of the date of this order, each Federal agency shall report to the Working Group on its progress in implementing its agency-wide environmental justice strategy.

(g) Federal agencies shall provide additional periodic reports to the Working Group as requested by the Working Group.

1–104. Reports to the President. Within 14 months of the date of this order, the Working Group shall submit to the President, through the Office of the Deputy Assistant to the President for Environmental Policy and the Office of the Assistant to the President for Domestic Policy, a report that describes the implementation of this order, and includes the final environmental justice strategies described in section 1–103(e) of this order.

Sec. 2–2. Federal Agency Responsibilities for Federal Programs. Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.
Sec. 3–3. Research, Data Collection, and Analysis.

3–301. Human Health and Environmental Research and Analysis. (a) Environmental human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies, including segments at high risk from environmental hazards, such as minority populations, low-income populations and workers who may be exposed to substantial environmental hazards.

(b) Environmental human health analyses, whenever practicable and appropriate, shall identify multiple and cumulative exposures.

(c) Federal agencies shall provide minority populations and low-income populations the opportunity to comment on the development and design of research strategies undertaken pursuant to this order.

3–302. Human Health and Environmental Data Collection and Analysis. To the extent permitted by existing law, including the Privacy Act, as amended (5 U.S.C. section 552a): (a) each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income. To the extent practical and appropriate, Federal agencies shall use this information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(b) In connection with the development and implementation of agency strategies in section 1–103 of this order, each Federal agency, whenever practicable and appropriate, shall collect, maintain and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites expected to have a substantial environmental, human health, or economic effect on the surrounding populations, when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action. Such information shall be made available to the public, unless prohibited by law; and

(c) Each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding Federal facilities that are: (1) subject to the reporting requirements under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. section 11001–11050 as mandated in Executive Order No. 12856; and (2) expected to have a substantial environmental, human health, or economic effect on surrounding populations. Such information shall be made available to the public, unless prohibited by law.

(d) In carrying out the responsibilities in this section, each Federal agency, whenever practicable and appropriate, shall share information and eliminate unnecessary duplication of efforts through the use of existing data systems and cooperative agreements among Federal agencies and with State, local, and tribal governments.

Sec. 4–4. Subsistence Consumption of Fish and Wildlife.

4–401. Consumption Patterns. In order to assist in identifying the need for ensuring protection of populations with differential patterns of subsistence consumption of fish and wildlife, Federal agencies, whenever practicable and appropriate, shall collect, maintain, and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence. Federal agencies shall communicate to the public the risks of those consumption patterns.

4–402. Guidance. Federal agencies, whenever practicable and appropriate, shall work in a coordinated manner to publish guidance reflecting the latest scientific information available concerning methods for evaluating the human health risks associated with the consumption of pollutant-bearing fish or
wildlife. Agencies shall consider such guidance in developing their policies and rules.

Sec. 5–5. Public Participation and Access to Information. (a) The public may submit recommendations to Federal agencies relating to the incorporation of environmental justice principles into Federal agency programs or policies. Each Federal agency shall convey such recommendations to the Working Group.

(b) Each Federal agency may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations.

(c) Each Federal agency shall work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.

(d) The Working Group shall hold public meetings, as appropriate, for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice. The Working Group shall prepare for public review a summary of the comments and recommendations discussed at the public meetings.

Sec. 6–6. General Provisions.

6–601. Responsibility for Agency Implementation. The head of each Federal agency shall be responsible for ensuring compliance with this order. Each Federal agency shall conduct internal reviews and take such other steps as may be necessary to monitor compliance with this order.

6–602. Executive Order No. 12250. This Executive order is intended to supplement but not supersede Executive Order No. 12250, which requires consistent and effective implementation of various laws prohibiting discriminatory practices in programs receiving Federal financial assistance. Nothing herein shall limit the effect or mandate of Executive Order No. 12250.

6–603. Executive Order No. 12875. This Executive order is not intended to limit the effect or mandate of Executive Order No. 12875.

6–604. Scope. For purposes of this order, Federal agency means any agency on the Working Group, and such other agencies as may be designated by the President, that conducts any Federal program or activity that substantially affects human health or the environment. Independent agencies are requested to comply with the provisions of this order.

6–605. Petitions for Exemptions. The head of a Federal agency may petition the President for an exemption from the requirements of this order on the grounds that all or some of the petitioning agency’s programs or activities should not be subject to the requirements of this order.

6–606. Native American Programs. Each Federal agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the Working Group, and, after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that address Federally-recognized Indian Tribes.

6–607. Costs. Unless otherwise provided by law, Federal agencies shall assume the financial costs of complying with this order.

6–608. General. Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law.

6–609. Judicial Review. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance
of the United States, its agencies, its officers, or any other person with this order.

THE WHITE HOUSE,
Executive Order 13007 of May 24, 1996

Indian Sacred Sites

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) “Federal lands” means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

(ii) “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103–454, 108 Stat. 4791, and “Indian” refers to a member of such an Indian tribe; and

(iii) “Sacred site” means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Sec. 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments.”

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.
Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, “agency action” has the same meaning as in the Administrative Procedure Act (5 U.S.C. 551(13)).

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

THE WHITE HOUSE,
May 24, 1996.

William Clinton
Executive Order 13112 of February 3, 1999

Invasive Species


Section 1. Definitions.

(a) “Alien species” means, with respect to a particular ecosystem, any species, including its seeds, eggs, spores, or other biological material capable of propagating that species, that is not native to that ecosystem.

(b) “Control” means, as appropriate, eradicating, suppressing, reducing, or managing invasive species populations, preventing spread of invasive species from areas where they are present, and taking steps such as restoration of native species and habitats to reduce the effects of invasive species and to prevent further invasions.

(c) “Ecosystem” means the complex of a community of organisms and its environment.

(d) “Federal agency” means an executive department or agency, but does not include independent establishments as defined by 5 U.S.C. 104.

(e) “Introduction” means the intentional or unintentional escape, release, dissemination, or placement of a species into an ecosystem as a result of human activity.

(f) “Invasive species” means an alien species whose introduction does or is likely to cause economic or environmental harm or harm to human health.

(g) “Native species” means, with respect to a particular ecosystem, a species that, other than as a result of an introduction, historically occurred or currently occurs in that ecosystem.

(h) “Species” means a group of organisms all of which have a high degree of physical and genetic similarity, generally interbreed only among themselves, and show persistent differences from members of allied groups of organisms.

(i) “Stakeholders” means, but is not limited to, State, tribal, and local government agencies, academic institutions, the scientific community, nongovernmental entities including environmental, agricultural, and conservation organizations, trade groups, commercial interests, and private landowners.

(j) “United States” means the 50 States, the District of Columbia, Puerto Rico, Guam, and all possessions, territories, and the territorial sea of the United States.
Sec. 2. Federal Agency Duties. (a) Each Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law,

(1) identify such actions;

(2) subject to the availability of appropriations, and within Administration budgetary limits, use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv) provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them; and

(3) not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.

(b) Federal agencies shall pursue the duties set forth in this section in consultation with the Invasive Species Council, consistent with the Invasive Species Management Plan and in cooperation with stakeholders, as appropriate, and, as approved by the Department of State, when Federal agencies are working with international organizations and foreign nations.

Sec. 3. Invasive Species Council. (a) An Invasive Species Council (Council) is hereby established whose members shall include the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Transportation, and the Administrator of the Environmental Protection Agency. The Council shall be Co-Chaired by the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce. The Council may invite additional Federal agency representatives to be members, including representatives from subcabinet bureaus or offices with significant responsibilities concerning invasive species, and may prescribe special procedures for their participation. The Secretary of the Interior shall, with concurrence of the Co-Chairs, appoint an Executive Director of the Council and shall provide the staff and administrative support for the Council.

(b) The Secretary of the Interior shall establish an advisory committee under the Federal Advisory Committee Act, 5 U.S.C. App., to provide information and advice for consideration by the Council, and shall, after consultation with other members of the Council, appoint members of the advisory committee representing stakeholders. Among other things, the advisory committee shall recommend plans and actions at local, tribal, State, regional, and ecosystem-based levels to achieve the goals and objectives of the Management Plan in section 5 of this order. The advisory committee shall act in cooperation with stakeholders and existing organizations addressing invasive species. The Department of the Interior shall provide the administrative and financial support for the advisory committee.

Sec. 4. Duties of the Invasive Species Council. The Invasive Species Council shall provide national leadership regarding invasive species, and shall:

(a) oversee the implementation of this order and see that the Federal agency activities concerning invasive species are coordinated, complementary, cost-efficient, and effective, relying to the extent feasible and appropriate on existing organizations addressing invasive species, such as the Aquatic Nuisance Species Task Force, the Federal Interagency Committee for the Management of Noxious and Exotic Weeds, and the Committee on Environment and Natural Resources;
(b) encourage planning and action at local, tribal, State, regional, and ecosystem-based levels to achieve the goals and objectives of the Management Plan in section 5 of this order, in cooperation with stakeholders and existing organizations addressing invasive species;

(c) develop recommendations for international cooperation in addressing invasive species;

(d) develop, in consultation with the Council on Environmental Quality, guidance to Federal agencies pursuant to the National Environmental Policy Act on prevention and control of invasive species, including the procurement, use, and maintenance of native species as they affect invasive species;

(e) facilitate development of a coordinated network among Federal agencies to document, evaluate, and monitor impacts from invasive species on the economy, the environment, and human health;

(f) facilitate establishment of a coordinated, up-to-date information-sharing system that utilizes, to the greatest extent practicable, the Internet; this system shall facilitate access to and exchange of information concerning invasive species, including, but not limited to, information on distribution and abundance of invasive species; life histories of such species and invasive characteristics; economic, environmental, and human health impacts; management techniques, and laws and programs for management, research, and public education; and

(g) prepare and issue a national Invasive Species Management Plan as set forth in section 5 of this order.

Sec. 5. Invasive Species Management Plan. (a) Within 18 months after issuance of this order, the Council shall prepare and issue the first edition of a National Invasive Species Management Plan (Management Plan), which shall detail and recommend performance-oriented goals and objectives and specific measures of success for Federal agency efforts concerning invasive species. The Management Plan shall recommend specific objectives and measures for carrying out each of the Federal agency duties established in section 2(a) of this order and shall set forth steps to be taken by the Council to carry out the duties assigned to it under section 4 of this order. The Management Plan shall be developed through a public process and in consultation with Federal agencies and stakeholders.

(b) The first edition of the Management Plan shall include a review of existing and prospective approaches and authorities for preventing the introduction and spread of invasive species, including those for identifying pathways by which invasive species are introduced and for minimizing the risk of introductions via those pathways, and shall identify research needs and recommend measures to minimize the risk that introductions will occur. Such recommended measures shall provide for a science-based process to evaluate risks associated with introduction and spread of invasive species and a coordinated and systematic risk-based process to identify, monitor, and interdict pathways that may be involved in the introduction of invasive species. If recommended measures are not authorized by current law, the Council shall develop and recommend to the President through its Co-Chairs legislative proposals for necessary changes in authority.

(c) The Council shall update the Management Plan biennially and shall concurrently evaluate and report on success in achieving the goals and objectives set forth in the Management Plan. The Management Plan shall identify the personnel, other resources, and additional levels of coordination needed to achieve the Management Plan’s identified goals and objectives, and the Council shall provide each edition of the Management Plan and each report on it to the Office of Management and Budget. Within 18 months after measures have been recommended by the Council in any edition of the Management Plan, each Federal agency whose action is required to implement such measures shall either take the action recommended or shall provide the Council with an explanation of why the action is not feasible. The Council shall assess the effectiveness of this order no
Sec. 6. Judicial Review and Administration. (a) This order is intended only to improve the internal management of the executive branch and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any other person.

(b) Executive Order 11987 of May 24, 1977, is hereby revoked.

(c) The requirements of this order do not affect the obligations of Federal agencies under 16 U.S.C. 4713 with respect to ballast water programs.

(d) The requirements of section 2(a)(3) of this order shall not apply to any action of the Department of State or Department of Defense if the Secretary of State or the Secretary of Defense finds that exemption from such requirements is necessary for foreign policy or national security reasons.

THE WHITE HOUSE,
February 3, 1999.
Executive Order 13175 of November 6, 2000
Consultation and Coordination With Indian Tribal Governments

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) “Policies that have tribal implications” refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) “Agency” means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) “Tribal officials” means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:
(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency’s implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency’s consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation, (A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency’s prior consultation with tribal officials, a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency’s prior consultation with tribal officials, a summary of the nature of their concerns and the agency’s position supporting the
need to issue the regulation, and a statement of the extent to which the
concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications
submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources,
or Indian tribal treaty and other rights, each agency should explore and,
where appropriate, use consensual mechanisms for developing regulations,
including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply
for waivers of statutory and regulatory requirements and take appropriate
steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law,
consider any application by an Indian tribe for a waiver of statutory or
regulatory requirements in connection with any program administered by
the agency with a general view toward increasing opportunities for utilizing
flexible policy approaches at the Indian tribal level in cases in which the
proposed waiver is consistent with the applicable Federal policy objectives
and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law,
render a decision upon a complete application for a waiver within 120
days of receipt of such application by the agency, or as otherwise provided
by law or regulation. If the application for waiver is not granted, the agency
shall provide the applicant with timely written notice of the decision and
the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that
are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications
to OMB pursuant to Executive Order 12866 of September 30, 1993, each
agency shall include a certification from the official designated to ensure
compliance with this order stating that the requirements of this order have
been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to
OMB, each agency shall include a certification from the official designated
to ensure compliance with this order that all relevant requirements of this
order have been met.

(c) Within 180 days after the effective date of this order the Director
of OMB and the Assistant to the President for Intergovernmental Affairs
shall confer with tribal officials to ensure that this order is being properly
and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encour-
gaged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede
the requirements contained in Executive Order 12866 (Regulatory Planning
and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular
A–19, and the Executive Memorandum of April 29, 1994, on Government-
to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions
in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian
Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.
Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

THE WHITE HOUSE,
November 6, 2000.

William Clinton
By the authority vested in me as President by the Constitution and the laws of the United States of America, and in furtherance of the purposes of the migratory bird conventions, the Migratory Bird Treaty Act (16 U.S.C. 703–711), the Bald and Golden Eagle Protection Acts (16 U.S.C. 668–668d), the Fish and Wildlife Coordination Act (16 U.S.C. 661–666c), the Endangered Species Act of 1973 (16 U.S.C. 1531–1544), the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347), and other pertinent statutes, it is hereby ordered as follows:

Section 1. Policy. Migratory birds are of great ecological and economic value to this country and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds. Such conventions include the Convention for the Protection of Migratory Birds with Great Britain on behalf of Canada 1916, the Convention for the Protection of Migratory Birds and Game Mammals-Mexico 1936, the Convention for the Protection of Birds and Their Environment-Japan 1972, and the Convention for the Conservation of Migratory Birds and Their Environment-Union of Soviet Socialist Republics 1978.

These migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the Migratory Bird Treaty Act (Act), the United States has implemented these migratory bird conventions with respect to the United States. This Executive Order directs executive departments and agencies to take certain actions to further implement the Act.

Sec. 2. Definitions. For purposes of this order:

(a) “Take” means take as defined in 50 C.F.R. 10.12, and includes both “intentional” and “unintentional” take.

(b) “Intentional take” means take that is the purpose of the activity in question.

(c) “Unintentional take” means take that results from, but is not the purpose of, the activity in question.


(e) “Migratory bird resources” means migratory birds and the habitats upon which they depend.

(f) “Migratory bird convention” means, collectively, the bilateral conventions (with Great Britain/Canada, Mexico, Japan, and Russia) for the conservation of migratory bird resources.

(g) “Federal agency” means an executive department or agency, but does not include independent establishments as defined by 5 U.S.C. 104.

(h) “Action” means a program, activity, project, official policy (such as a rule or regulation), or formal plan directly carried out by a Federal agency. Each Federal agency will further define what the term “action” means with respect to its own authorities and what programs should be included

Responsibilities of Federal Agencies To Protect Migratory Birds
in the agency-specific Memoranda of Understanding required by this order. Actions delegated to or assumed by nonfederal entities, or carried out by nonfederal entities with Federal assistance, are not subject to this order. Such actions, however, continue to be subject to the Migratory Bird Treaty Act.

(i) “Species of concern” refers to those species listed in the periodic report “Migratory Nongame Birds of Management Concern in the United States,” priority migratory bird species as documented by established plans (such as Bird Conservation Regions in the North American Bird Conservation Initiative or Partners in Flight physiographic areas), and those species listed in 50 C.F.R. 17.11.

Sec. 3. Federal Agency Responsibilities. (a) Each Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations.

(b) In coordination with affected Federal agencies, the Service shall develop a schedule for completion of the MOUs within 180 days of the date of this order. The schedule shall give priority to completing the MOUs with agencies having the most substantive impacts on migratory birds.

(c) Each MOU shall establish protocols for implementation of the MOU and for reporting accomplishments. These protocols may be incorporated into existing actions; however, the MOU shall recognize that the agency may not be able to implement some elements of the MOU until such time as the agency has successfully included them in each agency’s formal planning processes (such as revision of agency land management plans, land use compatibility guidelines, integrated resource management plans, and fishery management plans), including public participation and NEPA analysis, as appropriate. This order and the MOUs to be developed by the agencies are intended to be implemented when new actions or renewal of contracts, permits, delegations, or other third party agreements are initiated as well as during the initiation of new, or revisions to, land management plans.

(d) Each MOU shall include an elevation process to resolve any dispute between the signatory agencies regarding a particular practice or activity.

(e) Pursuant to its MOU, each agency shall, to the extent permitted by law and subject to the availability of appropriations and within Administration budgetary limits, and in harmony with agency missions:

(1) support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions;

(2) restore and enhance the habitat of migratory birds, as practicable;

(3) prevent or abate the pollution or detrimental alteration of the environment for the benefit of migratory birds, as practicable;

(4) design migratory bird habitat and population conservation principles, measures, and practices, into agency plans and planning processes (natural resource, land management, and environmental quality planning, including, but not limited to, forest and rangeland planning, coastal management planning, watershed planning, etc.) as practicable, and coordinate with other agencies and nonfederal partners in planning efforts;

(5) within established authorities and in conjunction with the adoption, amendment, or revision of agency management plans and guidance, ensure that agency plans and actions promote programs and recommendations of comprehensive migratory bird planning efforts such as Partners-in-Flight, U.S. National Shorebird Plan, North American Waterfowl Management Plan, North American Colonial Waterbird Plan, and other planning efforts, as well as guidance from other sources, including the Food and Agricultural
Organization’s International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries;

(6) ensure that environmental analyses of Federal actions required by the NEPA or other established environmental review processes evaluate the effects of actions and agency plans on migratory birds, with emphasis on species of concern;

(7) provide notice to the Service in advance of conducting an action that is intended to take migratory birds, or annually report to the Service on the number of individuals of each species of migratory birds intentionally taken during the conduct of any agency action, including but not limited to banding or marking, scientific collecting, taxidermy, and depredation control;

(8) minimize the intentional take of species of concern by: (i) delineating standards and procedures for such take; and (ii) developing procedures for the review and evaluation of take actions. With respect to intentional take, the MOU shall be consistent with the appropriate sections of 50 C.F.R. parts 10, 21, and 22;

(9) identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations, focusing first on species of concern, priority habitats, and key risk factors. With respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. These principles, standards, and practices shall be regularly evaluated and revised to ensure that they are effective in lessening the detrimental effect of agency actions on migratory bird populations. The agency also shall inventory and monitor bird habitat and populations within the agency’s capabilities and authorities to the extent feasible to facilitate decisions about the need for, and effectiveness of, conservation efforts;

(10) within the scope of its statutorily-designated authorities, control the import, export, and establishment in the wild of live exotic animals and plants that may be harmful to migratory bird resources;

(11) promote research and information exchange related to the conservation of migratory bird resources, including coordinated inventorying and monitoring and the collection and assessment of information on environmental contaminants and other physical or biological stressors having potential relevance to migratory bird conservation. Where such information is collected in the course of agency actions or supported through Federal financial assistance, reasonable efforts shall be made to share such information with the Service, the Biological Resources Division of the U.S. Geological Survey, and other appropriate repositories of such data (e.g., the Cornell Laboratory of Ornithology);

(12) provide training and information to appropriate employees on methods and means of avoiding or minimizing the take of migratory birds and conserving and restoring migratory bird habitat;

(13) promote migratory bird conservation in international activities and with other countries and international partners, in consultation with the Department of State, as appropriate or relevant to the agency’s authorities;

(14) recognize and promote economic and recreational values of birds, as appropriate; and

(15) develop partnerships with non-Federal entities to further bird conservation.

(f) Notwithstanding the requirement to finalize an MOU within 2 years, each agency is encouraged to immediately begin implementing the conservation measures set forth above in subparagraphs (1) through (15) of this section, as appropriate and practicable.
(g) Each agency shall advise the public of the availability of its MOU through a notice published in the Federal Register.

Sec. 4. Council for the Conservation of Migratory Birds. (a) The Secretary of Interior shall establish an interagency Council for the Conservation of Migratory Birds (Council) to oversee the implementation of this order. The Council’s duties shall include the following: (1) sharing the latest resource information to assist in the conservation and management of migratory birds; (2) developing an annual report of accomplishments and recommendations related to this order; (3) fostering partnerships to further the goals of this order; and (4) selecting an annual recipient of a Presidential Migratory Bird Federal Stewardship Award for contributions to the protection of migratory birds.

(b) The Council shall include representation, at the bureau director/administrator level, from the Departments of the Interior, State, Commerce, Agriculture, Transportation, Energy, Defense, and the Environmental Protection Agency and from such other agencies as appropriate.

Sec. 5. Application and Judicial Review. (a) This order and the MOU to be developed by the agencies do not require changes to current contracts, permits, or other third party agreements.

(b) This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

THE WHITE HOUSE,

William F. Plemmon
Executive Order Facilitation of Cooperative Conservation

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

Sec. 2. Definition. As used in this order, the term "cooperative conservation" means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

Sec. 3. Federal Activities. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

Sec. 4. White House Conference on Cooperative Conservation. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their
individual advice and does not involve collective judgment or consensus advice or deliberation.

Sec. 5. General Provision. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH

THE WHITE HOUSE,

August 26, 2004.

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EXECUTIVE ORDER

FEDERAL LEADERSHIP IN ENVIRONMENTAL, ENERGY, AND ECONOMIC PERFORMANCE

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to establish an integrated strategy towards sustainability in the Federal Government and to make reduction of greenhouse gas emissions a priority for Federal agencies, it is hereby ordered as follows:

Section 1. Policy. In order to create a clean energy economy that will increase our Nation's prosperity, promote energy security, protect the interests of taxpayers, and safeguard the health of our environment, the Federal Government must lead by example. It is therefore the policy of the United States that Federal agencies shall increase energy efficiency; measure, report, and reduce their greenhouse gas emissions from direct and indirect activities; conserve and protect water resources through efficiency, reuse, and stormwater management; eliminate waste, recycle, and prevent pollution; leverage agency acquisitions to foster markets for sustainable technologies and environmentally preferable materials, products, and services; design, construct, maintain, and operate high performance sustainable buildings in sustainable locations; strengthen the vitality and livability of the communities in which Federal facilities are located; and inform Federal employees about and involve them in the achievement of these goals.

It is further the policy of the United States that to achieve these goals and support their respective missions, agencies shall prioritize actions based on a full accounting of both economic and social benefits and costs and shall drive continuous improvement by annually evaluating performance, extending or expanding projects that have net benefits, and reassessing or discontinuing under-performing projects.

Finally, it is also the policy of the United States that agencies' efforts and outcomes in implementing this order shall be transparent and that agencies shall therefore disclose results associated with the actions taken pursuant to this order on publicly available Federal websites.

Sec. 2. Goals for Agencies. In implementing the policy set forth in section 1 of this order, and preparing and implementing the Strategic Sustainability Performance Plan called for in section 8 of this order, the head of each agency shall:

(a) within 90 days of the date of this order, establish and report to the Chair of the Council on Environmental Quality (CEQ Chair) and the Director of the Office of Management and Budget (OMB Director) a percentage reduction target for agency-wide more

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reductions of scope 1 and 2 greenhouse gas emissions in absolute terms by fiscal year 2020, relative to a fiscal year 2008 baseline of the agency's scope 1 and 2 greenhouse gas emissions. Where appropriate, the target shall exclude direct emissions from excluded vehicles and equipment and from electric power produced and sold commercially to other parties in the course of regular business. This target shall be subject to review and approval by the CEQ Chair in consultation with the OMB Director under section 5 of this order. In establishing the target, the agency head shall consider reductions associated with:

(i) reducing energy intensity in agency buildings;

(ii) increasing agency use of renewable energy and implementing renewable energy generation projects on agency property; and

(iii) reducing the use of fossil fuels by:

(A) using low greenhouse gas emitting vehicles including alternative fuel vehicles;

(B) optimizing the number of vehicles in the agency fleet; and

(C) reducing, if the agency operates a fleet of at least 20 motor vehicles, the agency fleet's total consumption of petroleum products by a minimum of 2 percent annually through the end of fiscal year 2020, relative to a baseline of fiscal year 2005;

(b) within 240 days of the date of this order and concurrent with submission of the Strategic Sustainability Performance Plan as described in section 8 of this order, establish and report to the CEQ Chair and the OMB Director a percentage reduction target for reducing agency-wide scope 3 greenhouse gas emissions in absolute terms by fiscal year 2020, relative to a fiscal year 2008 baseline of agency scope 3 emissions. This target shall be subject to review and approval by the CEQ Chair in consultation with the OMB Director under section 5 of this order. In establishing the target, the agency head shall consider reductions associated with:

(i) pursuing opportunities with vendors and contractors to address and incorporate incentives to reduce greenhouse gas emissions (such as changes to manufacturing, utility or delivery services, modes of transportation used, or other changes in supply chain activities);

(ii) implementing strategies and accommodations for transit, travel, training, and conferencing that actively support lower-carbon commuting and travel by agency staff;

(iii) greenhouse gas emission reductions associated with pursuing other relevant goals in this section; and

(iv) developing and implementing innovative policies and practices to address scope 3 greenhouse gas emissions unique to agency operations;
(c) establish and report to the CEQ Chair and OMB Director a comprehensive inventory of absolute greenhouse gas emissions, including scope 1, scope 2, and specified scope 3 emissions (i) within 15 months of the date of this order for fiscal year 2010, and (ii) thereafter, annually at the end of January, for the preceding fiscal year.

(d) improve water use efficiency and management by:

(i) reducing potable water consumption intensity by 2 percent annually through fiscal year 2020, or 26 percent by the end of fiscal year 2020, relative to a baseline of the agency's water consumption in fiscal year 2007, by implementing water management strategies including water-efficient and low-flow fixtures and efficient cooling towers;

(ii) reducing agency industrial, landscaping, and agricultural water consumption by 2 percent annually or 20 percent by the end of fiscal year 2020 relative to a baseline of the agency's industrial, landscaping, and agricultural water consumption in fiscal year 2010;

(iii) consistent with State law, identifying, promoting, and implementing water reuse strategies that reduce potable water consumption; and

(iv) implementing and achieving the objectives identified in the stormwater management guidance referenced in section 14 of this order;

(e) promote pollution prevention and eliminate waste by:

(i) minimizing the generation of waste and pollutants through source reduction;

(ii) diverting at least 50 percent of non-hazardous solid waste, excluding construction and demolition debris, by the end of fiscal year 2015;

(iii) diverting at least 50 percent of construction and demolition materials and debris by the end of fiscal year 2015;

(iv) reducing printing paper use and acquiring uncoated printing and writing paper containing at least 30 percent postconsumer fiber;

(v) reducing and minimizing the quantity of toxic and hazardous chemicals and materials acquired, used, or disposed of;

(vi) increasing diversion of compostable and organic material from the waste stream;

(vii) implementing integrated pest management and other appropriate landscape management practices;
(viii) increasing agency use of acceptable alternative chemicals and processes in keeping with the agency's procurement policies;

(ix) decreasing agency use of chemicals where such decrease will assist the agency in achieving greenhouse gas emission reduction targets under section 2(a) and (b) of this order; and

(x) reporting in accordance with the requirements of sections 301 through 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001 et seq.);

(f) advance regional and local integrated planning by:

(i) participating in regional transportation planning and recognizing existing community transportation infrastructure;

(ii) aligning Federal policies to increase the effectiveness of local planning for energy choices such as locally generated renewable energy;

(iii) ensuring that planning for new Federal facilities or new leases includes consideration of sites that are pedestrian friendly, near existing employment centers, and accessible to public transit, and emphasizes existing central cities and, in rural communities, existing or planned town centers;

(iv) identifying and analyzing impacts from energy usage and alternative energy sources in all Environmental Impact Statements and Environmental Assessments for proposals for new or expanded Federal facilities under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.); and

(v) coordinating with regional programs for Federal, State, tribal, and local ecosystem, watershed, and environmental management;

(g) implement high performance sustainable Federal building design, construction, operation and management, maintenance, and deconstruction including by:

(i) beginning in 2020 and thereafter, ensuring that all new Federal buildings that enter the planning process are designed to achieve zero-net-energy by 2030;

(ii) ensuring that all new construction, major renovation, or repair and alteration of Federal buildings complies with the Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings (Guiding Principles);

(iii) ensuring that at least 15 percent of the agency's existing buildings (above 5,000 gross square feet) and building leases (above 5,000 gross square feet)
gross square feet) meet the Guiding Principles by fiscal year 2015 and that the agency makes annual progress toward 100-percent conformance with the Guiding Principles for its building inventory;

(iv) pursuing cost-effective, innovative strategies, such as highly reflective and vegetated roofs, to minimize consumption of energy, water, and materials;

(v) managing existing building systems to reduce the consumption of energy, water, and materials, and identifying alternatives to renovation that reduce existing assets' deferred maintenance costs;

(vi) when adding assets to the agency's real property inventory, identifying opportunities to consolidate and dispose of existing assets, optimize the performance of the agency's real-property portfolio, and reduce associated environmental impacts; and

(vii) ensuring that rehabilitation of federally owned historic buildings utilizes best practices and technologies in retrofitting to promote long-term viability of the buildings;

(h) advance sustainable acquisition to ensure that 95 percent of new contract actions including task and delivery orders, for products and services with the exception of acquisition of weapon systems, are energy-efficient (Energy Star or Federal Energy Management Program (FEMP) designated), water-efficient, biobased, environmentally preferable (e.g., Electronic Product Environmental Assessment Tool (EPEAT) certified), non-ozone depleting, contain recycled content, or are non-toxic or less-toxic alternatives, where such products and services meet agency performance requirements;

(i) promote electronics stewardship, in particular by:

(i) ensuring procurement preference for EPEAT-registered electronic products;

(ii) establishing and implementing policies to enable power management, duplex printing, and other energy-efficient or environmentally preferable features on all eligible agency electronic products;

(iii) employing environmentally sound practices with respect to the agency's disposition of all agency excess or surplus electronic products;

(iv) ensuring the procurement of Energy Star and FEMP designated electronic equipment;

(v) implementing best management practices for energy-efficient management of servers and Federal data centers; and

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(j) sustain environmental management, including by:

(i) continuing implementation of formal environmental management systems at all appropriate organizational levels; and

(ii) ensuring these formal systems are appropriately implemented and maintained to achieve the performance necessary to meet the goals of this order.

Sec. 3. Steering Committee on Federal Sustainability. The OMB Director and the CEQ Chair shall:

(a) establish an interagency Steering Committee (Steering Committee) on Federal Sustainability composed of the Federal Environmental Executive, designated under section 6 of Executive Order 13423 of January 24, 2007, and Agency Senior Sustainability Officers, designated under section 7 of this order, and that shall:

(i) serve in the dual capacity of the Steering Committee on Strengthening Federal Environmental, Energy, and Transportation Management designated by the CEQ Chair pursuant to section 4 of Executive Order 13423;

(ii) advise the OMB Director and the CEQ Chair on implementation of this order;

(iii) facilitate the implementation of each agency's Strategic Sustainability Performance Plan; and

(iv) share information and promote progress towards the goals of this order;

(b) enlist the support of other organizations within the Federal Government to assist the Steering Committee in addressing the goals of this order;

(c) establish and disband, as appropriate, interagency subcommittees of the Steering Committee, to assist the Steering Committee in carrying out its responsibilities;

(d) determine appropriate Federal actions to achieve the policy of section 1 and the goals of section 2 of this order;

(e) ensure that Federal agencies are held accountable for conformance with the requirements of this order; and

(f) in coordination with the Department of Energy's Federal Energy Management Program and the Office of the Federal Environmental Executive designated under section 6 of Executive Order 13423, provide guidance and assistance to facilitate the development of agency targets for greenhouse gas emission reductions required under subsections 2(a) and (b) of this order.

Sec. 4. Additional Duties of the Director of the Office of Management and Budget. In addition to the duties of the OMB Director specified elsewhere in this order, the OMB Director shall:

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(a) review and approve each agency's multi-year Strategic Sustainability Performance Plan under section 8 of this order and each update of the Plan. The Director shall, where feasible, review each agency's Plan concurrently with OMB's review and evaluation of the agency's budget request;

(b) prepare scorecards providing periodic evaluation of Federal agency performance in implementing this order and publish scorecard results on a publicly available website; and

(c) approve and issue instructions to the heads of agencies concerning budget and appropriations matters relating to implementation of this order.

Sec. 5. Additional Duties of the Chair of the Council on Environmental Quality. In addition to the duties of the CEQ Chair specified elsewhere in this order, the CEQ Chair shall:

(a) issue guidance for greenhouse gas accounting and reporting required under section 2 of this order;

(b) issue instructions to implement this order, in addition to instructions within the authority of the OMB Director to issue under subsection 4(c) of this order;

(c) review and approve each agency's targets, in consultation with the OMB Director, for agency-wide reductions of greenhouse gas emissions under section 2 of this order;

(d) prepare, in coordination with the OMB Director, streamlined reporting metrics to determine each agency's progress under section 2 of this order;

(e) review and evaluate each agency's multi-year Strategic Sustainability Performance Plan under section 8 of this order and each update of the Plan;

(f) assess agency progress toward achieving the goals and policies of this order, and provide its assessment of the agency's progress to the OMB Director;

(g) within 120 days of the date of this order, provide the President with an aggregate Federal Government-wide target for reducing scope 1 and 2 greenhouse gas emissions in absolute terms by fiscal year 2020 relative to a fiscal year 2008 baseline;

(h) within 270 days of the date of this order, provide the President with an aggregate Federal Government-wide target for reducing scope 3 greenhouse gas emissions in absolute terms by fiscal year 2020 relative to a fiscal year 2008 baseline;

(i) establish and disband, as appropriate, interagency working groups to provide recommendations to the CEQ for areas of Federal agency operational and managerial improvement associated with the goals of this order; and

(j) administer the Presidential leadership awards program, established under subsection 4(c) of Executive Order 13423, to recognize exceptional and outstanding agency performance with respect to achieving the goals of this order and to recognize extraordinary innovation, technologies, and practices employed to achieve the goals of this order.

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Sec. 6. Duties of the Federal Environmental Executive. The Federal Environmental Executive designated by the President to head the Office of the Federal Environmental Executive, pursuant to section 6 of Executive Order 13423, shall:

(a) identify strategies and tools to assist Federal implementation efforts under this order, including through the sharing of best practices from successful Federal sustainability efforts; and

(b) monitor and advise the CEQ Chair and the OMB Director on the agencies' implementation of this order and their progress in achieving the order's policies and goals.

Sec. 7. Agency Senior Sustainability Officers. (a) Within 30 days of the date of this order, the head of each agency shall designate from among the agency's senior management officials a Senior Sustainability Officer who shall be accountable for agency conformance with the requirements of this order; and shall report such designation to the OMB Director and the CEQ Chair.

(b) The Senior Sustainability Officer for each agency shall perform the functions of the senior agency official designated by the head of each agency pursuant to section 3(d)(i) of Executive Order 13423 and shall be responsible for:

(i) preparing the targets for agency-wide reductions and the inventory of greenhouse gas emissions required under subsections 2(a), (b), and (c) of this order;

(ii) within 240 days of the date of this order, and annually thereafter, preparing and submitting to the CEQ Chair and the OMB Director, for their review and approval, a multi-year Strategic Sustainability Performance Plan (Sustainability Plan or Plan) as described in section 8 of this order;

(iii) preparing and implementing the approved Plan in coordination with appropriate offices and organizations within the agency including the General Counsel, Chief Information Officer, Chief Acquisition Officer, Chief Financial Officer, and Senior Real Property Officers, and in coordination with other agency plans, policies, and activities;

(iv) monitoring the agency's performance and progress in implementing the Plan, and reporting the performance and progress to the CEQ Chair and the OMB Director, on such schedule and in such format as the Chair and the Director may require; and

(v) reporting annually to the head of the agency on the adequacy and effectiveness of the agency's Plan in implementing this order.

Sec. 8. Agency Strategic Sustainability Performance Plan. Each agency shall develop, implement, and annually update an integrated Strategic Sustainability Performance Plan that will prioritize agency actions based on lifecycle return
on investment. Each agency Plan and update shall be subject to approval by the OMB Director under section 4 of this order. With respect to the period beginning in fiscal year 2011 and continuing through the end of fiscal year 2021, each agency Plan shall:

(a) include a policy statement committing the agency to compliance with environmental and energy statutes, regulations, and Executive Orders;

(b) achieve the sustainability goals and targets, including greenhouse gas reduction targets, established under section 2 of this order;

(c) be integrated into the agency's strategic planning and budget process, including the agency's strategic plan under section 3 of the Government Performance and Results Act of 1993, as amended (5 U.S.C. 306);

(d) identify agency activities, policies, plans, procedures, and practices that are relevant to the agency's implementation of this order, and where necessary, provide for development and implementation of new or revised policies, plans, procedures, and practices;

(e) identify specific agency goals, a schedule, milestones, and approaches for achieving results, and quantifiable metrics for agency implementation of this order;

(f) take into consideration environmental measures as well as economic and social benefits and costs in evaluating projects and activities based on lifecycle return on investment;

(g) outline planned actions to provide information about agency progress and performance with respect to achieving the goals of this order on a publicly available Federal website;

(h) incorporate actions for achieving progress metrics identified by the OMB Director and the CEQ Chair;

(i) evaluate agency climate-change risks and vulnerabilities to manage the effects of climate change on the agency's operations and mission in both the short and long term; and

(j) identify in annual updates opportunities for improvement and evaluation of past performance in order to extend or expand projects that have net lifecycle benefits, and reassess or discontinue under-performing projects.

Sec. 9. Recommendations for Greenhouse Gas Accounting and Reporting. The Department of Energy, through its Federal Energy Management Program, and in coordination with the Environmental Protection Agency, the Department of Defense, the General Services Administration, the Department of the Interior, the Department of Commerce, and other agencies as appropriate, shall:

(a) within 180 days of the date of this order develop and provide to the CEQ Chair recommended Federal greenhouse gas reporting and accounting procedures for agencies to use in carrying out their obligations under subsections 2(a), (b), and (c) of this order, including procedures that will ensure that agencies:

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(i) accurately and consistently quantify and account for greenhouse gas emissions from all scope 1, 2, and 3 sources, using accepted greenhouse gas accounting and reporting principles, and identify appropriate opportunities to revise the fiscal year 2008 baseline to address significant changes in factors affecting agency emissions such as reorganization and improvements in accuracy of data collection and estimation procedures or other major changes that would otherwise render the initial baseline information unsuitable;

(ii) consider past Federal agency efforts to reduce greenhouse gas emissions; and

(iii) consider and account for sequestration and emissions of greenhouse gases resulting from Federal land management practices;

(b) within 1 year of the date of this order, to ensure consistent and accurate reporting under this section, provide electronic accounting and reporting capability for the Federal greenhouse gas reporting procedures developed under subsection (a) of this section, and to the extent practicable, ensure compatibility between this capability and existing Federal agency reporting systems; and

(c) every 3 years from the date of the CEQ Chair’s issuance of the initial version of the reporting guidance, and as otherwise necessary, develop and provide recommendations to the CEQ Chair for revised Federal greenhouse gas reporting procedures for agencies to use in implementing subsections 2(a), (b), and (c) of this order.

Sec. 10. Recommendations for Sustainable Locations for Federal Facilities. Within 180 days of the date of this order, the Department of Transportation, in accordance with its Sustainable Partnership Agreement with the Department of Housing and Urban Development and the Environmental Protection Agency, and in coordination with the General Services Administration, the Department of Homeland Security, the Department of Defense, and other agencies as appropriate, shall:

(a) review existing policies and practices associated with site selection for Federal facilities; and

(b) provide recommendations to the CEQ Chair regarding sustainable location strategies for consideration in Sustainability Plans. The recommendations shall be consistent with principles of sustainable development including prioritizing central business district and rural town center locations, prioritizing sites well served by transit, including site design elements that ensure safe and convenient pedestrian access, consideration of transit access and proximity to housing affordable to a wide range of Federal employees, adaptive reuse or renovation of buildings, avoidance of development of sensitive land resources, and evaluation of parking management strategies.

Sec. 11. Recommendations for Federal Local Transportation Logistics. Within 180 days of the date of this order, the General Services Administration, in coordination with the Department of Transportation, the Department of the Treasury, the Department of Energy, the Office of Personnel Management,
and other agencies as appropriate, shall review current policies and practices associated with use of public transportation by Federal personnel, Federal shuttle bus and vehicle transportation routes supported by multiple Federal agencies, and use of alternative fuel vehicles in Federal shuttle bus fleets, and shall provide recommendations to the CEQ Chair on how these policies and practices could be revised to support the implementation of this order and the achievement of its policies and goals.

Sec. 12. Guidance for Federal Fleet Management. Within 180 days of the date of this order, the Department of Energy, in coordination with the General Services Administration, shall issue guidance on Federal fleet management that addresses the acquisition of alternative fuel vehicles and use of alternative fuels; the use of biodiesel blends in diesel vehicles; the acquisition of electric vehicles for appropriate functions; improvement of fleet fuel economy; the optimizing of fleets to the agency mission; petroleum reduction strategies, such as the acquisition of low greenhouse gas emitting vehicles and the reduction of vehicle miles traveled; and the installation of renewable fuel pumps at Federal fleet fueling centers.

Sec. 13. Recommendations for Vendor and Contractor Emissions. Within 180 days of the date of this order, the General Services Administration, in coordination with the Department of Defense, the Environmental Protection Agency, and other agencies as appropriate, shall review and provide recommendations to the CEQ Chair and the Administrator of OMB's Office of Federal Procurement Policy regarding the feasibility of working with the Federal vendor and contractor community to provide information that will assist Federal agencies in tracking and reducing scope 3 greenhouse gas emissions related to the supply of products and services to the Government. These recommendations should consider the potential impacts on the procurement process, and the Federal vendor and contractor community including small businesses and other socioeconomic procurement programs. Recommendations should also explore the feasibility of:

(a) requiring vendors and contractors to register with a voluntary registry or organization for reporting greenhouse gas emissions;

(b) requiring contractors, as part of a new or revised registration under the Central Contractor Registration or other tracking system, to develop and make available its greenhouse gas inventory and description of efforts to mitigate greenhouse gas emissions;

(c) using Federal Government purchasing preferences or other incentives for products manufactured using processes that minimize greenhouse gas emissions; and

(d) other options for encouraging sustainable practices and reducing greenhouse gas emissions.

Sec. 14. Stormwater Guidance for Federal Facilities. Within 60 days of the date of this order, the Environmental Protection Agency, in coordination with other Federal agencies as appropriate, shall issue guidance on the implementation of section 438 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17094).
Sec. 15. Regional Coordination. Within 180 days of the date of this order, the Federal Environmental Executive shall develop and implement a regional implementation plan to support the goals of this order taking into account energy and environmental priorities of particular regions of the United States.

Sec. 16. Agency Roles in Support of Federal Adaptation Strategy. In addition to other roles and responsibilities of agencies with respect to environmental leadership as specified in this order, the agencies shall participate actively in the Interagency Climate Change Adaptation Task Force, which is already engaged in developing the domestic and international dimensions of a U.S. strategy for adaptation to climate change, and shall develop approaches through which the policies and practices of the agencies can be made compatible with and reinforce that strategy. Within 1 year of the date of this order the CEQ Chair shall provide to the President, following consultation with the agencies and the Climate Change Adaptation Task Force, as appropriate, a progress report on agency actions in support of the national adaptation strategy and recommendations for any further such measures as the CEQ Chair may deem necessary.

Sec. 17. Limitations. (a) This order shall apply to an agency with respect to the activities, personnel, resources, and facilities of the agency that are located within the United States. The head of an agency may provide that this order shall apply in whole or in part with respect to the activities, personnel, resources, and facilities of the agency that are not located within the United States, if the head of the agency determines that such application is in the interest of the United States.

(b) The head of an agency shall manage activities, personnel, resources, and facilities of the agency that are not located within the United States, and with respect to which the head of the agency has not made a determination under subsection (a) of this section, in a manner consistent with the policy set forth in section 1 of this order to the extent the head of the agency determines practicable.

Sec. 18. Exemption Authority.

(a) The Director of National Intelligence may exempt an intelligence activity of the United States, and related personnel, resources, and facilities, from the provisions of this order, other than this subsection and section 20, to the extent the Director determines necessary to protect intelligence sources and methods from unauthorized disclosure.

(b) The head of an agency may exempt law enforcement activities of that agency, and related personnel, resources, and facilities, from the provisions of this order, other than this subsection and section 20, to the extent the head of an agency determines necessary to protect undercover operations from unauthorized disclosure.

(c) (i) The head of an agency may exempt law enforcement, protective, emergency response, or military tactical vehicle fleets of that agency from the provisions of this order, other than this subsection and section 20.
(ii) Heads of agencies shall manage fleets to which paragraph (i) of this subsection refers in a manner consistent with the policy set forth in section 1 of this order to the extent they determine practicable.

(d) The head of an agency may exempt particular agency activities and facilities from the provisions of this order, other than this subsection and section 20, where it is in the interest of national security. If the head of an agency issues an exemption under this section, the agency must notify the CEQ Chair in writing within 30 days of issuance of the exemption under this subsection. To the maximum extent practicable, and without compromising national security, each agency shall strive to comply with the purposes, goals, and implementation steps in this order.

(e) The head of an agency may submit to the President, through the CEQ Chair, a request for an exemption of an agency activity, and related personnel, resources, and facilities, from this order.

Sec. 19. Definitions. As used in this order:

(a) "absolute greenhouse gas emissions" means total greenhouse gas emissions without normalization for activity levels and includes any allowable consideration of sequestration;

(b) "agency" means an executive agency as defined in section 105 of title 5, United States Code, excluding the Government Accountability Office;

(c) "alternative fuel vehicle" means vehicles defined by section 301 of the Energy Policy Act of 1992, as amended (42 U.S.C. 13211), and otherwise includes electric fueled vehicles, hybrid electric vehicles, plug-in hybrid electric vehicles, dedicated alternative fuel vehicles, dual fueled alternative fuel vehicles, qualified fuel cell motor vehicles, advanced lean burn technology motor vehicles, self-propelled vehicles such as bicycles and any other alternative fuel vehicles that are defined by statute;

(d) "construction and demolition materials and debris" means materials and debris generated during construction, renovation, demolition, or dismantling of all structures and buildings and associated infrastructure;

(e) "divert" and "diverting" means redirecting materials that might otherwise be placed in the waste stream to recycling or recovery, excluding diversion to waste-to-energy facilities;

(f) "energy intensity" means energy consumption per square foot of building space, including industrial or laboratory facilities;

(g) "environmental" means environmental aspects of internal agency operations and activities, including those aspects related to energy and transportation functions;

(h) "excluded vehicles and equipment" means any vehicle, vessel, aircraft, or non-road equipment owned or operated by an agency of the Federal Government that is used in:

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combat support, combat service support, tactical or relief operations, or training for such operations;

(ii) Federal law enforcement (including protective service and investigation);

(iii) emergency response (including fire and rescue); or

(iv) spaceflight vehicles (including associated ground-support equipment);

(i) "greenhouse gases" means carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride;

(j) "renewable energy" means energy produced by solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project;

(k) "scope 1, 2, and 3" mean;

(i) scope 1: direct greenhouse gas emissions from sources that are owned or controlled by the Federal agency;

(ii) scope 2: direct greenhouse gas emissions resulting from the generation of electricity, heat, or steam purchased by a Federal agency; and

(iii) scope 3: greenhouse gas emissions from sources not owned or directly controlled by a Federal agency but related to agency activities such as vendor supply chains, delivery services, and employee travel and commuting;

(l) "sustainability" and "sustainable" mean to create and maintain conditions, under which humans and nature can exist in productive harmony, that permit fulfilling the social, economic, and other requirements of present and future generations;

(m) "United States" means the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Northern Mariana Islands, and associated territorial waters and airspace;

(n) "water consumption intensity" means water consumption per square foot of building space; and

(o) "zero-net-energy building" means a building that is designed, constructed, and operated to require a greatly reduced quantity of energy to operate, meet the balance of energy needs from sources of energy that do not produce greenhouse gases, and therefore result in no net emissions of greenhouse gases and be economically viable.

Sec. 20. General Provisions.

(a) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

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(b) Nothing in this order shall be construed to impair or otherwise affect the functions of the OMB Director relating to budgetary, administrative, or legislative proposals.

(c) This order is intended only to improve the internal management of the Federal Government and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA

THE WHITE HOUSE,
October 5, 2009.

# # #
To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: National Environmental Policy Act (NEPA) Responsibilities Under the Departmental Environmental Justice Policy

In a memorandum dated August 17, 1994, Secretary Babbitt established an environmental justice policy that requires the Department to consider the impacts of the Department's actions on minority and low-income populations and communities, as well as the equity of the distribution of benefits and risks of those decisions. The memorandum provides that these considerations should be specifically included in the National Environmental Policy Act documentation. The Department's environmental justice policy is based on Executive Order 12898, dated February 11, 1994, which requires agencies to incorporate environmental justice into their missions by identifying and addressing disproportionately high and adverse human health or environmental effects of their programs and policies on minorities and low-income populations and communities. The Executive Order applies equally to Federal agency responsibility for Native American programs.

Therefore, henceforth all environmental documents should specifically analyze and evaluate the impacts of any proposed projects, actions or decisions on minority and low-income populations and communities, as well as the equity of the distribution of the benefits and risks of those decisions.

To comply with the environmental justice policy established by the Secretary, bureaus and offices should identify and evaluate, during the scoping and/or planning processes, any anticipated effects, direct or indirect, from the proposed project, action or decision on minority and low-income populations and communities, including the equity of the distribution of the benefits and risks.

If any significant impacts to minority and low-income populations and communities are identified during the scoping and/or planning processes, the environmental document should clearly evaluate and state the environmental consequences of the proposed project, action or decision on minority and low-income populations and communities in the environmental document.
If a project or an action, however, is expected to have either an insignificant impact or no impact on minority/low-income populations, the document, under the scoping section in an environmental impact statement, should specifically state that the proposed project or action was considered during scoping and/or planning and is expected to have either insignificant impact or no impact, direct or indirect, with reasons given. A similar statement should be included in any environmental assessment under an appropriate section.

Attachment
To: Solicitor
All Assistant Secretaries
Inspector General
Heads of All Bureaus and Offices

From: The Secretary

Subject: Environmental Justice Policy

The Department of the Interior will be an active leader in seeking successful strategies to bring about environmental justice. As President Clinton has noted, at times the costs and risks of environmental decisions fall disproportionately on minorities and low income groups and communities. Too often these risks fall upon the children of these communities. I have commenced a series of actions to support Executive Order 12898 of February 11, 1994, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." We are working closely with the Environmental Protection Agency to meet the milestones of the Executive Order for establishing a strategy.

I want you to ensure that Department of the Interior decisions consider the impacts of our actions and inactions on minority and low income populations and communities, as well as the equity of the distribution of benefits and risks of those decisions. This consideration should be specifically included in National Environmental Policy Act (NEPA) documentation on our decisionmaking. I also want the Department to provide leadership in ways that assure meaningful participation by minority and low income populations in our wide range of activities where health and safety are involved. This interaction with diverse peoples has always been a part of our mission whether in the Pacific islands or the Northern Great Plains. Our emphasis on participation includes both a respect for diverse views and an ethics-based approach to stewardship.

The public health and safety concepts underlying environmental justice challenge and enlarge the nature of stewardship undertaken by Interior. This concept focuses both upon our responsibility to the community and to our employees. Environmental justice activism now creates new questions on the ability to solve health/resource related conflicts, on the weight and methods of community participation, the relationship with groups that have little or no history with traditional land or resource managers, and the effectiveness of current decision
development or negotiation processes. Many of our current organizations and efforts to involve the public in our processes may serve as national models for action. I ask each of you to use your creativity and talents at problem solving to identify and then address these diverse issues in our daily work.

I have appointed Anne Shields, Deputy Solicitor, and Faith Roseasal, Deputy Assistant Secretary for Indian Affairs, to co-chair the Department’s environmental justice activities. Please give them your support and assistance when they ask for your help.
ORDER NO. 3206

SIGNATURE DATE: June 5, 1997

Subject: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act

Sec. 1 Purpose and Authority. This Order is issued by the Secretary of the Interior and the Secretary of Commerce (Secretaries) pursuant to the Endangered Species Act of 1973, 16 U.S.C. §1531, as amended (the Act), the federal-tribal trust relationship, and other federal law. Specifically, this Order clarifies the responsibilities of the component agencies, bureaus and offices of the Department of the Interior and the Department of Commerce (Departments), when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, as defined in this Order. This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes. Accordingly, the Departments will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.

Sec. 2 Scope and Limitations. (A) This Order is for guidance within the Departments only and is adopted pursuant to, and is consistent with, existing law.

(B) This Order shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Order be construed to alter, amend, repeal, interpret or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribe, or to preempt, modify or limit the exercise of any such rights.

(C) This Order does not preempt or modify the Departments' statutory authorities or the authorities of Indian tribes or the states.

(D) Nothing in this Order shall be applied to authorize direct (directed) take of listed species, or any activity that would jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. Incidental take issues under this Order are addressed in Principle 3(C) of Section 5.

(E) Nothing in this Order shall require additional procedural requirements for substantially completed Departmental actions, activities, or policy initiatives.

(F) Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.
(G) Should any tribe(s) and the Department(s) agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.

(H) This Order shall not be construed to supersede, amend, or otherwise modify or affect the implementation of, existing agreements or understandings with the Departments or their agencies, bureaus, or offices including, but not limited to, memoranda of understanding, memoranda of agreement, or statements of relationship, unless mutually agreed by the signatory parties.

Sec. 3 Definitions. For the purposes of this Order, except as otherwise expressly provided, the following terms shall apply:

(A) The term "Indian tribe" shall mean any Indian tribe, band, nation, pueblo, community or other organized group within the United States which the Secretary of the Interior has identified on the most current list of tribes maintained by the Bureau of Indian Affairs.

(B) The term "tribal trust resources" means those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.

(C) The term "tribal rights" means those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies.

(D) The term "Indian lands" means any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Sec. 4 Background. The unique and distinctive political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements, and differentiates tribes from other entities that deal with, or are affected by, the federal government. This relationship has given rise to a special federal trust responsibility, involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

The Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Congressional and Administrative policies promote tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The Departments recognize and respect, and shall consider, the value that tribal traditional knowledge provides to tribal and federal land management decision-making and tribal resource management activities. The Departments recognize that Indian tribes are governmental sovereigns; inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal
rights and protect tribal trust resources. The Departments shall be sensitive to the fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.

Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

Because of the unique government-to-government relationship between Indian tribes and the United States, the Departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems.

In facilitating a government-to-government relationship, the Departments may work with intertribal organizations, to the extent such organizations are authorized by their member tribes to carry out resource management responsibilities.

Sec. 5 Responsibilities. To achieve the objectives of this Order, the heads of all agencies, bureaus and offices within the Department of the Interior, and the Administrator of the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce, shall be responsible for ensuring that the following directives are followed:

**Principle 1. THE DEPARTMENTS SHALL WORK DIRECTLY WITH INDIAN TRIBES ON A GOVERNMENT-TO-GOVERNMENT BASIS TO PROMOTE HEALTHY ECOSYSTEMS.**

The Departments shall recognize the unique and distinctive political and constitutionally based relationship that exists between the United States and each Indian tribe, and shall view tribal governments as sovereign entities with authority and responsibility for the health and welfare of ecosystems on Indian lands. The Departments recognize that Indian tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources. Accordingly, the Departments shall seek to establish effective government-to-government working relationships with tribes to achieve the common goal of promoting and protecting the health of these ecosystems. Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the Act may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable. This shall include providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes. To facilitate the government-to-government relationship, the Departments may coordinate their discussions with a representative from an intertribal organization, if so designated by the affected tribe(s).
Except when determined necessary for investigative or prosecutorial law enforcement activities, or when otherwise provided in a federal-tribal agreement, the Departments, to the maximum extent practicable, shall obtain permission from tribes before knowingly entering Indian reservations and tribally-owned fee lands for purposes of ESA-related activities, and shall communicate as necessary with the appropriate tribal officials. If a tribe believes this section has been violated, such tribe may file a complaint with the appropriate Secretary, who shall promptly investigate and respond to the tribe.

**Principle 2. THE DEPARTMENTS SHALL RECOGNIZE THAT INDIAN LANDS ARE NOT SUBJECT TO THE SAME CONTROLS AS FEDERAL PUBLIC LANDS.**

The Departments recognize that Indian lands, whether held in trust by the United States for the use and benefit of Indians or owned exclusively by an Indian tribe, are not subject to the controls or restrictions set forth in federal public land laws. Indian lands are not federal public lands or part of the public domain, but are rather retained by tribes or set aside for tribal use pursuant to treaties, statutes, court orders, executive orders, judicial decisions, or agreements. Accordingly, Indian tribes manage Indian lands in accordance with tribal goals and objectives, within the framework of applicable laws.

**Principle 3. THE DEPARTMENTS SHALL ASSIST INDIAN TRIBES IN DEVELOPING AND EXPANDING TRIBAL PROGRAMS SO THAT HEALTHY ECOSYSTEMS ARE PROMOTED AND CONSERVATION RESTRICTIONS ARE UNNECESSARY.**

**(A) The Departments shall take affirmative steps to assist Indian tribes in developing and expanding tribal programs that promote healthy ecosystems.**

The Departments shall take affirmative steps to achieve the common goals of promoting healthy ecosystems, Indian self-government, and productive government-to-government relationships under this Order, by assisting Indian tribes in developing and expanding tribal programs that promote the health of ecosystems upon which sensitive species (including candidate, proposed and listed species) depend.

The Departments shall offer and provide such scientific and technical assistance and information as may be available for the development of tribal conservation and management plans to promote the maintenance, restoration, enhancement and health of the ecosystems upon which sensitive species (including candidate, proposed, and listed species) depend, including the cooperative identification of appropriate management measures to address concerns for such species and their habitats.

**(B) The Departments shall recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal trust resources.**

The Departments acknowledge that Indian tribes value, and exercise responsibilities for, management of Indian lands and tribal trust resources. In keeping with the federal policy of promoting tribal self-government, the Departments shall respect the exercise of tribal sovereignty
over the management of Indian lands, and tribal trust resources. Accordingly, the Departments shall give deference to tribal conservation and management plans for tribal trust resources that: (a) govern activities on Indian lands, including, for the purposes of this section, tribally-owned fee lands, and (b) address the conservation needs of listed species. The Departments shall conduct government-to-government consultations to discuss the extent to which tribal resource management plans for tribal trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species.

(C) The Departments, as trustees, shall support tribal measures that preclude the need for conservation restrictions.

At the earliest indication that the need for federal conservation restrictions is being considered for any species, the Departments, acting in their trustee capacities, shall promptly notify all potentially affected tribes, and provide such technical, financial, or other assistance as may be appropriate, thereby assisting Indian tribes in identifying and implementing tribal conservation and other measures necessary to protect such species.

In the event that the Departments determine that conservation restrictions are necessary in order to protect listed species, the Departments, in keeping with the trust responsibility and government-to-government relationships, shall consult with affected tribes and provide written notice to them of the intended restriction as far in advance as practicable. If the proposed conservation restriction is directed at a tribal activity that could raise the potential issue of direct (directed) take under the Act, then meaningful government-to-government consultation shall occur, in order to strive to harmonize the federal trust responsibility to tribes, tribal sovereignty and the statutory missions of the Departments. In cases involving an activity that could raise the potential issue of an incidental take under the Act, such notice shall include an analysis and determination that all of the following conservation standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities, either as stated or applied; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

Principle 4. THE DEPARTMENTS SHALL BE SENSITIVE TO INDIAN CULTURE, RELIGION AND SPIRITUALITY.

The Departments shall take into consideration the impacts of their actions and policies under the Act on Indian use of listed species for cultural and religious purposes. The Departments shall avoid or minimize, to the extent practicable, adverse effects upon the noncommercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes. When appropriate, the Departments may issue guidelines to accommodate Indian access to, and traditional uses of, listed species, and to address unique circumstances that may exist when administering the Act.
Principle 5. THE DEPARTMENTS SHALL MAKE AVAILABLE TO INDIAN TRIBES INFORMATION RELATED TO TRIBAL TRUST RESOURCES AND INDIAN LANDS, AND, TO FACILITATE THE MUTUAL EXCHANGE OF INFORMATION, SHALL STRIVE TO PROTECT SENSITIVE TRIBAL INFORMATION FROM DISCLOSURE.

To further tribal self-government and the promotion of healthy ecosystems, the Departments recognize the critical need for Indian tribes to possess complete and accurate information related to Indian lands and tribal trust resources. To the extent consistent with the provisions of the Privacy Act, the Freedom of Information Act (FOIA) and the Departments' abilities to continue to assert FOIA exemptions with regard to FOIA requests, the Departments shall make available to an Indian tribe all information held by the Departments which is related to its Indian lands and tribal trust resources. In the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal information which has been disclosed to or collected by the Departments. The Departments shall promptly notify and, when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act.

Sec. 6 Federal-Tribal Intergovernmental Agreements. The Departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species (including candidate, proposed, and listed species) such as, but not limited to, land and resource management, multi-jurisdictional partnerships, cooperative law enforcement, and guidelines to accommodate Indian access to, and traditional uses of, natural products. Such agreements shall strive to establish partnerships that harmonize the Departments' missions under the Act with the Indian tribe's own ecosystem management objectives.

Sec. 7 Alaska. The Departments recognize that section 10(e) of the Act governs the taking of listed species by Alaska Natives for subsistence purposes and that there is a need to study the implementation of the Act as applied to Alaska tribes and natives. Accordingly, this Order shall not apply to Alaska and the Departments shall, within one year of the date of this Order, develop recommendations to the Secretaries to supplement or modify this Order and its Appendix, so as to guide the administration of the Act in Alaska. These recommendations shall be developed with the full cooperation and participation of Alaska tribes and natives. The purpose of these recommendations shall be to harmonize the government-to-government relationship with Alaska tribes, the federal trust responsibility to Alaska tribes and Alaska Natives, the rights of Alaska Natives, and the statutory missions of the Departments.

Sec. 8 Special Study on Cultural and Religious Use of Natural Products. The Departments recognize that there remain tribal concerns regarding the access to, and uses of, eagle feathers, animal parts, and other natural products for Indian cultural and religious purposes. Therefore, the Departments shall work together with Indian tribes to develop recommendations to the Secretaries within one year to revise or establish uniform administrative procedures to govern the possession, distribution, and transportation of such natural products that are under federal jurisdiction or control.

Sec. 9 Dispute Resolution. (A) Federal-tribal disputes regarding implementation of this Order shall be addressed through government-to-government discourse. Such discourse is to be respectful of
government-to-government relationships and relevant federal-tribal agreements, treaties, judicial decisions, and policies pertaining to Indian tribes. Alternative dispute resolution processes may be employed as necessary to resolve disputes on technical or policy issues within statutory time frames; provided that such alternative dispute resolution processes are not intended to apply in the context of investigative or prosecutorial law enforcement activities.

(B) Questions and concerns on matters relating to the use or possession of listed plants or listed animal parts used for religious or cultural purposes shall be referred to the appropriate Departmental officials and the appropriate tribal contacts for religious and cultural affairs.

Sec. 10 Implementation. This Order shall be implemented by all agencies, bureaus, and offices of the Departments, as applicable. In addition, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service shall implement their specific responsibilities under the Act in accordance with the guidance contained in the attached Appendix.

Sec. 11 Effective Date. This Order, issued within the Department of the Interior as Order No. 3206, is effective immediately and will remain in effect until amended, superseded, or revoked.

This Secretarial Order, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," and its accompanying Appendix were issued this 5th day of June, 1997, in Washington, D.C., by the Secretary of the Interior and the Secretary of Commerce.

/s/ Bruce Babbitt  
Secretary of the Interior

/s/ William M. Daley  
Secretary of Commerce

Date: June 5, 1997

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APPENDIX

Appendix to Secretarial Order issued within the Department of the Interior as Order No. 3206.

Sec. 1 Purpose. The purpose of this Appendix is to provide policy to the National, regional and field offices of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), (hereinafter "Services"), concerning the implementation of the Secretarial Order issued by the Department of the Interior and the Department of Commerce, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." This policy furthers the objectives of the FWS Native American Policy (June 28, 1994), and the American Indian and Alaska Native Policy of the Department of Commerce (March 30, 1995). This Appendix shall be considered an integral part of the above Secretarial Order, and all sections of the Order shall apply
in their entirety to this Appendix.

Sec. 2 General Policy. (A) Goals. The goals of this Appendix are to provide a basis for administration of the Act in a manner that (1) recognizes common federal-tribal goals of conserving sensitive species (including candidate, proposed, and listed species) and the ecosystems upon which they depend, Indian self-government, and productive government-to-government relationships; and (2) harmonizes the federal trust responsibility to tribes, tribal sovereignty, and the statutory missions of the Departments, so as to avoid or minimize the potential for conflict and confrontation.

(B) Government-to-Government Communication. It shall be the responsibility of each Service's regional and field offices to maintain a current list of tribal contact persons within each Region, and to ensure that meaningful government-to-government communication occurs regarding actions to be taken under the Act.

(C) Agency Coordination. The Services have the lead roles and responsibilities in administering the Act, while the Services and other federal agencies share responsibilities for honoring Indian treaties and other sources of tribal rights. The Bureau of Indian Affairs (BIA) has the primary responsibility for carrying out the federal responsibility to administer tribal trust property and represent tribal interests during formal Section 7 consultations under the Act. Accordingly, the Services shall consult, as appropriate, with each other, affected Indian tribes, the BIA, the Office of the Solicitor (Interior), the Office of American Indian Trust (Interior), and the NOAA Office of General Counsel in determining how the fiduciary responsibility of the federal government to Indian tribes may best be realized.

(D) Technical Assistance. In their roles as trustees, the Services shall offer and provide technical assistance and information for the development of tribal conservation and management plans to promote the maintenance, restoration, and enhancement of the ecosystems on which sensitive species (including candidate, proposed, and listed species) depend. The Services should be creative in working with the tribes to accomplish these objectives. Such technical assistance may include the cooperative identification of appropriate management measures to address concerns for sensitive species (including candidate, proposed and listed species) and their habitats. Such cooperation may include intergovernmental agreements to enable Indian tribes to more fully participate in conservation programs under the Act. Moreover, the Services may enter into conservation easements with tribal governments and enlist tribal participation in incentive programs.

(E) Tribal Conservation Measures. The Services shall, upon the request of an Indian tribe or the BIA, cooperatively review and assess tribal conservation measures for sensitive species (including candidate, proposed and listed species) which may be included in tribal resource management plans. The Services will communicate to the tribal government their desired conservation goals and objectives, as well as any technical advice or suggestions for the modification of the plan to enhance its benefits for the conservation of sensitive species (including candidate, proposed and listed species). In keeping with the Services' initiatives to promote voluntary conservation partnerships for listed species and the ecosystems upon which they depend, the Services shall consult on a government-to-government basis with the affected tribe to determine and provide appropriate
assurances that would otherwise be provided to a non-Indian.

Sec. 3 The Federal Trust Responsibility and the Administration of the Act.

The Services shall coordinate with affected Indian tribes in order to fulfill the Services' trust responsibilities and encourage meaningful tribal participation in the following programs under the Act, and shall:

(A) Candidate Conservation.

(1) Solicit and utilize the expertise of affected Indian tribes in evaluating which animal and plant species should be included on the list of candidate species, including conducting population status inventories and geographical distribution surveys;

(2) Solicit and utilize the expertise of affected Indian tribes when designing and implementing candidate conservation actions to remove or alleviate threats so that the species' listing priority is reduced or listing as endangered or threatened is rendered unnecessary; and

(3) Provide technical advice and information to support tribal efforts and facilitate voluntary tribal participation in implementation measures to conserve candidate species on Indian lands.

(B) The Listing Process.

(1) Provide affected Indian tribes with timely notification of the receipt of petitions to list species, the listing of which could affect the exercise of tribal rights or the use of tribal trust resources. In addition, the Services shall solicit and utilize the expertise of affected Indian tribes in responding to listing petitions that may affect tribal trust resources or the exercise of tribal rights.

(2) Recognize the right of Indian tribes to participate fully in the listing process by providing timely notification to, soliciting information and comments from, and utilizing the expertise of, Indian tribes whose exercise of tribal rights or tribal trust resources could be affected by a particular listing. This process shall apply to proposed and final rules to: (i) list species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; and (v) designate experimental populations.

(3) Recognize the contribution to be made by affected Indian tribes, throughout the process and prior to finalization and close of the public comment period, in the review of proposals to designate critical habitat and evaluate economic impacts of such proposals with implications for tribal trust resources or the exercise of tribal rights. The Services shall notify affected Indian tribes and the BIA, and solicit information on, but not limited to, tribal cultural values, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development, for use in: (i) the preparation of economic analyses involving impacts on tribal communities; and (ii) the preparation of "balancing tests" to determine appropriate exclusions from critical habitat and in the review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes.
(4) In keeping with the trust responsibility, shall consult with the affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

(5) When exercising regulatory authority for threatened species under section 4(d) of the Act, avoid or minimize effects on tribal management or economic development, or the exercise of reserved Indian fishing, hunting, gathering, or other rights, to the maximum extent allowed by law.

(6) Having first provided the affected Indian tribe(s) the opportunity to actively review and comment on proposed listing actions, provide affected Indian tribe(s) with a written explanation whenever a final decision on any of the following activities conflicts with comments provided by an affected Indian tribe: (i) list a species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; or (v) designate experimental populations. If an affected Indian tribe petitions for rulemaking under Section 4(b)(3), the Services will consult with and provide a written explanation to the affected tribe if they fail to adopt the requested regulation.

(C) ESA §7 Consultation.

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected Indian tribes in addition to data provided by the action agency during the consultation process. The Services shall provide timely notification to affected tribes as soon as the Services are aware that a proposed federal agency action subject to formal consultation may affect tribal rights or tribal trust resources.

(2) Provide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.

(3)(a) When the Services enter formal consultation on an action proposed by the BIA, the Services shall consider and treat affected tribes as license or permit applicants entitled to full participation in the consultation process. This shall include, but is not limited to, invitations to meetings between the Services and the BIA, opportunities to provide pertinent scientific data and to review data in the administrative record, and to review biological assessments and draft biological opinions. In keeping with the trust responsibility, tribal conservation and management plans for tribal trust resources that govern activities on Indian lands, including for purposes of this paragraph, tribally-owned fee lands, shall serve as the basis for developing any reasonable and prudent alternatives, to the extent practicable.

(b) When the Services enter into formal consultations with an Interior Department agency other than the BIA, or an agency of the Department of Commerce, on a proposed action which may affect tribal
rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and provide for the participation of the BIA in the consultation process.

(c) When the Services enter into formal consultations with agencies not in the Departments of the Interior or Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and encourage the action agency to invite the affected tribe(s) and the BIA to participate in the consultation process.

(d) In developing reasonable and prudent alternatives, the Services shall give full consideration to all comments and information received from any affected tribe, and shall strive to ensure that any alternative selected does not discriminate against such tribe(s). The Services shall make a written determination describing (i) how the selected alternative is consistent with their trust responsibilities, and (ii) the extent to which tribal conservation and management plans for affected tribal trust resources can be incorporated into any such alternative.

(D) Habitat Conservation Planning.

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected tribal governments in habitat conservation planning that may affect tribal trust resources or the exercise of tribal rights. The Services shall facilitate tribal participation by providing timely notification as soon as the Services are aware that a draft Habitat Conservation Plan (HCP) may affect such resources or the exercise of such rights.

(2) Encourage HCP applicants to recognize the benefits of working cooperatively with affected Indian tribes and advocate for tribal participation in the development of HCPs. In those instances where permit applicants choose not to invite affected tribes to participate in those negotiations, the Services shall consult with the affected tribes to evaluate the effects of the proposed HCP on tribal trust resources and will provide the information resulting from such consultation to the HCP applicant prior to the submission of the draft HCP for public comment. After consultation with the tribes and the non-federal landowner and after careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the Services' trust responsibility.

(3) Advocate the incorporation of measures into HCPs that will restore or enhance tribal trust resources. The Services shall advocate for HCP provisions that eliminate or minimize the diminishment of tribal trust resources. The Services shall be cognizant of the impacts of measures incorporated into HCPs on tribal trust resources and the tribal ability to utilize such resources.

(4) Advocate and encourage early participation by affected tribal governments in the development of region-wide or state-wide habitat conservation planning efforts and in the development of any related implementation documents.

(E) Recovery.
(1) Solicit and utilize the expertise of affected Indian tribes by having tribal representation, as appropriate, on Recovery Teams when the species occurs on Indian lands (including tribally-owned fee lands), affects tribal trust resources, or affects the exercise of tribal rights.

(2) In recognition of tribal rights, cooperate with affected tribes to develop and implement Recovery Plans in a manner that minimizes the social, cultural and economic impacts on tribal communities, consistent with the timely recovery of listed species. The Services shall be cognizant of tribal desires to attain population levels and conditions that are sufficient to support the meaningful exercise of reserved rights and the protection of tribal management or development prerogatives for Indian resources.

(3) Invite affected Indian tribes, or their designated representatives, to participate in the Recovery Plan implementation process through the development of a participation plan and through tribally-designated membership on recovery teams. The Services shall work cooperatively with affected Indian tribes to identify and implement the most effective measures to speed the recovery process.

(4) Solicit and utilize the expertise of affected Indian tribes in the design of monitoring programs for listed species and for species which have been removed from the list of Endangered and Threatened Wildlife and Plants occurring on Indian lands or affecting the exercise of tribal rights or tribal trust resources.

(F) **Law Enforcement.**

(1) At the request of an Indian tribe, enter into cooperative law enforcement agreements as integral components of tribal, federal, and state efforts to conserve species and the ecosystems upon which they depend. Such agreements may include the delegation of enforcement authority under the Act, within limitations, to full-time tribal conservation law enforcement officers.

(2) Cooperate with Indian tribes in enforcement of the Act by identifying opportunities for joint enforcement operations or investigations. Discuss new techniques and methods for the detection and apprehension of violators of the Act or tribal conservation laws, and exchange law enforcement information in general.

SO#3206 6/5/97
MEMORANDUM

To: Regional Director, PN, MP, LC, UC, GP
   Attention: PN-1000, MP-100, LC-1000, UC-100, GP-1000
   Director, Reclamation Service Center
   Attention: D-1000
   Director, Program Analysis
   Attention: D-5000, D-5300, D-5400, D-5500
   Director, Technical Service Center
   Attention: D-8000

From: Eluid L. Martinez

SGD ELUID L. MARTINEZ

Commissioner

Subject: Reclamation compliance with Indian Sacred Sites Executive Order (No. 13007)

On April 28, 1997, I signed into effect Reclamation's interim guidance for implementing Executive Order 13007 (EO). Attached is the final guidance, which shall replace the interim guidance effective immediately, as well as a copy of the associated Departmental Manual Chapter. Copies of these documents should be distributed to all Reclamation Regional and Area staff who may have to work with sacred sites issues, including Area Managers, managers and staff working in the areas of NEPA compliance, realty, cultural resources, etc.

I also hereby reaffirm Reclamation's commitment to manage Federal lands under its jurisdiction to: (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, and (2) avoid adversely affecting the physical integrity of such sacred sites. These actions shall be carried out to the extent practicable, permitted by law and not clearly inconsistent with essential agency functions. This policy shall be carried out in a manner consistent with Reclamation's government-to-government policy for working with Indian tribes, including consulting with tribally designated representatives whenever it appears that Reclamation activities may compromise the integrity of or access to sacred sites.

Within the guidelines established by the EO, Reclamation's goals shall be to ensure that:

a. its actions do not adversely affect Indian sacred sites, to the extent practicable;

b. access to and ceremonial use of Indian sacred sites is accommodated;
c. reasonable advance written notice is given to affected tribes of proposed actions, plans, projects, activities, or decisions which may adversely affect Indian sacred sites or restrict access or ceremonial use of such sites:

d. consultation with federally recognized tribes is carried out when contemplated Reclamation actions could cause adverse effects, or to discuss other issues associated with the EO; and

e. confidentiality of information relating to sacred sites is protected.

I am also directing the Regional Directors to provide copies of this guidance to tribes in their regions who may have sacred sites potentially affected by Reclamation actions. Copies should also be sent to tribes outside of the Reclamation states who are thought to have an interest in sacred sites located within that region.

Questions or comments about this document should be directed to Ms. Adrienne Marks, W-6100, via electronic mail, or faxed at 202-208-6688 or she can be reach at (202) 208-5000.

Attachments

bc: (w/att):
W-6100 (Marks)
W-6100 (Kenney)
W-6000 (Magnussen)
PN-1060 (Dooley)
GP-1130 (Eggers)
MP-120 (Sullivan)
UL-212 (Parry)
NAAO-1100(Saint)
D-6100 (Peterson)
SOL-6416 (Geigle)
UC-293 (Cook)
UC-3240 (Harrison)
D-5300 (Friedman)
D-5100 (Cawley)
ALB-151 (Larralde)
GP-2100 (Zontek)
DK-602 (Banks)
PN-6651 (McDonald)
LC-2212 (Hicks)
MP-152 (West)
W-5000 (Buckey)
W-5000 (Troast)

WBR:AMARKS:Im:9/10/98:208-5000
AMARKS\LMADALENA\DOC\trans-do.co2\CONTROL #98001194
Revised: AYOUNG:Im:9/15/98:208-5000:Control#98001194
Bureau of Reclamation
Guidance for Implementing Indian Sacred Sites Executive Order (No. 13007)

I. Background: Indians have encountered numerous obstacles in seeking to practice their traditional religions. Such obstacles have at times included: laws, regulations and policies that limited certain practices, limited access to sacred sites; and, particularly before the enactment of the National Environmental Policy Act (NEPA), adverse impacts to sacred sites caused by Federal actions taken without advance consideration of potential adverse effects on Indian religious practices.

II. Executive Order 13007 (EO): To address these obstacles insofar as they affect sacred sites, on May 24, 1995, President Clinton signed Executive Order 13007. (See Appendix B.) Section 1 of the EO requires all executive agencies to manage Federal lands under their jurisdictions to:

(i) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, and

(ii) avoid adversely affecting the physical integrity of such sacred sites.

These goals are to be implemented to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions.

Section 2 requires each agency to develop procedures for implementing this EO. This guidance has been prepared for use by Reclamation staff in satisfaction of this Section 2 requirement.

III. Reclamation policy, procedures and guidance pertaining to protecting sacred sites and providing access to them by Indian religious practitioners: Consistent with the EO, Reclamation will manage Federal lands under its jurisdiction to: (i) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners¹, and (ii) avoid adversely affecting the physical integrity of such sacred sites. Activities to achieve these goals will be carried out to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions.

¹"Practitioner" and "practitioners" are used interchangeably in this document. Also, "religious practitioners" and "practitioners" as used in this document refer only to Indian religious practitioners as defined by the EO.
A. Carrying out the EO – Threshold issues:

1. Defining sacred sites: The EO defines a sacred site as "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion . . . ."

Some tribes have sacred sites on non-Federal lands, which are not covered by the EO. However, as noted below, such sites should also be considered when analyzing the potential impacts of Reclamation activities.

2. Identifying sacred sites: For the EO to apply, the "tribe or appropriately authoritative representative of an Indian religion [must inform] the agency of the existence of such a site." To insure that the government-to-government relationship is respected, Reclamation will ask tribes to inform Reclamation of the existence of sacred sites by means of a tribal resolution or other official means authorized by the tribal governing body. The resolution or communication should identify the site, specify the general area in which the site is found, or designate an "authoritative representative of an Indian religion" who can identify the location of the sites. To insure that a tribe has the opportunity to inform Reclamation about the existence of sacred sites in a potentially affected area, Reclamation should undertake to do early consultation with potentially concerned tribes, as discussed later in this document.

At a minimum, Reclamation needs to be informed that a sacred site is located on Reclamation lands or is in an area that could be affected by proposed Reclamation actions, so that Reclamation will know to consult with the appropriate tribal representatives to attempt to avoid adverse impacts to the sacred site. It will usually be preferable that the location be delineated with as much specificity as possible, and in some cases it may be impossible to provide the desired level of protection to the site without a specific location. However, in some cases it will be unnecessary for a site’s precise location to be provided to Reclamation. Reclamation staff should never attempt to pressure tribal representatives to provide more information concerning the location than they are comfortable giving. Unless otherwise delegated by the Regional Director, the Regional Offices will have the lead to coordinate with tribes concerning sacred site identification.

While Reclamation may ask questions necessary to determine that a site is covered by the EO (i.e., that a site is a “specific, discrete, narrowly delineated location on Federal land” that has been identified by the tribal government or individual authorized by the tribal government), Reclamation will not question the religious validity of the site, as doing so could create a
problem with the First Amendment's "Establishment Clause." As a practical matter, if a tribal government passes a resolution indicating that a sacred site as defined by Section 1(b)(iii) of the EO is located at or within a designated area, there is no information about the site that can properly be demanded of a tribe or practitioner. Rather, as indicated above, the best course will be to work with the designated tribal representatives to determine if adverse impacts are likely and what sort of changes would be required to avoid them.

Example: Reclamation is planning a canal alignment. Reclamation should consult with any potentially concerned tribes in the early planning stages to identify areas in which sacred sites are located and determine which alignments avoid adversely impacting the sites. If an alignment that Reclamation wishes to consider further would cause adverse impacts, Reclamation should inform the tribe of such and ask if additional information can be provided that would allow it to formulate a new alternative that would avoid or minimize adversely impacting the site. In some cases, the tribal representatives may provide enough additional information and it may be possible to formulate a new alternative; in other cases, they may be unable to do so. In the latter case, the alignment that would adversely impact sacred sites need not be eliminated from further consideration. However, if that alternative is presented to the decisionmaker for his consideration, it must be explained that choosing this alignment will cause adverse impacts to the tribe's sacred site, and any associated adverse social or cultural impacts included in the NEPA analysis. If this alternative is recommended, an explanation should be included as to why selecting it is not inconsistent with the EO.

3. Whose access is to be accommodated? The EO states that access is to be provided to "Indian religious practitioners." Generally Reclamation will assume that the EO applies to any tribal member who: (i) belongs to a federally-recognized tribe that has indicated an interest in a sacred site, and (ii) who identifies himself as a religious practitioner seeking access to the sacred site. In some cases a tribe may not recognize as a religious practitioner a member who is asking Reclamation for access to a sacred site. Such cases will be dealt with on a case-by-case basis. At

3The "Establishment Clause" of the U.S. Constitution's First Amendment precludes the government from enacting laws respecting the "establishment of religion." Generally this has been interpreted by the courts to prohibit governmental support intended to favor one religion over others, or intended to favor religion over non-religion. The application of this clause precludes excessive government "entanglement" with religion; this means, among other things, that governmental officials should not pass judgement concerning the validity of religious beliefs. The courts have applied specific tests to determine whether or not an action violates the Establishment Clause. An attorney knowledgeable in this area should be consulted when it is suspected that there may be a problem. If a problem is identified and cannot be worked around, Reclamation's Director, Native American Affairs Office should be notified.
all times, the EO and this guidance should be implemented in a manner respectful of the
government-to-government relationship.

4. **Other considerations:** The goals of the EO are not absolute, but are to be tempered by
other provisions of the EO. These include:

   a. **Not clearly inconsistent with essential agency missions:** This means that
      activities carried out pursuant to the EO should not interfere with carrying out authorized project
      or program purposes. A clear statement of the project or program purposes should be provided
      to a tribe or religious practitioner so requesting.

   b. **Practicability:** Carrying out the EO should not impose a significant
      operational or financial burden on Reclamation (e.g., altering the operation of power generation
      facilities and thereby significantly reducing power revenues; operating a dam in a way that is
      incompatible with an approved Endangered Species Act recovery plan). However, this is not to
      say that Reclamation cannot incur any additional costs in association with sacred sites, or that
      changes cannot be sought to approved operating plans. For example, in some cases it might be
      allowable and appropriate to adjust a dam release schedule, or to modify the hours for
      recreational use of an area, although doing so may reduce user fees somewhat.

   c. **Shall not cause interference with vested property interests or enforceable
      rights:** Reclamation shall not interfere with vested third party rights when implementing the
      EO. In other words, activities undertaken to carry out the EO should not put Reclamation in the
      position of being the losing party in a lawsuit brought by somebody whose vested rights or
      property interests (e.g., leasing rights, water rights, easements) have been interfered with. When
      in doubt as to whether there is probable merit to a third party’s claim of interference, consult the
      Solicitor’s Office.

   d. **Consistent with other laws, rules, regulations:** The EO does not authorize
      activities that are inconsistent with other laws, rules, or regulations by which Reclamation is
      bound; it neither grants rights that are not otherwise provided by law or treaty, nor limits such
      rights. Rules, regulations, or policies subsequently found to be inconsistent with the EO should
      be called to the attention of the Director, Native American Affairs Office and other appropriate
      Reclamation managers.

   e. **Federal lands:** For purposes of implementing the EO, sacred sites are limited
      to those located on Federal lands, where Federal lands are defined as the United States’ interests
      in land, including but not limited to leased lands and rights-of-way, but excluding Indian trust
      lands. When there are existing leases under which Reclamation is either the lessor or lessee,
      Reclamation will generally be agreeable to changing the terms of the lease to accommodate the
      EO if the other party is agreeable. However, no changes in leases will be made if doing so will
      interfere with vested property interests, or if Reclamation is asked to provide significant
      additional benefit to the other contracting party in exchange for agreeing to the changes. When
Reclamation enters into a new lease, it will endeavor to ensure that the goals of the EO are met. Some proposed Reclamation actions will have the potential to affect sites located on non-Federal lands and which are considered sacred by Indian religious practitioners. Although such actions fall outside the scope of the EO, as the EO only applies to sacred sites located on Federal lands, impacts to such sites located on non-Federal lands should be considered and discussed along with impacts to sacred sites on Federal lands.

f. Federally recognized tribes: The application of the EO is limited by its terms to federally recognized Indian tribes and members of such tribes. More precisely, the EO defines an “Indian tribe” as “an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791.” A list of Federally recognized tribes is published periodically in the Federal Register and the most recent list can be found on the Bureau of Indian Affairs website. However, as a tribe may gain recognition prior to the next issuance of the list, the absence of a tribe’s name should not be taken as conclusive evidence that it is not a Federally recognized tribe. When in doubt as to whether a tribe is federally recognized, one of the following sources should be consulted: the Bureau of Indian Affairs, Reclamation Regional or Area Office Indian program managers, or the Solicitor’s Office. When dealing with members of non-federally recognized tribes, Reclamation cannot apply the EO, but will endeavor to use other appropriate authorities, procedures or policies to provide protection for or access to such sites.

B. Accommodating access and ceremonial use:

1. Generally: All Reclamation managers with responsibility for approving requests for land use are to grant requests in accord with the EO, applicable laws and regulations, this document, and other Reclamation guidance on this subject. New leases and land and recreation management agreements that Reclamation enters into with other entities will be evaluated for compliance with this EO, and if necessary, language included to ensure that the future managing entity will also comply. When requested by federally recognized tribes, Reclamation will generally be agreeable to amending existing leases and management agreements to comply with the EO, so long as the other parties to the lease/agreement concur; however, this does not mean that Reclamation is obligated to renegotiate other provisions of the lease/agreement or that it needs to make additional concessions for the amendments.

2. Reclamation Manual - Directives and Standards: Procedures concerning land use will be found in the Reclamation Manual (RM) - Directives and Standards for “rights of use,” which are currently in the review process. Also, the new RM will contain Directives and Standards for comprehensively managing recreation areas, which are expected to be implemented in 1999. These Directives and Standards will accommodate the EO requirements.

3. Interim guidelines: Until the new RM takes effect, the following guidance will be
followed in the absence of an agreement between Reclamation and the tribe to do something else concerning providing access to sacred sites. Following the adoption of the RM sections mentioned above, the following should be considered as interpretive guidance to supplement other existing procedures, although in the event of any contradictions, language found in regulations or in the RM should control.

a. Receiving requests: Requests for access to a sacred site or for a particular land use should be made by the tribal representative or Indian religious practitioner to the Area Manager for the Reclamation office having jurisdiction over the lands. If the request is made to other Reclamation staff, the person receiving the request shall forward it to the appropriate person within Reclamation and notify the tribe of such. When doubt exists as to whom the "appropriate person" is, the request should be forwarded to the Regional Native American program manager, who will ensure that the request is correctly forwarded and the tribe notified. The request should not be returned to the tribe on the basis that it was directed to the "wrong person" within Reclamation. As some requests are time sensitive, a procedure should be implemented to ensure that requests can be processed in a timely manner, even during a prolonged absence by key staff.

b. Granting requests: The management level at which the requests are granted will be in accordance with other Reclamation procedures and will usually depend on the nature of the use being sought and the delegations of authority in the affected region.

c. Denying requests and appealing denials: Requests made by parties covered by the EO for access to sacred sites on Reclamation-managed lands will generally be granted unless doing so would exceed the limitations of the EO. If a request for access is denied, the tribal representative can appeal through the procedures described in 43 CFR Sec. 429 concerning decisions and appeals. When access is denied, the deciding official will ensure that: (i) the requestor is immediately informed of his appeal rights pursuant to 43 CFR Sec. 429; (ii) the requestor has a copy of this or other Reclamation guidance documents on the EO; and (iii) notification of the denial shall be provided to the Director, Native American Affairs Office. The tribe may request that the Director, Native American Affairs Office, or another mutually agreed upon person act in a mediatory capacity. When this occurs, Reclamation will inform the tribe in writing that the 30-day period that they have for lodging an appeal will not begin tolling until further written notice; this is necessary to ensure the tribe does not lose appeal rights because of their willingness to pursue a Reclamation-mediated resolution.

4. Confidentiality of information: When a tribe is granted access rights through existing Reclamation procedures, information about the access location generally becomes part of the public record and is also releasable through Freedom of Information Act (FOIA) requests. All efforts should be made to protect confidentiality; however, because of existing laws, it may not be possible to withhold sensitive information coming into Reclamation's possession. The issue of confidentiality should therefore be thoroughly analyzed and explained to the tribe or religious practitioners prior to issuing permits or other formal instruments. See Section III.E.1 below for
5. **Recovery of costs associated with use**: Reclamation should avoid assessing user charges for uses of Reclamation lands associated with the EO to the maximum practicable extent. However, under existing Federal regulations and Office of Management and Budget (OMB) policy, Reclamation may be required to assess user charges and administrative fees, depending on the nature of the requested use, although no fees should be collected when the cost of doing so would represent an unduly large part of the fee for the activity. Examples: user fees will generally be charged when additional staff is required to be on-duty to allow activities to take place; no fees should be assessed when a tribe is granted access to a place normally accessible to the general public to conduct activities that do not significantly add to Reclamation's costs for maintaining the area.

Additional material concerning the circumstances under which Reclamation must charge for rights-of-use and when it has discretion to waive these costs are in 43 CFR 429. These regulations allow for the waiver of charges for nonprofit organizations when the use will not interfere with the authorized current or planned use. However, rights-of-use by other governmental agencies are to be made with a fair market value reimbursement unless one of the stated exceptions applies. Agencies are also required by OMB Circular A-25 to collect user fees from “identifiable recipients(s) for special benefits” from Federal activities beyond those received by the general public. For purposes of determining what, if any, use fees must be charged, requests by a tribe or Indian religious practitioner seeking access to sacred sites in accordance with the EO should be given the most favorable treatment allowable by applicable law, regulation, and policy.

Coordination with the appropriate realty office is essential when attempting to determine what charges are required and where there may be discretion to waive them. If problems are encountered in having to charge fees that the responsible officials believe are more appropriately waived, a short report of such should be provided to the Director, Native American Affairs Office, and other appropriate Reclamation managers. If such reports are received, it may be possible to seek a blanket waiver for collection of fees in certain situations.

6. **Other issues:**

   **a. Accommodating access may include partial closures**: A tribe or Indian religious practitioners may sometimes request that areas open to the general public be closed during a particular time period to accommodate their access or ceremonies. Reclamation may agree to such closures when consistent with applicable laws, regulations, EOs and other policy and guidance. Proposed temporary or permanent closures will be considered on a case-by-case basis and should be implemented in coordination with the Solicitor's Office to avoid conflicts with the First Amendment's "Establishment Clause."

   **b. Accommodating “access to and ceremonial use of” sacred sites may include**
consumptive use: When requesting access to a sacred site, a tribe or practitioner may request to
collect and consumptively use resources associated with the ceremonial use of the site. When the
collection would occur on Reclamation managed lands and is consistent with other laws and
regulations, the request should be granted. The terms of the agreed-upon use will usually be
formalized in a use permit. Memoranda of Agreement (MOA), or other instrument However,
the EO does not diminish other rights a tribe may have to use a site, so that even in the absence
of a use permit or MOA, any existing treaty or other tribal rights must be respected.

C. Avoiding adverse impacts to sacred sites:

1. Generally: The EO directs agencies to avoid adversely impacting sacred sites,
subject to the specified limitations. While the NEPA compliance process is the primary vehicle
through which the goals of the EO are accomplished, other Reclamation programs will also take
into account the objectives of the EO. Information is also provided in this section concerning
consultation and coordination, as well as some key issues associated with seeking to avoid
adverse impacts to sacred sites.

2. NEPA compliance process: Reclamation's NEPA compliance process has been
modified to clarify the process for analyzing impacts of proposed Reclamation activities on the
physical integrity of sacred sites and access to the sites. Modifications to Reclamation's NEPA
process include:

(i) Categorical Exclusion Checklist (CEC) - Revised CEC addresses compliance
with the EO's requirements.

(ii) NEPA Handbook - Revised NEPA Handbook to address sacred sites. The
handbook is currently in the review process.

3. Integrating EO objectives with other Reclamation programs: Some Reclamation
programs define management strategies. The EO will be considered when defining these
strategies. The following are some of the programs identified, although this is not intended to be
a comprehensive listing:

a. Resource Management Plans (RMPs): During the development of RMPs,
resource or other management concerns are identified for a designated project area through
public meetings, tribal consultations, and research. Management strategies are then defined to
appropriately manage the identified concerns. RMPs can be used as an avenue to consult with
tribes about sacred site concerns in the study area. They can also document agreed-upon
processes to accommodate sacred sites' access or to implement programmatic impact avoidance
strategies.

b. Cultural Resources Management Programs: These programs complete
inventories to identify cultural resources, and develop and implement strategies for their
management and protection. These activities are carried out under various authorities, including
the NHPA and the Archeological Resources Protection Act (ARPA). Some of the
archeologically, historically, and culturally significant locations may be considered sacred sites
by tribes and Indian traditional religious practitioners. When they are, and to the extent they are
covered under the EO, development of an appropriate management strategy or treatment will be
carried out in consultation with the appropriate tribes.

c. Recreation Management Program: This program provides for the
management of recreation on Reclamation lands and at its facilities by other Federal or non-
Federal entities through various instruments, such as MOAs, cooperative agreements and
contracts. These instruments are frequently used to transfer certain limited jurisdicitive or
administrative responsibilities to other entities and to describe the responsibilities of the parties.
Through these instruments, access and avoidance of adverse impacts to sacred sites can be
addressed. Also, as noted above, the Reclamation Manual section pertaining to recreation
management will address the EO's requirements.

4. Ongoing adverse impacts: If a tribe or its authorized representative notifies
Reclamation that ongoing Reclamation actions are adversely impacting a sacred site or their
access to the site, Reclamation will work with the tribe to determine feasible alternatives that
would avoid or adequately mitigate the impacts and are otherwise consistent with the EO. An
effort should be made to select an alternative that avoids non-mitigatable adverse impacts,
although doing so will depend on the availability of adequate authority and funds.

5. Consultation: Meaningful consultation with Indian tribes and potentially affected
individuals will be carried out in accordance with existing Reclamation guidance for consultation
and government-to-government relationships, and will include consideration of the tribe's own
consultation process. For additional information, refer to Reclamation's Protocol Guidelines:
Consulting with Indian Tribal Governments (February 3, 1998), as well as Appendix A which
briefly summarizes considerations to take into account when carrying out consultation
concerning sacred sites. In some cases, Reclamation may be aware of two or more tribes with an
interest in a sacred site. When this is so, Reclamation should work with each of the tribes, either
jointly or individually, as the tribes and Reclamation determine is appropriate.

6. Coordination with other agencies or land managers: When other Federal agencies
are managing lands on which Reclamation facilities are located, the land managing agency will
have the lead for consulting with tribes regarding access to sacred sites. When non-Federal
entities manage such lands, Reclamation will have the lead to consult. Reclamation will work
with the non-Federal entities to inform them of the EO and explain what compliance entails. In
the absence of an agreement to the contrary, requests for access to sacred sites should be
forwarded to designated Reclamation staff. Actions proposed by state agencies on Reclamation
lands will generally be covered by NEPA and the EO. The EO will be considered during the
NEPA planning process for those actions, and these considerations reflected by appropriate
7. Unavoidable adverse impacts: If in the course of performing its work Reclamation suspects that its actions may adversely impact a sacred site, Reclamation will notify and consult with the affected tribe. Reclamation will attempt to coordinate with the tribe to learn what, if any, mitigating activities might be appropriate and to attempt to reach agreement with the tribe to mitigate the adverse effects. While no new mitigation authority is created by the EO, mitigation may be accomplished through various means, such as the comprehensive management planning process, RMPs, MOAs, or authorized land exchanges. No adverse action will be taken by Reclamation without adequate notification to and appropriate consultation with the tribe, unless: (i) emergency conditions prevent these steps from being taken, or (ii) the tribe has not informed Reclamation concerning the existence of sacred sites in the affected area and Reclamation is not otherwise aware of potentially impacted sacred sites.

8. Other limitations and clarifications:

a. Avoiding adverse impacts: The language of the EO calls for avoiding adversely affecting sacred sites, but not for protecting or maintaining them. However, Reclamation should not ignore a situation in which some protective or maintenance actions appear warranted. At a minimum, Reclamation should provide the sacred site the same protections afforded other parts of the unit of which the sacred site is a part. There may be cases when other applicable law will call for protection and maintenance of a sacred site, such as certain cultural resource laws when the site qualifies for protection under the act. In some instances, it may be appropriate for Reclamation to take special measures to ensure that a sacred site is afforded appropriate protection and is treated with proper respect.

b. Physical integrity of sites: The terms of the EO limit its application to the "physical integrity" of the sacred site, so that it does not apply to other attributes, such as spiritual integrity. Nevertheless, in attempting to avoid adverse impacts to a site, Reclamation should be sensitive to those values important to the tribe and necessary for the proper treatment of the sacred site. It is anticipated that in most cases, adverse impacts to non-physical aspects of sacred sites would involve negative social impacts, which should be addressed as part of the environmental compliance process.

c. Sacred sites usually not trust assets: The fact that a location may be a sacred site does not conclusively determine its status as a trust asset. As defined by the EO, sacred sites located on Federal lands will usually not be trust assets, although sites considered sacred by religious practitioners and located on Indian trust lands generally will be trust assets, deriving that status from the land on which they are located. When trying to determine if a sacred site is also a trust asset, one should look for an independent source for concluding that it has trust status (e.g., a treaty right or statute).

d. Applicability to all sacred sites: Reclamation interprets the EO to apply to all
sacred sites which otherwise meet the definition provided in the EO, and not only to those sacred sites with a pattern of regular use. This interpretation is based on the understood intent of the EO and is supported by the Department’s and Solicitor Office’s representatives on the Department’s inter-bureau EO implementation team.

D. Memorializing understandings and agreements: Reclamation will encourage the use of MOA between the appropriate regional or area office and tribe setting forth the mutual understandings and agreements of the tribe and Reclamation with regard to access and use of sacred sites on Federal lands, as well as how notice should be provided in the event there are potential adverse impacts to the site, access to the site, or the site’s environs. Government-to-government protocols may also be established through MOA. Topics addressed in the MOA may include, though need not be limited to:

(i) Identification of site or geographic area of interest: The specific location of the sacred site is not necessarily required in this document, but only the understanding that a specified area contains sensitive sites and that the tribe wishes to be notified when Reclamation contemplates actions within that area.

(ii) Notification processes: This section should explain the “when, how and where” of Reclamation notification to the tribe concerning potential Reclamation actions that may affect sacred sites.

(iii) Contact persons: The Reclamation and tribal contact persons for notification, consultation, and access needs should be identified.

(iv) Special accommodations that are being sought or have been agreed to: Examples of such accommodations are specific date(s) for which access is required; and restrictions of certain activities that are not compatible with the practitioners’ activities, where the restrictions have been agreed to by Reclamation and the tribe and deemed legally permissible by the Solicitor’s Office.

(v) Dispute resolution and hold harmless clauses: Specify procedures that will be used to resolve potential disagreements, as well as clauses concerning liability. As required by 43 CFR 429, all rights-of-use for access to sacred sites will include an appropriate solicitor-approved hold harmless clause.

(vi) Formal land use instruments: If formal land use instruments are necessary, specify the types of instruments required and the process for obtaining them.

These memoranda or other instruments should be entered into in a manner consistent with the June 14, 1996, Reclamation policy and procedures for maintaining government-to-government relationships, the February 3, 1998, Reclamation protocol guidance, as well as with any
subsequently issued Reclamation guidance concerning consultation with tribal governments.

Generally the actual grant or authorization to use Federal lands cannot be made through a MOA, but must be made through a formal land use instrument, such as an access permit or easement grant. When it is desired to grant authorization in a MOA, the appropriate Realty Officer or the Solicitor's Office will be conferred with. When necessary to issue a formal land use instrument, some tribes may prefer that group permits be issued to it, rather than individual permits to its members; this preference should be accommodated when feasible.

E. Other issues:

1. Confidentiality of information regarding sacred sites: Reclamation's files are generally accessible to the public, unless protected from disclosure by Federal law. If a sacred site is also a "historic property" as defined by the NHPA or an "archeological resource" as defined by the ARPA, information about such sites may qualify to be withheld from public scrutiny, as both NHPA and ARPA exempt sections of the files of qualifying cultural resources from FOIA requests. However, sensitive information could still be released if the FOIA request is successfully appealed. Furthermore, Reclamation will not be able to prevent release of sensitive information if it is subpoenaed as information during a lawsuit. Reclamation therefore strongly advises tribes to maintain in their possession all information regarding sacred sites that they believe is too sensitive for public release.

Example: A tribe's traditional religious practitioner's are concerned about possible adverse impacts of actions Reclamation is considering. The tribal council may choose to pass a resolution requesting that certain impacts in specified area be avoided because of possible harm to sacred sites within all or part of the affected areas. The resolution can become part of the public record that Reclamation can show to prove it was not arbitrary or capricious in seeking to avoid certain impacts; however, the location of the site is protected, as the resolution does not pinpoint the site.

2. No financial compensation to tribal representatives for developing sacred sites inventory: Generally Reclamation does not provide compensation for contributing information or comments as part of a compliance process, although there may be some cases when this is done. Consequently, input on sacred sites provided by Indian tribes, organizations, and individuals will usually be on a non-compensable basis. In the course of developing inventories of, or information on, sacred sites, Reclamation should try to avoid creating situations whereby travel or per diem costs are incurred. Efforts should be made to accommodate Indian participation whenever possible by holding meetings on reservations or at other mutually-determined locations, and by conferring with tribes to establish mutually agreed-upon time frames and consultation protocols.

3. Dispute resolution: When appropriate, Reclamation will work with the aggrieved tribe or religious practitioner to resolve EO disputes using ADR procedures based on non-
adversarial methods that show mutual respect for each other's interests. By mutual consent of the pertinent Reclamation office and the potentially affected tribe, agreed-upon neutral parties may be used to facilitate or mediate disputes. Although the use of ADR methods is encouraged, a tribe or Indian religious practitioner would not be precluded from using formal appeals processes that may apply in a specific situation.

4. Evaluating implementation effort: Reclamation managers and staff involved in implementing the EO should meet periodically with affected tribes, authorized representatives or Indian religious practitioners to assess the effectiveness of the EO implementation process and receive suggestions concerning changes in the way Reclamation implements the EO. Unless the Regional Director has established other coordination procedures, the appropriate Area Manager will coordinate these meetings.

Reclamation managers and staff should also meet periodically among themselves to discuss the effectiveness of the implementation processes, share experiences to aid other staff in addressing issues, and recommend changes in implementing the EO. These meetings will be coordinated by the Director, Native American Affairs Office. Reclamation managers and staff, as well as affected tribes and practitioners, are also encouraged to provide interim feedback to the Director concerning problems encountered in implementing the EO and, when available, recommended solutions to resolve the problems.

5. Internal training: Reclamation will provide training for managers and staff responsible for carrying out activities that could be affected by the EO, subject to the availability of funding and the ascertainment of need.

6. Impact on program costs: Overall the implementation of the EO could cause some increases in program costs. The impact on planning and environmental activities is expected to be minimal, as the EO represents more of a clarification as to what is required rather than a new policy. However, the policies stated by the EO could impact the decisionmaking process in some cases, resulting in some increased costs for project or program implementation or operations.

7. Reclamation authority and funding for activities: The EO does not create a new authority for carrying out or funding activities carried out to achieve its goals. Activities undertaken to implement the EO will be treated as part of existing projects or programs, and those funds will be appropriately used to ensure that the requirements of the EO are satisfied.

8. Designation of sacred site coordinators. - Regional Directors and Area Managers are encouraged to designate one or more staff who shall be responsible for coordinating or carrying out sacred sites activities, such as preparing the sections of the NEPA document addressing the EO or responding to requests for access to sacred sites. Regional Native American program managers are urged to maintain lists of all such coordinators, within their region and to provide copies of the current list to the Director, Native American Affairs Office. Doing this will facilitate the ability of Reclamation to respond quickly to inquiries concerning the EO.
Appendix A: Consultation for EO 13007

The following, which was adapted from the November 1996 draft of the NHPA Section 110 guidelines, should be considered when consulting with Indians concerning sacred sites, absent other Reclamation guidance to the contrary. Reclamation's Protocol Guidelines: Consulting with Indian Tribal Governments should also be referred to for more guidance concerning carrying out consultation, including developing protocol to conduct consultation with tribes.

"Consultation" is the process of seeking and considering the views of others. It means to confer and discuss, not simply inform. Reclamation does not have to accept or act upon the input that it receives through consultation; however, it is obligated to consider that input when it is relevant to the issue(s) under study or consideration.

Reclamation will consult to: (i) gain information and a better understanding of issues, and (ii) ensure that others who may be affected by their decisions have a reasonable opportunity to provide input.

Whom to Consult

For EO purposes, consultation should occur at least with tribes indicating an interest in potentially affected sacred sites. Preferably, Reclamation should also offer to consult with tribes thought to have an interest in Reclamation activities, although they may not have expressed it, including those tribes who currently or historically have used the lands affected or potentially affected by Reclamation activities.

When to Consult

Consultation should be done as early in, and continue through, the decision-making process. Soliciting others' advice and opinions on which action to take when the course of action has already been determined is not true consultation. If Reclamation does this, it is really seeking to have a decision "ratified" or otherwise agreed with.

What to Consult About and at What Level of Detail

In determining what to consult about and at what level of detail, Reclamation should consider what it needs to know to make a wise decision. In most situations, the less specific the decision being made, then the less specific the information that is needed. Information gained through the consultation process may include such items as: areas that contain sacred sites; and understanding the tribe's position on various issues, such as what constitutes respectful treatment of a sacred site.

How to Consult
The consultation procedures that Reclamation uses help ensure that it achieves the goals of consultation. To work, Reclamation's procedures for consulting must be both systematic and flexible. Systematic procedures allow for information to be obtained in a consistent format. Flexible procedures permit accommodation of unusual circumstances, such as consulting with groups or individuals whose cultural values or modes of communication differ from standard government methods of communication.

Whether consulting on broad agency programs or specific projects, Reclamation should:

- Approach the process in good faith, and should not assume an adversarial relationship.
- Make its interests and constraints (including laws, processes, and schedules) clear at the beginning.
- Be forthcoming about the degree of confidentiality that tribes, individuals or groups can expect in terms of their identity and the information that they provide. (As a general practice, Reclamation should not request or seek confidential information unless it can demonstrate a need for such information and can ensure that it will not be released through avenues such as FOIA requests.)
- Seek to acknowledge and understand others' interests.
- Identify shared interests.
- Consider a full range of options.
- Try to identify options that satisfy all parties.

Traditionally, Reclamation has initiated consultation through formal processes, such as notices in the Federal Register and form letters describing its planned activities and asking for comments or attendance at meetings. Such meetings commonly are part of the NEPA public involvement processes. Reclamation should consider that some tribal governments have established, legally-based procedures for acting on requests for information or making decisions. These procedures must be followed and can sometimes be time consuming. Reclamation should take this into consideration when planning for and conducting consultations with tribal governments.

When Reclamation accommodates others in the ways it takes in information and provides information back, it benefits from doing so. Reclamation may find that asking others how they wish to be “consulted with” and agreeing on “how to consult” during the first communications will facilitate later consultation and avoid confusion and misunderstandings. Professional facilitators or mediators may be helpful.

In the spirit of these guidelines, consultation should generally start with a letter to appropriate tribal entities, then be followed up with phone calls or personal visits, if necessary, depending on the activity being considered. Regions may establish, consistent with other Reclamation consulting guidance, consultation procedures appropriate for their geographic areas and the tribes with whom they will be consulting.
September 16, 1998

Appendix B:

President Clinton's Executive Order on Indian Sacred Sites

This document entered May 27, 1996

Released by the White House, May 24, 1996

SUBJECT: INDIAN SACRED SITES

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of Sacred Sites.

(a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

(ii) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and

(iii) "Sacred site" means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion, provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Section 2. Procedures.

(a) Each executive branch agency with statutory or administrative responsibility for the
management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments.”

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things,

(i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites;

(ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and

(iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Section 3.

Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, “agency action” has the same meaning as in the Administrative Procedure Act (5 U.S.C. 551(13)).

Section 4.

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

Signed: William J. Clinton
The White House
May 24, 1996
Other Indian Sacred Sites References
(July 2004)

Department of Interior, Departmental Manual, Part 512, Chapter 3- Departmental Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites (effective Date 6/5/98

ECM 97-2- Departmental Responsibilities for Indian Trust Resources and Indian Sacred Sites on Federal Lands (See Indian Trust Asset attachment).

Additionally, the following reference provides guidance to carrying out consultation with federally recognized Indian tribes: Reclamation’s Protocol Guidelines: Consulting with Indian Tribal Governments, February 3, 1998 (Revised February 9, 2001).
Memorandum

To: All Employees
From: Commissioner

Subject: Indian Trust Policy

Indian trust assets are legal interests in property held in trust by the United States for Indian tribes or individuals. The Secretary of the Interior is the trustee for the United States on behalf of Indian tribes. All Department of the Interior agencies, including the Bureau of Reclamation (Reclamation) share the Secretary's duty to act responsibly to protect Indian trust assets. The attached document sets forth Reclamation's policy to protect Indian assets from adverse impacts of its actions.

By copy of this memorandum I am directing the Assistant Commissioners of Program, Budget, and Liaison and Resources Management to incorporate into existing environmental directives this policy by October 1, 1993.

Attachment
Bureau of Reclamation
Indian Trust Asset Policy

This document describes the Bureau of Reclamation's (Reclamation's) policy to protect Indian trust assets from adverse impacts of Reclamation programs and activities, thereby better enabling the Secretary of the Interior (Secretary) to fulfill his responsibility to Indian tribes. In furtherance of this policy, Reclamation will modify its National Environmental Policy Act (NEPA) Handbook procedures.

Background

Indian trust assets (trust assets) are legal interests in property held in trust by the United States for Indian tribes or individuals. Examples of things that may be trust assets are lands, minerals, hunting and fishing rights, and water rights. The United States, with the Secretary as the trustee, holds many assets in trust for Indian tribes or Indian individuals.

The United States has an Indian trust responsibility (trust responsibility) to protect and maintain rights reserved by or granted to Indian tribes or Indian individuals by treaties, statutes, and executive orders, which rights are sometimes further interpreted through court decisions and regulations. This trust responsibility requires that all Federal agencies, including Reclamation, take all actions reasonably necessary to protect trust assets.

Policy

Reclamation will carry out its activities in a manner which protects trust assets and avoids adverse impacts when possible. When Reclamation cannot avoid adverse impacts, it will provide appropriate mitigation or compensation.

To carry out this policy, Reclamation will modify its NEPA compliance procedures to require evaluation of the potential effects of its proposed actions on trust assets. Reclamation will perform interdisciplinary analyses to assess potential impacts to trust assets and the consequences of such impacts for the Indian people who beneficially own the assets. The procedure shall include format changes in all NEPA compliance documents to highlight all trust asset impacts. These changes shall include:

- a statement that no impacts to trust assets are anticipated, when such is the case;
- a clearly labeled section discussing anticipated impacts to trust assets;
- an Indian trust asset item in the Categorical Exclusion Checklist.
MEMORANDUM

To: Assistant Commissioner - Engineering and Research
   Attention: D-3000
   Assistant Commissioner - Human Resources
   Attention: D-4000
   Assistant Commissioner - Program, Budget, and Liaison
   Attention: W-6000
   Assistant Commissioner - Administration
   Attention: D-7000
   Regional Director, PN, MP, LC, UC, GP
   Attention: 100

From: J. William McDonald
      Assistant Commissioner - Resources Management

Subject: National Environmental Policy Act Handbook Procedures to Implement Indian Trust Asset Policy (NEPA)

The Commissioner has approved the subject procedures (enclosed) and directed that they be implemented immediately. As part of the implementation of the enclosed procedures, the Commissioner has directed that an Indian trust asset coordinator be appointed at the regional level to oversee compliance activities (Commissioner's memorandum dated November 29, 1993, enclosed).

In addition, the enclosed procedures are amended to include a November 8, 1993, Secretarial Order 3175 directive that environmental assessments, environmental impact statements, management plans, etc., should "... clearly state the rationale for the recommended decision and explain how the decision will be consistent with the Department's trust responsibilities." A copy of Secretarial Order 3175 is also enclosed for your information.

If you have questions concerning the procedures, please contact Rebecca Westra at (303) 236-9336, extension 301. Questions concerning the Indian trust asset policy being implemented by these procedures should be directed to Adrienne Marks at (202) 208-5105.

Enclosures

Copies to persons on attached sheet.
cc:  Commissioner, Attention: W-1000
     Principal Deputy Commissioner, Attention: W-1010
     Deputy Commissioner, Attention: D-1000
     Assistant Commissioner - Program, Budget, and Liaison
          Attention: W-6100 (Marks)
     Regional Director, Boulder City NV
          Attention: LC-108 (Saint)
     Regional Director, Salt Lake City UT
          Attention: UC-710 (Jacobson)
     Regional Director, Billings MT
          Attention: GP-130 (Rawlings)
          (w/encl to each)
ITA-1 Indian Trust Asset (ITA) Policy

The United States has a trust responsibility to protect and maintain rights reserved by or granted to American Indian (Indian) tribes or Indian individuals by treaties, statutes, and executive orders. These rights are sometimes further interpreted through court decisions and regulations. This trust responsibility requires that all Federal agencies, including Reclamation, take all actions reasonably necessary to protect ITAs.

Reclamation's Indian Trust Asset Policy was signed by the Commissioner on July 2, 1993. The Policy states that Reclamation will carry out its activities in a manner which protects ITAs and avoids adverse impacts when possible. When Reclamation cannot avoid adverse impacts, it will provide appropriate mitigation or compensation. Under no circumstances should Reclamation engage in a Fifth Amendment taking of ITAs without statutory authority and adequate compensation.

ITAs are legal interests in property held in trust by the United States for Indian tribes or individuals, or property that is the United States is otherwise charged by law to protect. Examples of resources that could be ITAs are lands, minerals, hunting and fishing rights, water rights, and instream flows.

ITA-2 Applying NEPA Early - Identifying ITAs

The NEPA process should consider potential impacts on ITAs at the earliest reasonable time in the decisionmaking process. The initial step will be to identify ITAs in or near the affected area. ITA identification should involve consultation with: (1) potentially affected tribes, Indian organizations or individuals, and (ii) the Bureau of Indian Affairs, the Office of American Indian Trust, the Solicitor's Office, Reclamation's Native American Affairs Office (W-6100), or the Regional Native American Affairs coordinator, all of which are in the Department of the Interior. Refer to Section 2-1, "Apply NEPA Early," for additional guidance.
ITA-3 Categorical Exclusion Checklist (CEC)

A question addressing impacts to ITAs is included in the revised CEC (Figure 2-4). Contact with the entities listed in Section ITA-2, "Applying NEPA Early - Identifying ITAs," should be established to ascertain general locations and types of ITAs in or near the affected area. A signature line has been added to the CEC for concurrence in the ITA response by the appropriate Regional Director, Assistant Commissioner, or the designated ITA representative. Refer to Sections 2-2, "Categorical Exclusions," and 2-3, "Categorical Exclusion Checklist," for additional guidance.

ITA-4 Environmental Assessments (EAs) and Environmental Impact Statements (EISs)

The format and contents of EAs, EISs, and EIS Supplements required by Chapter 2, "Initiating the NEPA Process," and Chapter 4, "The Environmental Impact Statement," will be supplemented by the sections discussed below.

The methodology for determining whether ITAs exist will include discussions with the entities listed in Section ITA-2, "Applying NEPA Early - Identifying ITAs," and should include a review of relevant treaties, statutes, and executive orders. Relevant agreements and contracts should also be considered in the impact analysis.

A. Format and Content -

1. Summary - When there is a summary, a labeled section will briefly describe any expected impacts of the proposed action on ITAs. If there are no ITAs, or if no impacts to ITAs are anticipated, a statement to that effect will be included. The summary table will include impacts to ITAs.

2. Proposed Action and Alternatives - When it is determined there will be potential impacts to ITAs, a labeled section will present those mitigation measures to protect ITAs which are part of the alternatives. Any additional mitigation measures will be included in the Environmental Commitments Section. Effort should be made to seek agreement with affected tribes or owners of allotted lands as to reasonable ITA protection, mitigation or compensation. Agreement may also be necessary with the Corps of Engineers, Fish and Wildlife Service, Bureau of Indian Affairs, and other responsible Federal agencies.
3. Affected Environment and Environmental Consequences

a. Separate Chapter on Affected Environment - When there is a separate chapter on the Affected Environment and ITAs are located in or near the potentially impacted area, the chapter will contain a labeled section identifying potentially impacted ITAs, or a statement that there are no ITAs. This section will include full descriptions of the ITAs or a summary of ITAs described elsewhere in the chapter.

b. Separate Chapter on Environmental Consequences - When potential impacts to ITAs are identified, the chapter describing environmental impacts will contain a labeled section on ITAs. The section will include a full analysis of ITA impacts or a summary of impacts fully described elsewhere in the chapter. If the alternative would have no impact on ITAs, this should be stated.

c. Combined Chapter on Affected Environment and Environmental Consequences - The chapter will include a statement that there will be no impacts to ITAs, or a labeled section including the information discussed above in 3.a. and 3.b.

4. Consultation and Coordination - The chapter will include a separate, labeled section summarizing or describing public involvement activities undertaken to identify and assess impacts to ITAs.

5. Attachments - Environmental Commitments - The attachment will identify all measures included in the proposed action to avoid, mitigate, or compensate for impacts to ITAs.

B. Public Involvement -

A diligent effort will be made to elicit an appropriate level of input from potentially affected Indian communities in preparing and reviewing the NEPA compliance document. Public involvement should be used to: (i) assist to identify potentially affected ITAs and assess potential impacts; (ii) provide potentially affected Indian people with information about the actions being studied; and (iii) involve potentially affected Indian communities in the decisionmaking process.

The public involvement program for actions potentially affecting ITAs will include consultation with interested and affected individuals, organizations, agencies, tribal governments, and other governmental entities having jurisdictional responsibilities for the assets. Refer to Sections 2-4.C and 3-7, "Public Involvement," for further information.
ITA-5 Other Actions Associated with the Environmental Impact Statement (EIS)

A. Notice of Intent (NOI) -

When appropriate, the Federal Register NOI to prepare the EIS will briefly: (i) address the intent to assess potential impacts to ITAs, and (ii) request input about concerns or issues related to ITAs from potentially affected Indian groups and individuals, the general public, and state and Federal agencies. Refer to Section 3-5, "Notice of Intent," for additional information.

B. Notice of Availability (NOA) -

The Federal Register NOA for both the draft and final EIS will, if appropriate, refer to the analysis of impacts to ITAs.

ITA-6 Review, Filing, and Distribution

Procedures specified in Sections 2-5.C, "Processing," and 3-10, "Review, Filing, and Distribution," are amended so that potentially affected and interested Indian tribes, communities, and individuals will be placed on the distribution list to receive EAs and EISs.

ITA-7 Findings of No Significant Impact (FONSI) and Records of Decision (RODs)

The FONSI or ROD will include: (i) a statement that there would be no impacts to ITAs, or (ii) a statement describing the expected impacts of the proposed action on ITAs, (iii) a listing of unresolved ITA issues, (iv) a list of any commitments to prevent, mitigate, or compensate adverse impacts to ITAs, and (v) a summary of any mitigation monitoring and enforcement programs related to ITAs. Refer to Section 2-5, "Finding of No Significant Impact," and Section 7-1, "Record of Decision," for additional information.
ORDER NO. 3175

Subject: Departmental Responsibilities for Indian Trust Resources

Sec. 1 Purpose. This Order clarifies the responsibility of the component bureaus and offices of the Department of the Interior to ensure that the trust resources of federally recognized Indian tribes and their members that may be affected by the activities of those bureaus and offices are identified, conserved and protected. It is the intent of this Order that each bureau and office will operate within a government to government relationship with federally recognized Indian tribes and that the Bureau of Indian Affairs provide timely and accurate information upon the request of their Interior Department counterparts.

This Order is for internal management guidance only, and shall not be construed to grant or vest any right to any party in respect to any Federal action not otherwise granted or vested by existing law or regulations.

Sec. 2 Authority. This Order is issued under the authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262).

Sec. 3 Responsibility. The heads of bureaus and offices are responsible for being aware of the impact of their plans, projects, programs or activities on Indian trust resources. Bureaus and offices when engaged in the planning of any proposed project or action will ensure that any anticipated effects on Indian trust resources are explicitly addressed in the planning, decision and operational documents; i.e., Environmental Assessments, Environmental Impact Statements, Management Plans, etc., that are prepared for the project. These documents should clearly state the rationale for the recommended decision and explain how the decision will be consistent with the Department's trust responsibilities. Bureaus and offices are required to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may affect, the appropriate office of the Bureau of Indian Affairs, and the Office of the Solicitor (for legal assistance) if their evaluation reveals any impacts on Indian trust resources. All consultations with tribal governments are to be open and candid so that all interested parties may evaluate for themselves the potential impact of the proposal on trust resources.
ORDER NO. 3175, Amendment 1

Subject: Departmental Responsibilities for Indian Trust Resources

Section 4 of Secretary's Order No. 3175, dated November 8, 1993, is amended to read as follows:

Sec. 4 Effective-Date. This Order is effective immediately. Its provisions shall remain in effect until they are converted to the Departmental Manual, or until it is amended, superseded, or revoked, whichever occurs first. In the absence of the foregoing actions, however, this Order will terminate and be considered obsolete on June 1, 1995.

Date: August 17, 1994
MEMORANDUM

OCT 21 1994

To: Director, Reclamation Service Center
   Regional Director, PN, MP, LC, UC, GP

From: Daniel P. Beard
       Commissioner

Subject: Indian Trust Asset Policy: Guidance for Implementing

Attached is a document dated August 31, 1994, containing a series of questions and answers about Reclamation's Indian trust policy and National Environmental Policy Act (NEPA) implementing procedures. This document incorporates comments provided by Reclamation's Denver and Regional Offices, as well as by the Solicitor's Office and the Office of American Indian Trust.

Reclamation has recently become the first Interior bureau to be found in "substantial compliance" with Secretarial Order 3175, which requires all bureaus to develop procedures for protecting Indian trust assets. As part of the compliance process, Reclamation has agreed that this questions and answers document shall be provided to all persons responsible for carrying out its trust asset policy and procedures, included with any training materials on Indian trust responsibilities, and included as a supplement to general NEPA materials. Please insure that the appropriate distribution is made.

Although no changes are planned for this document in the immediate future, comments are still welcome. They should be directed to:

Adrienne Marks, code W-6100
fax: 202-208-6688
lan: AMARKS

Attachment

cc: Director, Operations
bc:  W-6100: (2), W-5000 (Troast), D-5300 (BGlenn)
     LC-108 (Saint), LC-150 (Peterson), GP-400 (Byers)
     UC-710 (Jacobson), PN-150 (JLawrence), MP-130 (PWelch)
     (with attachment)

WBR: AMarks: ld: 10/13/94: 208-5104
H: \HOME\LDAVIS\DOC\TRANSQ&A.3
BUREAU OF RECLAMATION
INDIAN TRUST ASSET
POLICY AND
NEPA IMPLEMENTING PROCEDURES

QUESTIONS AND ANSWERS ABOUT
THE POLICY AND PROCEDURES
Forward: This document provides answers to questions about Reclamation's Indian trust asset policy and the NEPA procedures implementing it. The primary audience is people who have no previous experience in dealing with Indian trust assets, but who now share the responsibility for carrying out the policy. An attempt was made to explain concepts as clearly as possible. However, as the subject of trust assets is inherently legalistic, some of the answers unavoidably share this characteristic. Despite this, these answers are not definitive legal opinions; whenever there is doubt about a legal point, the Solicitor's Office should be consulted.

Abbreviations used:

CEC - NEPA Categorical Exclusion Checklist
Interior - Department of the Interior
ITA - Indian Trust Asset
NEPA - National Environmental Policy Act
NAAO - Native American Affairs Office
Reclamation - Bureau of Reclamation
Tribe - Federally recognized Indian tribe

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Part I: ITA basics: What they are and where they are

I-1 - What are ITAs?

ITAs are "legal interests" in "assets" held in "trust" by the Federal Government for federally recognized Indian tribes or individual Indians.¹

"Assets" are anything owned that has monetary value. The asset need not be owned outright, but could be some other type of property interest, such as a lease or a right to use something. Assets can be real property, physical assets or intangible property rights.

A "trust" has three components: the trustee, the beneficiary, and the trust asset(s). The beneficiary is also sometimes referred to as the "beneficial owner" of the trust asset. In this trust relationship, title to ITAs is held by the United States (trustee) for the benefit of an Indian tribe or Indian individuals (beneficiary).

A characteristic of an ITA is that it cannot be sold, leased, or otherwise alienated without the United States' approval. While most ITAs are located on the reservation, they can also be located off-reservation. Examples of things that can be ITAs are lands, minerals, water rights, hunting and fishing rights, other natural resources, money, or claims.

"Legal interest" means there is a property interest for which a legal remedy, such as compensation or injunction, may be obtained if there is improper interference. ITAs do not include things in which a tribe or individuals have no legal interest. For example, off-reservation sacred lands in which a tribe has no legal property interest are not ITAs. In such a case, if other tribal interests (e.g., religious and cultural) could be impacted by a Reclamation action, these interests should be addressed in the cultural resources and social impacts assessments.

I-2 - Are listings of ITAs available?

There is not a comprehensive listing of ITAs for tribes and individual Indians, although such listings may exist for

¹These terms defined in Part II of this document.
some tribes. The Office of American Indian Trust is charged with assisting the Bureau of Indian Affairs to develop inventory listings of ITAs for all tribes. However, a lack of funding has prevented this inventory from progressing beyond an early stage. In the absence of an inventory, individual determinations must be made whenever it is essential to determine the trust status of a particular asset. As will be discussed below, it is not always necessary to determine this status.

I-3 - What is the distinction between "Indian trust resources" and "ITAs"?

Reclamation's trust policy does not distinguish between these terms, although there are other situations which do distinguish. For example, the implementing regulations for the Indian Self-Determination and Education Assistance Act refers to "trust assets" as one type of "trust resources." Interior's Order 3175 refers only to Departmental responsibilities for Indian "trust resources." Reclamation's ITA policy extends to the same property covered by this order.

I-4 - Where are ITAs found?

ITAs can be found anywhere. While most ITAs are found on reservation lands, they can also be found off-reservation. When dealing with hunting, fishing, and water rights, it is especially important to consider off-reservation ITAs.

As noted below in the cultural resource discussion, the land status can sometimes affect whether something is considered an ITA. That is, whether the resource is located on public, trust, or non-trust private lands could affect the determination as to whether a thing is an ITA.

I-5 - Are ITAs found on ceded lands?

Ceded lands are a special type of lands that can be located on or off-reservation. These are lands that were Indian lands before ownership was formally transferred to the United States. ITAs can sometimes be found on ceded lands; this needs to be determined on a case-by-case basis.

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2 25 CFR § 272.2(r)
I-6 - When is a cultural resource an ITA?

As defined in federal statutes and regulations, cultural resources are tangible property recognized as important to the nation's history and culture. Cultural resources include archeological sites, buildings and structures, locations, and landscapes. They are the subject of historic preservation laws.

In the absence of a treaty or act of Congress specifying otherwise, the trust status of a cultural resource generally depends on the status of the land on which the resource is found.

- Indian trust lands\(^1\) - Cultural resources located on Indian trust lands are often the property of the tribe or Indian beneficially owning those lands.\(^4\) These cultural resources are frequently ITAs.

- Private lands (or "fee" lands) - Private lands can be trust or non-trust lands. There are generally no trust responsibilities\(^5\) for archeological resources found on non-trust private lands, whether owned by Indians or non-Indians. Clarification should be sought when the term "private lands" is used, as the term is often used to refer only to non-trust lands.

- Public lands - Generally, cultural resources located on public lands belong to the Federal Government.\(^6\) As such, they are usually not ITAs.

I-7 - Are the human remains and "cultural items" that NAGPRA deals with trust assets?

Generally not. The Native American Graves Protection and Repatriation Act (NAGPRA), among other things, recognizes Indian ownership of human remains and certain cultural items located on lands within the exterior reservation boundary

\(^1\)This term defined below in Part II.

\(^4\)43 CFR § 7.13(b)

\(^5\)This term discussed below in Part II.

\(^6\)e.g., 16 U.S.C. § 470cc(b)(3)
and on public lands. (At this time it is not clear how the Department of the Interior implementing regulations will deal with non-Indian owned lands within exterior reservation boundaries.) Human remains and NAGPRA cultural items are not given trust status by virtue of NAGPRA. If in some situations they do have trust asset status, they derive it from some other source, such as land status, treaty or another statute.

Part II: Other background concepts and definitions

II-1 - What is meant by "Indian trust responsibility"?

Many Indian assets are held in trust by the United States for the benefit of an Indian tribe or Indian individual. Such trust status is derived from rights reserved by or granted to Indian tribes or individuals by treaties, statutes, and executive orders. The United States has a trust responsibility to protect and maintain these trust assets and rights. This responsibility requires that the United States, as trustee, deals with the trust assets in the same manner a prudent person would deal with his own assets. All federal agencies, including Reclamation, must take reasonable actions necessary to protect ITAs. The rationale is that where the government has power, it has the duty to exercise that power in a responsible manner.

II-2 - What are Indian trust lands?

Not all lands owned by Indians are trust lands. Trust lands must have been given that status by virtue of a Congressional or Presidential action. A hallmark of trust lands is that they cannot be alienated (that is, sold, leased, used for easements, or have the Indian owner's right to use them lessened) without approval from the United States. The United States holds legal title to trust lands.

Trust lands may be beneficially owned by a tribe or by individual Indians. Individually owned trust lands can be "allotted" or "non-allotted." Allotted lands are former reservation or publicly withdrawn lands held in trust by the United States for individuals, sometimes referred to as "allottees."

725 U.S.C. § 3001(15) and § 3002
"Restricted lands" are similar to trust lands in that certain uses are subject to approval by the government. However, they are similar to Indian-owned private lands in that the Indian owners hold title to the land. Although resources found on restricted lands are not ITAs, the United States has a trust-like responsibility when exercising its approval authority. This means that the United States could be found liable for inadequately protecting Indian resources on restricted lands. For purposes of Reclamation's trust policy, impacts to resources on restricted lands and proposed mitigation measures should be documented as for trust lands.

"Fee lands" are private lands which may or may not be trust lands.

II-3 - Are "on-reservation lands" the same as "trust lands"?

"On-reservation land" is not synonymous with "trust land." When something is referred to as being "on-reservation," it usually means that it is located within the exterior reservation borders. Because of historical events, many reservations contain lands of different status, including tribal trust lands, allotted trust lands, privately owned lands, and public lands. When a reservation is said to have a "checkerboard" pattern, this refers to a mixture of trust and non-trust lands distributed in a pattern resembling a checkerboard. Because of this, it is important to ascertain the status of lands within the affected environment, and not to assume that because certain parcels of land are or are not trust lands, that the neighboring lands must have the same status.

II-4 - What is meant by the terms: "Indian," "Indian tribes," "Indian governments," "Indian communities," and "Indian individuals"?

These definitions are provided to facilitate understanding of terms used in this document and in Reclamation NEPA procedures; they are not intended to be comprehensive or to replace other definitions used by Reclamation.

"Indian individuals" are persons who are members of an Indian tribe.

"Indian tribes" are Indian tribes, bands, nations, and other organized groups or communities of Indians which are
recognized by the Secretary of the Interior as: (i) eligible for the special programs and services provided by the United States to Indians because of their status as Indians, and (ii) possessing powers of self-government.

"Indian governments" are tribal governments, councils, organizations, and other governing bodies organized to exercise powers of government usually within a defined geographical boundary.

"Indian communities" are communities, villages, pueblos, towns, and groups of Indian people who have common interests and are living within a common jurisdiction of an Indian government.

II-5 - What is Departmental Order No. 3175?

The requirements of this order are similar to those of Reclamation's ITA policy: Interior bureaus and offices must explicitly address anticipated effects on ITA's in planning, decision and operational documents, and explain how their decisions are consistent with the Department's trust responsibilities. When impacts are identified, there must be consultations with the recognized tribal government having jurisdiction over the affected ITAs, the BIA, and the Solicitor's office. The order is dated November 8, 1993, and will expire October 1, 1994, unless extended.

Reclamation has conferred with the Office of American Indian Trust to determine that compliance with Reclamation's trust asset policy and procedures (as interpreted by these questions and answers) is adequate to insure compliance with the Departmental Order. Reclamation's ITA policy and procedures will remain in effect until modified, and will be unaffected by the expiration of the Departmental Order.

II-6 - What is the nature of Indian tribal sovereignty and what does "government-to-government" mean?

The political relationship between the United States and federally recognized Indian tribes is unique from all other relationships maintained by the United States. This relationship is based on the nature of Indian tribes, which have been described as "domestic dependent nations." Tribal governments are unlike fully sovereign nations, such as Great Britain, and are unlike entities with derivative sovereign powers, such as states. Tribes have the power to
govern their own affairs and are not subordinate to State
governments. Tribes should not routinely be treated through
federal-state processes, but through processes upholding
federal Indian law and policy and not impinging upon tribal
sovereignty.

"Government-to-government" is the United States' policy for
working with federally recognized Indian Tribes. This policy recognizes the unique aspects of tribal governments
and tries to insure that tribes are not treated as "just another" interest group. It requires that federal agencies
design solutions and tailor federal programs, in appropriate
circumstances, to address specific or unique needs of Indian
tribes.

Part III: Applying the procedures

III-1 - Do the ITA policy and NEPA implementing procedures apply
to completed projects?

The responsibility enunciated in the policy statement
concerning protecting ITAs from adverse impacts of
Reclamation actions applies in all situations: to
completed, operational projects as well as to new
actions. However, Reclamation deemed it best to use
the NEPA process to implement the ITA policy. The NEPA
compliance process is triggered by "federal actions."
This means there are no procedures at this time to deal
with ITAs affected by operational, completed projects,
absent an action triggering NEPA compliance.
Nevertheless, if it is known that an operational
project is adversely impacting trust assets,
appropriate measures should be taken to eliminate or
mitigate such impacts. Failing to do this could expose
the government to increased liability.

Part IV: Assessing impacts to ITAs

IV-1 - Who can assist in identifying ITAs within the affected
environment?

When there is doubt as to whether something is an ITA, the
following entities should be consulted: potentially
affected tribes or Indian individuals, the Solicitor's
Office, the Bureau of Indian Affairs, the NAAO, or the
regional Native American Affairs Coordinator in those regions where such a position exists. ITA identification should become easier with experience. As the determination of ITA status is essentially a legal issue, the involvement of the Solicitor is important when it is essential to state with certainty if something is an ITA.

IV-2 - Is it always necessary to identify all ITAs located within the affected environment?

Potentially impacted resources that could be ITAs should be identified. However, for purposes of carrying out the ITA policy, it may not always be essential to determine with certainty if a particular resource is an ITA. For example, if it is known that a resource will not be impacted, or if it is known that a resource will be impacted but the owners of the affected trust asset and the United States as trustee are satisfied with the adequacy of mitigation proposed for a different reason, it would probably not be essential to determine if the resource is an ITA. In such cases, if the trust status of the resource is unknown, a discussion of the resource should be included in the sections of the NEPA compliance document dealing with ITAs, and the doubt concerning the trust status noted.

IV-3 - Is it necessary to describe the precise location of all potentially affected ITAs in the NEPA document?

The description of the location should be adequate to enable the decisionmaker to understand that potential impacts to ITAs were considered. It is anticipated that there could be times when a tribe does not want information about the precise locations of sensitive areas to be published. When possible, this preference should be honored.

Public disclosure for NEPA is governed by the Freedom of Information Act. An exception is provided for cultural resources covered by the National Historic Preservation Act. This latter statute authorizes Reclamation to withhold from public disclosure information about the location, character, or ownership of a cultural resource if the disclosure may cause an invasion of privacy, risk harm to the resource, or impede the use of a traditional religious site.\textsuperscript{8} No disclosure exemption is currently available for purely

\textsuperscript{8}16 U.S.C. § 470-2(a)
religious sites, although one might be created by the pending Native American Cultural Protection and Free Exercise of Religion bill.

IV-4 - What type of ITA impacts should be considered?

Actions that could impact the value, use or enjoyment of the ITA should be analyzed as part of the ITA assessment. Such actions could include interference with the exercise of a reserved water right, degradation of water quality where there is a water right, impacts to fish or wildlife where there is a hunting or fishing right, noise near a reservation when it adversely impacts uses of reservation lands.

Under the procedures, all impacts, both positive or negative, should be analyzed and discussed.

IV-5 - When ITAs are present, when is it appropriate to check "No" to the ITA item on the CEC?

"No" can be checked in the following situations:

- When there are no impacts.
- When all impacts are positive and non-significant. Any impacts should be documented and attached to the CEC.
- When impacts are negative, non-significant, can be adequately mitigated or compensated, and the adequacy of the mitigation or compensation is not in dispute. Any impacts and mitigative commitments should be documented and attached to the CEC.

IV-6 - How should Reclamation consider effects to cultural resources that may be ITAs?

None of Reclamation's other cultural resource responsibilities under NEPA, the National Historic Preservation Act (NHPA), and the Archaeological Resources Protection Act (ARPA) and their implementing regulations are affected by the changes in its NEPA procedures. These responsibilities are briefly summarized in Part VI of this document.
IV-7 - Why is it important to perform interdisciplinary studies to assess ITA impacts?

Reclamation believes it can make better decisions concerning potential impacts to ITAs by following an interdisciplinary approach. For example, when does an impact on an ITA cause a net loss to an Indian beneficial owner? Or, when do adverse social impacts on an Indian community outweigh a potential economic gain? Or, what are "reasonable" actions that a prudent person should take to protect ITAs and what are "unreasonable" actions? To resolve these questions, an interdisciplinary analysis should be performed to identify potential impacts and reasonable measures that could prevent or mitigate the adverse impacts.

IV-8 - Should social and cultural values be considered when addressing impacts on ITAs?

Yes. Social and cultural values should be considered to determine the full extent of the impacts and to define what measures to prevent the impacts are reasonable in view of the circumstances. If only economic impacts on physical assets were considered, bad decisionmaking could result. ITAs have economic value, but this may not be their only value; they may also have social or cultural values and impacts to the physical assets may affect social or cultural values in addition to economic value. Two examples follow.

Example 1: Assume a certain parcel of trust land would be adversely impacted as a result of a proposed action, but the economic impacts would be more than offset through project benefits, giving the Indian beneficial owner of the ITA a net economic gain. Assume also that this parcel was particularly important to the tribe as a sacred site. The negative social impacts of this project may outweigh the economic benefit.

Example 2: Assume an ITA would be impacted so as to cause a net economic loss; e.g., assume some tribal farm lands would be converted to wetlands as the result of an agency action. Assume that during the public involvement process, the tribe whose land is affected indicates that the positive cultural impacts associated with the wetlands creation would more than compensate them for the economic loss. The positive cultural benefits would probably be deemed to offset the economic loss, although the basis for this conclusion would need to be carefully documented.
**IV-9 - Should the Indian tribal government always be the primary point of contact?**

The tribal government should be the primary point of contact in most cases. There may, however, be some cases when another entity or individuals should be the primary point of contact, although even in these cases the tribal government should be notified as soon as practical of the situation. For example, when the only potentially impacted resources are allotted lands, the owners of the allotted lands would probably be the primary contact and the tribal government the secondary contact. Every situation needs to be assessed on a case-by-case basis. In all cases the public involvement program should include all affected and interested individuals and groups, including the BIA.

**IV-10 - What is the role of the Bureau of Indian Affairs (BIA) in dealing with ITAs?**

When tribes or individual Indians sell, lease, impact by allowing a right-of-way, or otherwise alienate or encumber ITAs, approval must be given by the Secretary of the Interior. This approval responsibility is delegated to the BIA in all cases except in parts of Oklahoma. For example, if Reclamation wanted to acquire a right-of-way across reservation lands, the contract would generally require BIA approval. For those cases when BIA lacks approval authority, such as when dealing with some restricted lands, the BIA will usually perform a field review to determine if the transaction should be approved. Therefore, when a proposed action includes a possible sale, lease, or other alienation or encumbrance of ITAs or restricted lands, Reclamation should keep the BIA informed.

**IV-11 - What kind of input is required from the tribes or other affected Indians?**

Reclamation NEPA procedures require Reclamation to have a public involvement program designed to elicit an appropriate level of input from Indian persons and entities at all stages of the NEPA compliance process. They require consultation with interested and affected individuals, organizations, agencies, tribal governments, and other governmental entities. Additionally, the government-to-government policy requires that tribal governments be consulted to the greatest extent practicable concerning actions with potential affects on the tribe, tribal ITAs, or
ITAs held in trust for individual tribal members.

A significant concern expressed by Indians has been that governmental agencies frequently do not take the time to determine where the decisionmaking authority lies within the tribal system. Because of this, the agency does not deal with the "right" people during consultation and public involvement processes. To avoid this, adequate time and care should be taken to learn about the tribe and its decisionmaking system.

IV-12 - How should the NEPA document deal with situations in which the tribe and the United States disagree about whether a resource is an ITA?

If the resource would be impacted as a result of the proposed action and mitigation is not otherwise planned, it is necessary to state clearly the United States' position that the resource is not an ITA. However, the tribe's view should also be stated, so that the decisionmaker is aware of the dispute.

As discussed earlier in Part II, there are situations in which it is not necessary to determine the trust status of a particular resource. If one of these situations applies, it may be possible to avoid stating the United States' view on whether the asset is an ITA.

One example as to how a dispute could be discussed in an Environmental Assessment or Environmental Impact Statement (EIS) follows:

No adverse impacts to Indian trust assets are anticipated from the preferred alternative. However, flood frequency reduction measures for other alternatives may include dedicating up to one million acre-feet of lake space to flood control. The tribe is concerned that this flood frequency reduction method would prevent the full development of its irrigation project.

Reclamation concluded that no Indian trust assets were located within the river corridor. However, the tribe has asserted that it does have trust assets within its reservation boundary and that these are affected by dam operations. The claimed resources include fish, vegetation, wildlife, and cultural resources. Even though Reclamation does not agree with
this claim, impacts to the claimed resources were assessed as part of this EIS. The conclusion was that the restricted fluctuating and steady flow alternatives (including the preferred alternative) would have beneficial impacts on fish, vegetation, wildlife, and cultural resources relative to the No Action Alternative. A detailed analysis of the impacts on these resources for each alternative are described earlier in this chapter.

IV-13 - What happens if Indian communities disagree with Reclamation's conclusions concerning impacts to their ITAs?

The disagreement should be discussed in the NEPA document for consideration by the decisionmaker. Following the decision, the community would have the same channels of appeal open to other groups who disagree with conclusions reached by an administrative agency: they can appeal informally to the agency to reconsider its conclusions; or they can appeal formally if they feel the agency has acted in an arbitrary and capricious manner or that the agency failed to follow its own procedures.

Part V: Mitigation

V-1 - How do we mitigate or compensate for significant adverse effects?

The first strategy should be to avoid causing significant adverse impacts. When this is not possible, an attempt should be made to minimize such impacts. If adverse impacts do occur, the next step is to identify mitigation or compensation measures to offset adverse impacts so that there is no net loss to the Indian beneficial owners of the asset.

Mitigation determinations should be done as they are now, by consulting with affected Indian entities, appropriate state and federal agencies and using mitigation procedures as specified in Reclamation Instructions (R.I. 376.13).

Compensation, using current Reclamation procedures, is also an option when dealing with ITA impacts. Compensation may involve money or exchanging the damaged real property with other real property. Compensation should be based upon reviewed and approved appraisals and assessments, unless an
authorized official approved a negotiated settlement as provided for in 49 CFR 24.102(i).

Agreements between Reclamation and the Indian beneficial owners concerning the adequacy of the mitigation or compensation may require BIA approval of the tribal-Reclamation agreement. In some cases, Congressional approval may be required.

V-2 - Must an environmental commitment plan be approved by the affected tribe prior to its implementation?

It need not be "approved" by the affected tribe, but it is strongly preferred that the tribe support the proposed environmental commitment plan, especially insofar as it pertains to mitigating anticipated impacts to ITAs. If it is known that an affected tribe does not support the plan, this should be discussed in the NEPA document for consideration by the decisionmaker.

If an affected tribe does not support the plan, it could protest the plan as discussed above. Additionally, a tribe could decline to enter into agreements necessary to carry out the proposed action, making it impossible to implement.

Part VI: Interrelationship of ITA policy and procedures and other statutes and regulations

VI-1 - What other NEPA CEQ procedures pertain to Indian people or ITAs, and how do they relate to ITA procedures?

The NEPA statute does not specifically mention Native Americans, Indian tribes, Indian lands, or ITAs. However, its CEQ implementing regulations provide guidance about how they should be considered during the NEPA process. These include the following provisions:

(a) Federal agencies are to consult with Indian tribes early in the NEPA process. 40 CFR § 1501.2(d)(2)

(b) Affected Indian tribes are to be invited to participate in the scoping process. 40 CFR § 1501.7(a)(1)

(c) During the analysis of environmental consequences to an Indian reservation, discussions must consider possible conflicts between the proposed action and the objectives of
Indian land use plans, policies, and controls. 40 CFR § 1502.16(c)

(d) Indian tribes must be invited to comment on a draft EIS when the effects may be on a reservation. 40 CFR § 1503.1(a)(2)(ii)

(e) As part of the public involvement process, notice must be provided to Indian tribes when effects may occur on reservations. 40 CFR § 1506.6(b)(3)(ii)

(f) When effects are on an Indian reservation, an Indian tribe may become a cooperating agency by entering into an agreement with the lead agency. 40 CFR § 1508.5

Reclamation's procedures pertaining to ITAs are compatible with these, in that they expand on basic NEPA requirements to include a consideration of all ITAs and not just effects to Indian reservations.

VI-2 - What are Reclamation's other cultural resource responsibilities affecting Indian people and Indian cultural resources?

None of Reclamation's other cultural resource responsibilities under NEPA,\footnote{42 U.S.C. § 4331 (b)(4)} NHPA,\footnote{16 U.S.C. § 470 et seq.} and ARPA\footnote{16 U.S.C. § 470aa-470mm} are affected by the changes in its NEPA procedures. These responsibilities are briefly summarized below:

- **NEPA** - Reclamation's NEPA procedures require consideration of ITAs, as well as consideration of cultural and historic resources. The Council on Environmental Quality's NEPA regulations require agencies to provide public notice to Indian tribes when effects may occur on reservations.\footnote{40 CFR § 1506.6(b)(3)(ii)}

- **NHPA** - NHPA's Section 106 process requires consultation with Indian tribes and traditional leaders for federal projects that may affect cultural resources significant to Native Americans, whether or not they are ITAs. Under NHPA,
consultations are initiated with Indian tribes, the public, and regulatory agencies to consider ways to avoid or mitigate the effects of federal undertakings on public, private, and Indian lands.\textsuperscript{13}

NHPA also imposes additional obligations when federal undertakings may affect cultural resources located on Indian lands. When a proposed action is located on Indian lands, the affected tribe must be invited to participate in the consultation process and concur in any resulting agreement document.\textsuperscript{14} The State Historic Preservation Officer and the Advisory Council on Historic Preservation provide oversight for the consideration of Indian concerns.

• ARPA - ARPA provides Native Americans with opportunities to influence agency decisions about the treatment of cultural resources. An ARPA permit is required to conduct archaeological excavations on public and Indian lands. Notice must be provided to tribes when the permit might result in harm to cultural or religious sites. For archaeological excavation on Indian lands, ARPA requires tribal consent for the excavation and that tribally mandated terms and conditions be included in the ARPA permit.\textsuperscript{15}

VI-3 - What is the American Indian Religious Freedom Act (AIRFA) and how does it affect Reclamation’s ITA responsibilities?

AIRFA is a Congressional policy statement that recognizes Native Americans’ rights to practice traditional religions and to have access to sacred sites located on public lands.\textsuperscript{16} AIRFA does not grant Native Americans more religious rights than those provided to all American citizens under the 1st Amendment to the Constitution, nor does it create ITAs. Because it does not create ITAs, AIRFA does not impact Reclamation’s ITA responsibilities. However, it does impose procedural requirements on federal agencies to consider the impact of administrative actions on Native American religious beliefs and practices.

\textsuperscript{13}36 CFR § 800.13(c)

\textsuperscript{14}36 CFR § 800.1(c)(2)(iii)

\textsuperscript{15}16 U.S.C. § 470cc

\textsuperscript{16}42 U.S.C. § 1996
PEP - Environmental Compliance Memorandum No. ECM97-2

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
       Office of Environmental Policy and Compliance

Subject: Departmental Responsibilities for Indian Trust Resources and Indian Sacred Sites on Federal Lands

This memorandum provides guidance to Departmental bureaus and offices with regard to the implementation of and compliance with 512 DM Chapter 2, Departmental Responsibility for Indian Trust Resources, and Executive Order No. 13007 - Indian Sacred Sites. These subjects are dealt with in Part I and Part II of the memorandum, respectively.

Part 1 - 512 DM Chapter 2

This Chapter provides guidance to bureaus and offices regarding Departmental responsibilities for the protection of Indian trust resources. This Chapter requires that any anticipated impacts to Indian trust resources from a proposed project or action by bureaus and offices be explicitly addressed in environmental documents.

This Chapter also provides that Departmental bureaus and offices, when engaged in the planning of any proposed project or action, will ensure that any anticipated effects on Indian trust resources are explicitly addressed in the planning, decision and operational documents; i.e., Environmental Assessments (EAs), Environmental Impact Statements (EISs), Management Plans, etc., that are prepared for the project. These documents must clearly state the rationale for the recommended decision and explain how the decision will be consistent with the Department's trust responsibilities.

Accordingly, bureaus and offices must identify and evaluate during the scoping and/or planning processes any anticipated effects, direct or indirect, from the proposed project or action on Indian trust resources. If any impact to the Indian trust resources is identified, the bureau or office must consult with the affected tribe(s) on a government-to-government basis with respect to the impact from the proposed project or action.
If any significant impact to Indian trust resources is identified during the scoping and/or planning processes, the environmental document must clearly evaluate and state in the environmental consequences section, under a separate impact heading, how the proposed mitigation measures or actions in the document would be consistent with the Department's Indian trust responsibilities.

If a project or an action, however, is expected to have either an insignificant impact or no impact on any Indian trust resources, the document, under the scoping section in an EIS, must specifically state that the proposed project or action is expected to have either insignificant impact or no impact, direct or indirect, on any Indian trust resources, with reasons given. A similar statement must be included in an EA under an appropriate section.

Part 2 - Executive Order 13007

Executive Order No. 13007, dated May 24, 1996, provides that in managing Federal lands, each executive branch agency with statutory or administrative responsibility for management of Federal lands shall, to the extent practicable, permitted by law and not inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. In addition, where appropriate, agencies shall maintain the confidentiality of sacred sites.

"Sacred site" means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian Tribe, or Indian individual determined to be an appropriate authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided the Tribe or appropriate authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Federal agencies are required to promptly implement procedures for the purposes of carrying out the provisions of the Executive Order, including, where practicable and appropriate, procedures to ensure that reasonable notice is provided of proposed actions or land management policies that may restrict future access to or
ceremonial use of, or adversely affect the physical integrity of, sacred sites.

The Executive Order also carries with it the intent that Departmental bureaus and offices must ensure that any anticipated effects on Indian sacred sites which may arise from planning or proposed action are explicitly addressed in the planning, decision and operational documents; i.e., Environmental Assessments (EAs), Environmental Impact Statements (EISs), Management Plans, etc. These documents must clearly state the rationale for the recommended decision and explain how the decision will be consistent with the Executive Order.

Accordingly, bureaus and offices must identify and evaluate during the scoping and/or planning processes any anticipated effects, direct or indirect, from the proposed project on Indian sacred sites on Federal lands. If any impact to Indian sacred sites is identified, the bureau or office must consult with the affected tribe(s) on a government-to-government basis with respect to the impact from the proposed project or action. In addition, bureaus and offices, to the extent practicable, must ensure that: (1) Indian religious practitioners are provided access to and ceremonial use of Indian sacred sites, and (2) any action that adversely affects the physical integrity of Indian sacred sites is avoided.

If any significant impact to an Indian sacred site on Federal lands is unavoidable and is identified during the scoping and/or planning processes, the environmental document must clearly evaluate and state in the environmental consequences section, under a separate impact heading, how the proposed mitigation measures or actions in the document would be consistent with the provisions of the Executive Order.

If a project or an action, however, is expected to have either an insignificant impact or no impact on any Indian sacred site on Federal lands, the document, under the scoping section in an EIS, must specifically state that the proposed project or action is expected to have either insignificant impact or no impact, direct or indirect, on any Indian sacred site, with reasons given. A similar statement must be included in an EA under an appropriate section.

This Environmental Compliance Memorandum Replaces ECM95-2 dated May 15, 1995.
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1. **Purpose.** This Chapter establishes the policies, responsibilities, and procedures for operating on a government-to-government basis with federally recognized Indian tribes for the identification, conservation, and protection of American Indian and Alaska Native trust resources to ensure the fulfillment of the Federal Indian Trust Responsibility.

2. **Policy.** It is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety.

3. **Responsibilities.**

   A. **Heads of bureaus and offices** are responsible for identifying any impact of Departmental plans, projects, programs or activities on Indian trust resources. Department officials shall:

   (1) Establish procedures to ensure that the activities of Departmental organizations impacting upon Indian trust resources are explicitly addressed in planning, decision, and operational documents;

   (2) Ensure that bureaus and offices consult with the recognized tribal government whose trust resource, asset, or health and safety is potentially affected by the proposed action, plan, or activity;

   (3) Remove procedural impediments to working directly and effectively with tribal governments;

   (4) Provide drafts of all procedures or amendments to procedures developed pursuant to this Chapter to the Office of American Indian Trust for review and comment; and,

   (5) Designate a senior staff member to serve as liaison between the bureau or office and the Office of American Indian Trust.

   B. **Office of American Indian Trust** is responsible for ensuring compliance with the procedures and requirements under this Chapter. The Office of American Indian Trust will serve as the Department's liaison and initial point of contact on all matters arising under this Chapter. All procedures and amendments to procedures shall be submitted by Departmental bureaus and offices to the Office of American Indian Trust for review and comment. After such review and comment, the procedures and
amendments to procedures will be transmitted to the Assistant Secretary - Indian Affairs for final approval.

C. Assistant Secretary - Indian Affairs is responsible for approving bureau and office procedures, or amendments thereto, developed pursuant to this Chapter.

4. Procedures.

A. Reports. As part of the planning process, each bureau and office must identify any potential effects on Indian trust resources. Any effect must be explicitly addressed in the planning/decision documents, including, but not limited to, Environmental Assessments, Environmental Impact Statements, and/or Management Plans prepared for the project or activity. The documentation shall:

(1) Clearly state the rationale for the recommended decision; and

(2) Explain how the decision will be consistent with the Department's trust responsibility.

B. Consultation. In the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s), the appropriate office(s) of the Bureau of Indian Affairs, the Office of the Solicitor, and the Office of American Indian Trust. Each bureau and office within the Department shall be open and candid with tribal government(s) during consultations so that the affected tribe(s) may fully evaluate the potential impact of the proposal on trust resources and the affected bureau(s) or office(s), as trustee, may fully incorporate tribal views in its decision-making processes. These consultations, whether initiated by the tribe or the Department, shall be respectful of tribal sovereignty. Information received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee’s legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s).

12/01/95 #3049

Replaces 5/23/95 #3040

Click here to download in WordPerfect format
3.1 **Purpose.** This Chapter establishes the policy, responsibilities, and procedures to accommodate access to and ceremonial use of Indian sacred sites and to protect the physical integrity of such sites consistent with Executive Order No. 13007, "Indian Sacred Sites."

3.2 **Policy.** It is the policy of the Department of the Interior in managing federal lands under its jurisdiction, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, to accommodate American Indian and Alaska Native access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sacred sites. It is also the policy of the Department of the Interior to consult with American Indian and Alaska Native tribes on a government-to-government basis whenever the Department has reason to believe that its plans, activities, decisions, or proposed actions may compromise the physical integrity of, or access to sacred sites.

3.3 **Definitions.** For purposes of this Chapter:

A. "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

B. "Indian tribe" means an Indian or Alaska Native tribe, band, nation, Pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe;

C. "Sacred site" means any specific, discrete, narrowly delineated location on federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site; and

D. "Agency action" has the same meaning as in the Administrative Procedure Act,
3.4 Responsibilities.

A. **Heads of Bureaus and Offices** shall be consistent with this policy:

1. Establish written guidance and procedures that ensure that the bureau or office, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions:

   a. manages federal lands under its jurisdiction in a manner that avoids adversely affecting the physical integrity of sacred sites and requires that any unavoidable impacts are explicitly addressed in planning, decision, and operational documents;

   b. accommodates access to and ceremonial use by Indian religious practitioners of Indian sacred sites located on federal lands it administers;

   c. provides reasonable advance notice in writing and through direct contact with the appropriate representative of affected tribes of proposed actions, plans, projects, activities or decisions which may adversely affect the physical integrity of sacred sites or which may restrict future access to or ceremonial use of such sites;

   d. consults with the federally recognized tribal government whose sacred site(s) may be potentially affected by its proposed actions, decisions, projects, or activities; and

   e. maintains the confidentiality of the nature and location of sacred sites, where appropriate.

2. Such procedures and guidelines must include provisions which direct the bureau or office:

   a. where appropriate, to enter into a memorandum of understanding, a memorandum of agreement or other written instrument setting forth the mutual understanding of the tribe and the bureau or office with regard to access and use of sacred sites on federal lands, confidentiality, and mutually acceptable processes for notice and dispute resolution including, for example, alternative dispute resolution procedures, which will 1) provide a mechanism for the early resolution of conflicts or disputes; 2) provide for the systematic resolution of complaints by tribes relating to agency action on federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites; and 3) enable tribal governments to file an administrative appeal from any action or failure to act by an official of the bureau or office that is contrary to the requirements of Executive Order No. 13007, "Indian Sacred Sites," the requirements of this Chapter, or bureau or office policy or procedures established to implement this Chapter or the Executive Order; and

   b. to identify, in consultation with concerned tribes, appropriate procedures to accommodate tribal concerns when a tribe has a religious prohibition against revealing precise
information about the location or practice at a particular sacred site.

B. **Office of American Indian Trust** will coordinate the Department's policy implementation and serve as the Department's liaison and initial point of contact on all matters arising under this Chapter. All procedures and amendments to procedures by bureaus and offices shall be forwarded to the Assistant Secretary - Indian Affairs through the Office of American Indian Trust for review and comment. Each bureau or office shall designate a senior level staff member as a point of contact for the Office of American Indian Trust on matters arising under this Chapter.

C. **Assistant Secretary - Indian Affairs** is responsible for advising bureaus and offices regarding procedures, or amendments thereto, developed pursuant to paragraph 3.4A of this Chapter.

3.5 Procedures.

A. Each bureau or office with statutory or administrative responsibility for the management of federal lands shall implement procedures for the purposes of carrying out the provisions of paragraph 3.4, above.

B. In all actions pursuant to this section, each bureau or office shall comply with the Executive Memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," and Departmental Manual Part 512, Chapter 2 "Departmental Responsibilities for Indian Trust Resources."

3.6 Reports.

A. As part of the planning process, each bureau or office must identify and analyze the potential effects its proposed actions, decisions, or activities may have with regard to the physical integrity of sacred sites or which may affect use of and/or access to known sites. Any effect must be explicitly addressed in the planning/decision documents including, but not limited to, environmental assessments, environmental impact statements, and/or management plans prepared for the project or activity. Such documents shall:

1. clearly state the rationale for the recommended decision; and

2. explain how the decision is consistent with this Chapter.

B. Where a bureau or office determines that compliance with the general requirements of the Order would be clearly inconsistent with an essential agency function, the bureau or office shall fully explain its rationale for that conclusion in the report.

C. Beginning with an initial review conducted by September 30, 1998, each bureau or office shall undertake a periodic review of its policies, procedures, rules, and regulations to ensure consistency with the requirements of this Chapter and shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions:
(1) make any changes necessary in order to accommodate access to and ceremonial use of Indian sacred sites; and

(2) make any changes necessary to avoid adversely affecting the physical integrity of sacred sites;

3.7 Consultation. In all actions pursuant to this section, each bureau or office shall consult with the potentially affected federally recognized tribal government(s). Consultations with affected tribal governments shall be open and candid and each tribal government shall be accorded reasonable opportunity to evaluate fully the potential impact of the proposal prior to final agency action. Each bureau or office shall give full consideration to tribal views in its decision-making processes. Further, whether the consultation is initiated by a tribe or the Department, each bureau or office shall be respectful of tribal sovereignty. To the extent permissible under federal law and regulation, information received during consultation shall be managed in a manner which is least likely to be disclosed to third parties. Information so received shall be deemed confidential if disclosure would inappropriately reveal the nature, location or compromise the physical integrity of a sacred site.

3.8 Rulemaking. Each bureau or office shall take into account the policies and requirements mandated by Executive Order No. 13007, "Indian Sacred Sites" and this Chapter in the rulemaking process to ensure that Departmental rules and regulations are developed in accordance with the policies and procedural requirements outlined in this Chapter.

3.9 Memoranda of Agreement and Memoranda of Understanding. Each bureau or office shall, whenever appropriate:

A. contact any Indian tribe likely to be affected by its activities to develop and enter into Memoranda of Agreement or Memoranda of Understanding to:

(1) avoid adverse impacts to the physical integrity of sacred sites;

(2) accommodate access to and use of sacred sites by Indian religious practitioners;

(3) safeguard the confidentiality of Indian sacred sites;

(4) develop mutually acceptable notification processes; and

(5) develop specific dispute resolution procedures.

B. develop a process for incorporating alternative dispute resolution procedures into a Memoranda of Agreement or Memoranda of Understanding.

3.10 Limitations. Nothing in this Chapter shall be construed to require a taking of vested property interests. Nor shall this Chapter be construed to impair enforceable rights to the use of federal lands that have been granted to third parties through final agency action or by statute.
Nothing in this Chapter creates any rights, benefits or trust responsibility enforceable at law or equity by any party against the United States, its agencies, offices, or any person.
ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8994–7]

Amended Environmental Impact Statement Filing System Guidance for Implementing 40 CFR 1506.9 and 1506.10 of the Council on Environmental Quality’s Regulations Implementing the National Environmental Policy Act

1. Introduction

On October 7, 1977, the Council of Environmental Quality (CEQ) and the Environmental Protection Agency (EPA) signed a Memorandum of Agreement (MOA) that allocated the responsibilities of the two agencies for assuring the government-wide implementation of the National Environmental Policy Act of 1969 (NEPA). Specifically, the MOA transferred to EPA the administrative aspects of the environmental impact statement (EIS) filing process. Within EPA, the Office of Federal Activities has been designated the official recipient in EPA of all EISs. These responsibilities have been codified in CEQ’s NEPA Filing System Guidance for Environmental Quality’s Regulations Implementing 40 CFR 1506.10 of the Council on Environmental Policy Act (EPIA).

Under 40 CFR 1506.9, EPA can issue guidelines to implement its EIS filing responsibilities. The purpose of the EPA Filing System Guidelines is to provide guidance to Federal agencies on filing EISs, including draft, final, and supplemental EISs. Information is provided on: (1) Where to file EISs; (2) the number of copies required; (3) the steps to follow when a Federal agency is adopting an EIS, or when an EIS is withdrawn, delayed, or reopened; (4) public review periods; (5) issuance of notices of availability in the Federal Register; and (6) retention of filed EISs. EPA’s current EIS filing guidelines were published in the Federal Register on March 7, 1989.

The guidelines published today update the previous guidelines, modify the number and format of the EISs to be filed, and provide specific guidelines for EIS filing during Continuity of Operations Plan (COOP) events. Additionally, we are soliciting input from federal agencies, other stakeholders, and the public on a series of questions that will be used to make further modifications to the EIS filing process in the future.

2. Purpose

Pursuant to 40 CFR 1506.9 and 1506.10, EPA is responsible for administering the EIS filing process, and can issue guidelines to implement those responsibilities. The process of EIS filing includes the following: (1) Receiving and recording of the EISs, so that information in them can be incorporated into EPA’s computerized data base; (2) establishing the beginning and ending dates for comment and review periods for draft and final EISs, respectively; (3) publishing these dates in a weekly Notice of Availability (NOA) in the Federal Register; (4) retaining the EISs in a central repository; and (5) determining whether time periods can be lengthened or shortened for “compelling reasons of national policy.”

Under 40 CFR 1506.9, lead agencies are responsible for distributing EISs, and for providing additional copies of already distributed EISs, to the interested public for review. However, EPA will assist the public and other Federal agencies by providing agency contacts on, and information about, EISs.

3. Filing Draft, Final, and Supplemental EISs

Federal agencies are required to prepare EISs in accordance with 40 CFR part 1502, and to file the EISs with EPA as specified in 40 CFR 1506.9. Federal agencies file an EIS by providing EPA with four copies of the complete EIS, including appendices. At least one copy of the entire EIS must be a paper copy; the remaining three (3) copies can be on appropriate electronic storage devices—e.g., compact discs (CDs), USB flash drives, or memory cards. Please note that if a Federal agency prepares an abbreviated Final EIS (as described in 40 CFR 1503.4(c)), it should include copies of the Draft EIS when filing the Final EIS.

To file an EIS by using the U.S. Postal Service (including USPS Express Mail), please use the following address: U.S. Environmental Protection Agency, Office of Federal Activities, EIS Filing Section, Mail Code 2252A, Ariel Rios Building (South Oval Lobby), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

To file an EIS in person or by commercial express service (including Federal Express or UPS), please use the following address:

(If the documents are to be hand-delivered, you will need to ask the security guards to phone our office at (202) 564–5400, so you can be escorted to the EIS Filing Section.)
an EIS on which it served as a cooperating agency, the document does not need to be circulated for public comment or review; it is not necessary to file the EISs again with EPA. However, EPA should be notified in order to ensure that the official EIS record is accurate. EPA will publish an amended NOA in the Federal Register that states that an adoption has occurred. This will not establish a comment period, but will complete the public record.

EPA should also be notified of all situations where an agency has decided to withdraw, delay, or reopen a review period on an EIS. All such notices to EPA will be reflected in EPA’s weekly Notices of Availability published in the Federal Register. In the case of reopening EIS review periods, the lead agency should notify EPA as to what measures will be taken to ensure that the EIS is available to all interested parties. This is especially important for EIS reviews that are being reopened after a substantial amount of time has passed since the original review period closed.

Once received by EPA, each EIS is stamped with an official filing date and checked for completeness and compliance with 40 CFR 1502.10. If the EIS is not “complete” (i.e., if the documents do not contain the required components), EPA will contact the lead agency to obtain the omitted information or to resolve any questions prior to publishing the NOA in the Federal Register.

Agencies often publish (either in their EISs or individual notices to the public) a date by which all comments on an EIS are to be received; such actions are encouraged. However, agencies should ensure that the date they use is based on the date of publication of the NOA in the Federal Register. If the published date gives reviewers less than the minimum review time computed by EPA, EPA will send the agency contact a letter explaining how the review period is calculated and the correct date by which comments are due back to the lead agency. This letter also encourages agencies to notify all reviewers and interested parties of the corrected review periods.

4. EIS Filing Procedure for COOP Events

In order to ensure official filing of EISs in the event of a COOP event, when EISs cannot be physically delivered to EPA, Federal agencies will need to send EPA a copy of the EIS cover sheet to the email address identified above. In turn, EPA will use the cover sheet information to publish the weekly EIS NOA in the Federal Register.

During the COOP event, filing agencies should not submit the four copies of the EIS to the EPA. However, once the COOP event is over, filing agencies will have 14 days to submit the four copies of all EISs filed during the event to the EPA’s Filing Section. If EPA does not receive the four copies of the EIS filed during the COOP event within 14 days, it will publish a notice in the Federal Register retracting the NOA for that EIS.

5. Notice in the Federal Register

EPA will prepare a weekly report of all EISs filed during the preceding week for publication each Friday under a NOA in the Federal Register. If the Friday is a Federal holiday the publication will be on Thursday. At the time EPA sends its weekly report for publication in the Federal Register, the report will also be sent to the CEQ. Amended notices may be added to the NOA to include corrections, changes in time periods of previously filed EISs, withdrawals of EISs by lead agencies, and retraction of EISs by EPA.

6. Time Periods

The minimum time periods set forth in 40 CFR 1506.10 (b), (c), and (d) are calculated from the date EPA publishes the NOA in the Federal Register. Comment periods for draft EISs, draft supplements, and revised draft EISs will end 45 calendar days after publication of the NOA in the Federal Register. Review periods for final EISs and final supplements will end 30 calendar days after publication of the NOA in the Federal Register. If a calculated time period would end on a non-working day, the assigned time period will be the next working day (i.e., time periods will not end on weekends or Federal holidays). While these time periods are minimum time periods, a lead agency may establish longer time periods. If the lead agency employs a longer time period, it must notify EPA of the extended time period when either filing the EIS or when the lead agency extends the time period.

It should be noted that 40 CFR 1506.10(b) allows for an exception to the rules of timing. An exception may be made in the case of an agency decision which is subject to a formal internal appeal. Agencies should assure that EPA is informed so that the situation is accurately reflected in the NOA.

Moreover, under 40 CFR 1506.10(d), EPA has the authority to both extend and reduce the time periods on draft and final EISs based on a demonstration of “compelling reasons of national policy.” A lead agency request to EPA to reduce time periods or another Federal agency (not the lead agency) request to formally extend a time period should be submitted in writing to the Director, Office of Federal Activities, and outline the reasons for the request. EPA will accept telephone requests; however, agencies should follow up such requests in writing so that the documentation supporting the decision is complete. A meeting to discuss the consequences for the project and any decision to change time periods may be necessary. For this reason, EPA asks that it be made aware of any intent to submit requests of this type as early as possible in the NEPA process. This is to prevent the possibility of the time frame for the decision on the time period modification from interfering with the lead agency’s schedule for the EIS. EPA will notify CEQ of any reduction or extension granted.

7. Retention

Filed EISs are retained in the EPA Office of Federal Activities for a period of two years and are made available to office staff only. After two years the EISs are sent to the National Records Center. After a total of twenty (20) years the EISs are transferred to the National Archives Records Administration (NARA).

8. Soliciting Comments on Future Updates of the EIS Filing Guidelines

In addition to the modifications to the filing guidelines outlined herein, EPA is considering additional modifications that may lead to the implementation of an electronic EIS filing process. With that in mind, EPA is soliciting comments from Federal agencies, other stakeholders and the public on the following questions.

For Federal Agencies
1. Does your agency make its Draft, Final, and Supplemental EISs available for public review on the Internet?
2. If so, how long do the Draft, Final, and Supplemental EISs remain available for review on the Internet?
3. In a related matter, does your agency mandate how long EISs must be available for public review?
4. If so, how long is that period?
5. Also, does your agency mandate how long its EISs must be retained as official agency records?
6. If so, how long is that period?

For Stakeholders and the Public
1. At some point in the future, CEQ and EPA may eliminate the publication of weekly Notices of Availability for EISs in the Federal Register in favor of a central repository on the Internet.
(possibly on EPA’s Web site). Would you find this approach more or less useful than the current process?

2. Do you foresee any problems/issues with reviewing ELs that are made available only on the Internet?

3. In your opinion, how long should ELs remain in accessible to the public?

Please submit your responses to the above questions to: Robert Hargrove, Director, NEPA Compliance Division, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW. (2252A), Washington, DC 20460; or hargrove.robert@epa.gov, by COB February 28, 2011.

Dated: January 11, 2011.

Susan E. Bromm,
Director, Office of Federal Activities.

[FR Doc. 2011–758 Filed 1–13–11; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9252–9]

Notice of a Project Waiver of Section 1605: (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA) to the Inland Empire Utilities Agency

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA is hereby granting a project waiver of the Buy American requirements of ARRA Section 1605(a) under the authority of Section 1605(b)(2) (manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality) to the Inland Empire Utilities Agency (IEUA), a Clean Water State Revolving Fund (CWSRF)/ARRA loan recipient, for the purchase of Air Release Vacuum (ARV) Valves manufactured by A.R.I. in Israel, for Project #5176–140 funded by the California CWSRF/ARRA Loan #06–851. This is a different project than Project #5176–110/5176–130 which was previously issued a waiver for this same product. The IEUA indicates that the design for the Church Street lateral project includes A.R.I. valves, which are the standard air relief structures used within the regional pipeline system, and that currently there is not a comparable domestic equivalent that meets the IEUA specifications. This is a project-specific waiver and only applies to the use of the specified product for the ARRA funded project being proposed. Any other ARRA project that may wish to use the same product must apply for a separate waiver based on project-specific circumstances. The Assistant Administrator of the Office of Administration and Resource Management has concurred with this decision to make an exception under section 1605(b)(2) of ARRA.

DATES: Effective Date: November 30, 2010.


SUPPLEMENTARY INFORMATION: In accordance with ARRA Sections 1605(c) and 1605(b)(2), EPA hereby provides notice it is granting a project waiver of the requirements of Section 1605(a) of Public Law 111–5, Buy American requirements, to the IEUA for the acquisition of the ARV valves manufactured in Israel by A.R.I. The head of each federal agency is authorized to issue project waivers pursuant to Section 1605(b) of ARRA. Section 1605(a) of the ARRA requires that none of the funds appropriated or otherwise made available by the ARRA may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. Pursuant to Section 1605(b), a waiver from this requirement may be provided if EPA determines: (1) Applying these requirements would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

A Delegation of Authority Memorandum was issued by the EPA Administrator on March 31, 2009 which provided EPA Regional Administrators with the authority to issue waivers to Section 1605(a) of ARRA within the geographic boundaries of their respective regions and with respect to requests by individual recipients of ARRA financial assistance.

The IEUA provides drinking water and waste water treatment services to municipalities in the Chino Basin. The Church Street lateral project consists of approximately 4,200 linear feet of 12-inch diameter recycled water pipeline that will convey recycled water to serve customers in the 1430 and 1630 pressure zones. Project specifications provided by the applicant state that acceptable products are A.R.I. Flow Control Accessories, Ltd. (Model D–060) or an approved equal.

The functional justification for these specifications advanced by the IEUA was that the IEUA had, in years prior to the enactment of ARRA, made the ARI valves their standard air relief structures used within the regional pipeline system based on the IEUA’s determination that these valves had a superior design, functionality, and ease of maintenance. Specifically:

• ARI combination valves (D–060’s) have the air release on the top of the valve, whereas alternative valves have the air release on the side. A side release creates an internal air pocket on the valve, which allows the rubber seal for the vacuum component to dry out and leak over time.

• The 316SS float for the ARI vacuum component stops against a 316SS ring. The alternative valves have a float that stops against a flat rubber seal on the top of the valve, and constant pounding during closure tends to crack the seal and cause leaks.

• The ARI valves are half the weight and size of the alternative valves, which makes installation and maintenance easier. Also, as the valves are smaller, the enclosures for the valves are less expensive.

The consequences of finding the IEUA’s specifications not justified would include the following:

• Additional design costs would be incurred to change all ARV valves, including re-calculating the size of the valves based on the competitors design criteria, modifying valve and enclosure details, and modifying the pipeline profiles to accommodate larger valves. Alternative ARV valves that must be buried would require lowering the pipeline depth several feet on each side of the valves to accommodate a deeper valve vault.

• Construction costs would be higher due to the increase in valve sizes, larger enclosures, and a deeper pipeline. The pricing through the change order process would be significantly higher than prices for a competitive bid. The cost for the material and installation of the valves is approximately $198,708. If the ARI valves are replaced with alternative valves, the estimated cost for the material and installation would be approximately $100,000 more.

• IEUA staff would have to be trained on the different types of valves installed and additional spare parts would need to be ordered and stocked. Since the IEUA has moved forward with implementing the ARI valves as the
Federal Guidance for the Establishment, Use and Operation of Mitigation Banks; Notice
Mitigation Banks
Establishment, Use and Operation of
Federal Guidance for the
DEPARTMENT OF COMMERCE
Fish and Wildlife Service
DEPARTMENT OF AGRICULTURE
Natural Resources Conservation Service
DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
DEPARTMENT OF DEFENSE
Department of the Army
Corps of Engineers
ENVIRONMENTAL PROTECTION AGENCY
Federal Guidance for the
Establishment, Use and Operation of
Mitigation Banks
AGENCIES: Corps of Engineers, Department of the Army, DOD; Environmental Protection Agency; Natural Resources Conservation Service, Agriculture; Fish and Wildlife Service, Interior; and National Marine Fisheries Service, National Oceanic and Atmospheric Administration.
ACTION: Notice.
SUMMARY: The Army Corps of Engineers (Corps), Environmental Protection Agency (EPA), Natural Resources Conservation Service (NRCS), Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) are proposing guidance regarding the establishment, use and operation of mitigation banks for the purpose of providing compensatory mitigation for adverse impacts to wetlands and other aquatic resources. The purpose of this guidance is to clarify the manner in which mitigation banks may be used to satisfy mitigation requirements associated with the Clean Water Act (CWA) Section 404 permit program and the wetland conservation provisions of the Food Security Act (FSA) (i.e., "Swampbuster" provisions). Recognizing the potential benefits mitigation banking offers for streamlining the permit evaluation process and providing more effective mitigation for authorized impacts to wetlands, the agencies encourage the establishment and appropriate use of mitigation banks in the Section 404 and "Swampbuster" programs.
DATES: Written comments must be submitted in writing to: Mitigation Banking Docket, Wetlands Division, Mail Code (4502F), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.
FOR FURTHER INFORMATION CONTACT: Mr. Jack Chowning (Corps) at (202) 272–1725; Ms. Julie Metz (Corps) at (703) 355–3065; Mr. Thomas Kelsh (EPA) at (202) 260–8795; Ms. Sandra Byrd (NRCS) at (202) 690–3501; Mr. Michael Long (FWS) at (703) 358–2183; Ms. Susan-Marie Stedman (NMFS) at (301) 713–2325.
SUPPLEMENTARY INFORMATION: Mitigating the harmful effects of necessary development actions on the Nation’s wetlands and other aquatic resources is a central premise of Federal wetlands programs. The CWA Section 404 permit program relies on a sequential approach to mitigating these harmful effects by first avoiding unnecessary impacts, then minimizing environmental harm, and, finally, compensating for remaining unavoidable damage to wetlands and other aquatic resources through, for example, the restoration or creation of wetlands. Under the “Swampbuster” provisions of the FSA, farmers are required to provide mitigation to offset certain conversions of wetlands for agricultural purposes in order to maintain their program eligibility. Mitigation banking has been defined as wetland restoration, creation, enhancement, and in exceptional circumstances, preservation undertaken expressly for the purpose of mitigating unavoidable adverse wetland losses in advance of development actions, when compensatory mitigation cannot be achieved at the development site or is not as environmentally beneficial. It typically involves the consolidation of fragmented wetland mitigation projects into one large contiguous site. Units of restored, created, enhanced or preserved wetlands are expressed as “credits” which may subsequently be withdrawn to offset “debts” incurred at a project development site.
Ideally, mitigation banks are constructed and functioning in advance of development impacts, and are seen as a way of reducing uncertainty in the CWA Section 404 permit program or the FSA “Swampbuster” program by having established compensatory mitigation credit available to an applicant. By consolidating compensation requirements, banks can more effectively replace lost wetland functions within a watershed, as well as provide economies of scale relating to the planning, implementation, monitoring and management of mitigation projects.
On August 23, 1993, the Clinton Administration released a comprehensive package of improvements to Federal wetlands programs which included support for the use of mitigation banks within environmentally sound limits as a means for compensating for authorized wetland impacts. At that same time, EPA and the Department of the Army issued interim guidance clarifying the role of mitigation banks in the Section 404 permit program and providing general guidelines for their establishment and use. In that document it was acknowledged that additional guidance would be developed, as necessary, following completion of the first phase of the Corps Institute for Water Resources national study on mitigation banking.
This notice responds to a need identified in the Corps national study for more detailed guidance on the policy of the Federal government regarding the establishment, use and operation of mitigation banks. The proposed guidance is based, in part, on the experiences to date with mitigation banking, as well as other environmental, economic and institutional issues identified through the Corps national study. The agencies are specifically soliciting public comment on the proposed guidance and will consider all comments submitted by the public in developing final guidance. A copy of the proposed guidance is published with this notice.
John H. Zirschky,
Acting Assistant Secretary (Civil Works), Department of the Army.
Robert Perciasepe,
Assistant Administrator for Water, Environmental Protection Agency.
James R. Lyons,
Assistant Secretary, Natural Resources and Environment, Department of Agriculture.
George T. Frampton, Jr.,
Assistant Secretary for Oceans and Atmosphere, Department of Commerce.
Federal Guidance for the
Establishment, Use and Operation of
Mitigation Banks
I. Introduction
A. Purpose and Scope of Guidance
This document provides policy guidance for the establishment, use and operation of mitigation banks for the purpose of providing compensatory mitigation for authorized adverse impacts to wetlands and other aquatic resources. This guidance is provided
expressly to assist Federal personnel, bank sponsors, and others in meeting the purpose and goals of Section 104 of the Clean Water Act (CWA), Section 10 of the Rivers and Harbors Act, the wetland conservation provisions of the Food Security Act (FSA) (i.e., “Swampbuster” provisions and other applicable Federal statutes and regulations. The policies and procedures discussed herein are consistent with current requirements of the Section 10/404 regulatory program and “Swampbuster” provisions and are intended only to clarify the applicability of existing requirements to mitigation banking. The policies and procedures are applicable to the establishment, use and operation of public mitigation banks, as well as privately-sponsored mitigation banks, including third party banks (e.g., entrepreneurial banks).

B. Background

For purposes of this guidance, mitigation banking means the restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources. The objective of a mitigation bank is to provide for the replacement of the chemical, physical and biological functions of wetlands and other aquatic resources which are lost as a result of authorized impacts. Using appropriate methods, the newly established functions are quantified as mitigation “credits” which are available for use by the bank sponsor or by other parties to compensate for adverse impacts (i.e., “offsets”). Consistent with mitigation policies established under the Council on Environmental Quality Implementing Regulations (CEQ regulations) (40 CFR parts 1500–1508), and the Section 404(b)(1) Guidelines (Guidelines) (40 CFR part 230), the use of credits may only be authorized for purposes of complying with Section 10/404 when adverse impacts are unavoidable. In addition, for both the Section 10/404 and “Swampbuster” programs, credits may only be authorized when on-site compensation is either not practicable or use of a mitigation bank is environmentally preferable to on-site compensation. Prospective bank sponsors should not construe or anticipate participation in the establishment of a mitigation bank as ultimate authorization for specific projects or as excepting such projects from any applicable requirements.

Mitigation banks can have several advantages over individual mitigation projects, some of which are listed below:

1. It may be more advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation into a single large parcel or contiguous parcels where ecologically appropriate; and
2. Establishment of a mitigation bank can bring together financial resources, planning and scientific expertise not practicable to many project-specific compensatory mitigation proposals. This consolidation of resources can increase the potential for the establishment and long-term management of successful mitigation that maximizes opportunities for contributing to biodiversity and/or watershed function;
3. Use of mitigation banks may reduce permit processing times for projects that qualify and provide more cost-effective compensatory mitigation opportunities;
4. Compensatory mitigation is typically implemented and functioning in advance of project impacts, thereby reducing temporal losses of aquatic functions and uncertainty over whether the mitigation will be successful in offsetting project impacts;
5. The existence of mitigation banks can contribute towards attainment of the goal for no overall net loss of the Nation’s wetlands by providing applicants with opportunities to compensate for authorized impacts when mitigation might not otherwise be required.

II. Policy Considerations

The following policy considerations provide general guidance for the establishment, use and operation of mitigation banks. This policy applies to all mitigation bank proposals submitted for approval on or after the effective date of this guidance and to those in early stages of planning or development. It is not intended that this policy be retroactive for mitigation banks that have already received agency approval. While it is recognized that individual mitigation banking proposals may vary, the fundamental precepts of this guidance should apply to all future mitigation banks.

For the purposes of Section 10/404, and consistent with the CEQ regulations, the Guidelines, and the Memorandum of Agreement Between the Environmental Protection Agency (EPA) and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, mitigation means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.

Compensatory mitigation, under Section 10/404, is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of compensating for unavoidable adverse impacts. A site where wetlands and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources is a mitigation bank.

A. Authorities

This guidance is established in accordance with the following statutes, regulations, and policies. It is intended to clarify provisions within these existing authorities and does not establish any new requirements:

1. Clean Water Act Section 404 (33 USC 1344).
2. Rivers and Harbors Act of 1899 Section 10 (33 USC 403 et seq.).
4. Department of the Army, Section 404 Permit Regulations (33 CFR parts 320–330). Policies for evaluating permit applications to discharge dredged or fill material.
5. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404 (b)(1) Guidelines (February 6, 1990).
6. Title XII Food Security Act of 1985 as amended by the Food, Agriculture, Conservation and Trade Act of 1990 (16 USC 3801 et seq.).
8. Fish and Wildlife Coordination Act (16 USC 661 et seq.).
10. Magnuson Fishery Conservation and Management Act (16 USC 1801 et seq.).

B. Planning Considerations

1. Prospectus

Prospective bank sponsors are encouraged to submit a prospectus to
the Army Corps of Engineers (Corps) or Natural Resources Conservation Service (NRCS) to initiate the planning and review process by the appropriate agencies (e.g., pre-application coordination). The purpose of the prospectus is to provide information to the agencies regarding the general need for and technical feasibility of a bank, as well as its potential for providing compensatory mitigation within a particular watershed or other designated geographic area (i.e., bank service area). Formal agency involvement and review is initiated with submittal of a prospectus. The submittal of a prospectus and establishment of an approved mitigation bank in no way guarantees use of a bank to satisfy compensatory mitigation requirements of any authorized activity.

2. Goal Setting

The overall goal of a mitigation bank should be the establishment or reestablishment of a self-sustaining, functioning aquatic system, which replaces the functions and acreage of wetlands and other aquatic resources and is expected to be adversely affected within a watershed or other designated geographic area. It is desirable to set the particular objectives (i.e., determining the type and character of compensatory mitigation to be developed) for a mitigation bank in advance of site selection. The goal and objectives should be driven by the anticipated mitigation need; the site selection should support achieving the goal and objectives.

3. Site Selection

Consideration should be given to the ecological suitability of a site for achieving the goal and objectives of a bank, i.e., that it possess the physical, chemical and biological characteristics to support establishment of the desired aquatic resources and functions. Size and location of the site relative to other ecological features, hydrologic sources (including the availability of water rights), and compatibility with adjacent land uses and watershed management plans are important factors for consideration. It also is important that ecologically significant upland resources (e.g., mature forests) or cultural sites, or threatened and endangered species habitat are not compromised in the process of establishing a bank. Other factors for mitigation include development trends (i.e., land use changes), habitat status and trends, local or regional goals for the restoration or protection of particular habitat types or functions (e.g., reestablishment of habitat corridors), water quality and floodplain management goals, and establishment of habitat for species of concern.

Banks may be sited on public or private lands. Cooperative arrangements between public and private entities to use public lands for mitigation banks may be acceptable. In some circumstances, it may be appropriate to site banks on Federal, state, tribal or locally owned resource management areas (e.g., wildlife management areas, national or state forests, public parks, recreation areas). The siting of banks on such lands may be acceptable if the internal policies of the public agency allow use of such purposes, and the public agency grants approval. Mitigation credits generated by banks of this nature must be based solely on those values in the bank that are supplemental to the public program(s) already planned or in place, that is, baseline values represented by existing or already planned public programs, including preservation value, may not be counted toward bank credits. Federally funded wetland conservation projects undertaken via separate authority and for other purposes, such as the Wetlands Reserve Program, Farmers Home Administration fee title transfers or conservation easements, and Partners for Wildlife Program, cannot be used for the purpose of generating credits within a mitigation bank.

4. Technical Feasibility

Mitigation banks should be planned and designed to be self-sustaining over time to the extent possible and pose little risk of failure. The techniques for restoring and creating wetlands and/or other aquatic resources must be carefully selected, since restoration/creation science is constantly evolving. The restoration of historic or substantially degraded wetlands and/or other aquatic resources utilizing proven techniques increases the likelihood of mitigation success and lessens the loss of valuable uplands due to wetland creation. Thus, restoration should be the first option considered when siting a bank.

In general, banks which involve complex hydraulic engineering features and/or questionable water sources (e.g., pumped) are more costly to develop, operate and maintain, and have a higher risk of failure than banks designed to function with little or no human intervention. The former situations should be avoided to the extent possible. This guidance recognizes that in some circumstances wetlands must be actively managed to ensure their viability and sustainability.

Furthermore, long-term maintenance requirements may be necessary and appropriate in some cases (e.g., to maintain fire-dependent plant communities in the absence of natural fire; to control invasive exotic plant species).

Mitigation techniques should be sufficiently well understood and reliable to allow the development of detailed construction plans and specifications for review and approval. When uncertainties surrounding the technical feasibility of a proposed mitigation technique exist, appropriate arrangements (e.g., financial assurances, contingency plans, additional monitoring requirements) should be in place to increase the likelihood of success. Such arrangements may be phased out or reduced once the attainment of prescribed performance standards is demonstrated.

5. Role of Preservation

Credit may be given when existing wetlands and/or other aquatic resources are preserved in conjunction with restoration, creation or enhancement activities, and when it is demonstrated that the preservation will augment the functions of the restored, created or enhanced aquatic resource. Such augmentation may be reflected in the total number of credits available from the bank.

Consistent with existing regulations, policies and guidance, the preservation of existing wetlands and other aquatic resources in perpetuity may be authorized as the sole basis for generating credits in mitigation banks only under exceptional circumstances. Under such circumstances, preservation may be accomplished through the implementation of appropriate legal mechanisms (e.g., transfer of deed, deed restrictions, conservation easement) to protect wetlands and/or other aquatic resources, accompanied by implementation of appropriate changes in land use or other physical changes as necessary (e.g., installation of restrictive fencing).

Determining whether preservation is appropriate as the sole basis for generating credits at a mitigation bank requires careful judgment regarding a number of factors. Consideration must be given to whether wetlands and/or other aquatic resources proposed for preservation (1) perform physical or biological functions, the preservation of
which is important to the region in which the aquatic resources are located, and (2) are under demonstrable threat of loss or substantial degradation due to human activities that might not otherwise be expected to be restricted (e.g., by Section 10/404 or the FSA "Swampbuster" provisions). The existence of a demonstrable threat must be based on clear evidence of destructive land use changes which are consistent with local and regional land use trends and are not the consequence of actions under the control of the bank sponsor. The number of mitigation credits available from a bank that is based solely on preservation should be based on the functions that would otherwise be lost or degraded if the aquatic resources were not preserved, and the timing of such loss or degradation. As such, compensation for additional and/or greater impacts will generally require a greater number of acres from a preservation bank than from a bank which is based on restoration, creation or enhancement.

6. Inclusion of Upland Areas
Credit may be given for the inclusion of upland areas occurring within a bank only to the degree that such features increase the overall ecological functioning of the bank. If such features are included as part of a bank, it is important that they receive the same protected status as the rest of the bank and be subject to the same operational policies and procedures. An appropriate functional assessment methodology should be used to determine the manner and extent to which such features augment the functions of restored, created or enhanced wetlands and/or other aquatic resources. The presence of upland areas may increase the per-unit value of the aquatic habitat in the bank, but upland areas are not directly counted as mitigation credits.

7. Mitigation Banking and Watershed Planning
Mitigation banks should be planned and developed to address resource needs within a particular watershed. Moreover, decisions regarding the location and uses of a mitigation bank, as well as the type of wetlands and/or other aquatic resources to be restored, created, enhanced or preserved may often be made within the context of ecological objectives set for the watershed. Watershed planning efforts often identify categories of activities having minimal adverse effects on the aquatic ecosystem which could be authorized under a general permit. In order to reduce potential cumulative effects of such activities, it may be appropriate to offset these types of impacts through the use of a mitigation bank established in conjunction with a watershed plan.

C. Establishment of Mitigation Banks
1. Mitigation Banking Instruments
All mitigation banks need to have a banking instrument as documentation of agency concurrence on the objectives and administration of the bank. The banking instrument should describe in detail the physical and legal characteristics of the bank, and how the bank will be established and operated. The banking instrument will be signed by the bank sponsor and the concurring regulatory and resource agencies represented on the Mitigation Bank Review Team (section II.C.2.). The following information should be addressed, as appropriate:
   a. Bank goals and objectives;
   b. Ownership of bank lands;
   c. Bank size and classes of wetlands and/or other aquatic resources proposed for inclusion in the bank;
   d. Description of baseline conditions;
   e. Geographic service area;
   f. Wetland classes or other aquatic resource impacts suitable for compensation;
   g. Methods for determining credits and debits;
   h. Accounting procedures;
   i. Performance standards for determining credit availability and bank success;
   j. Reporting protocols and monitoring plan;
   k. Contingency and remedial actions and responsibilities;
   l. Financial assurances;
   m. Compensation ratios;

In cases where initial establishment of the mitigation bank involves a discharge into waters of the United States requiring Section 10/404 authorization, the banking instrument will be made part of the Department of the Army (DA) permit. The permit application to establish a bank will be reviewed by the Corps on its own merits pursuant to Section 10/404 policies and procedures. As such, preparation of a banking instrument should not alter the normal permit evaluation process timeframes. A bank sponsor may proceed with activities for the construction of a bank subsequent to receiving the DA authorization. It should be noted, however, that a bank sponsor who proceeds in the absence of a banking instrument does so at his/her own risk.

In cases where the mitigation bank is established pursuant to the FWS, the banking instrument will be included in the plan developed or approved by NRCS and the Fish and Wildlife Service (FWS).

2. Agency Roles and Coordination
Collectively, the signatory agencies to the banking instrument will comprise the Mitigation Bank Review Team (MBRT). Representatives from the Corps, EPA, FWS, National Marine Fisheries Service (NMFS), and NRCS, as appropriate, will be given the project use for the bank, should typically comprise the MBRT. In addition, it is appropriate for representatives from state, tribal and local regulatory and resource agencies to participate where an agency has authorities and/or mandates directly affecting or affected by the establishment, use or operation of a bank. No agency is required to sign a banking instrument; however, in signing a banking instrument, an agency agrees to comply with the terms of that instrument.

The Chair of the MBRT will be the Corps, except in cases where the bank is proposed solely for the purpose of complying with the FSA, in which case NRCS will be the MBRT Chair. Either agency may delegate that responsibility to another Federal, state, tribal or local agency, as appropriate.

The primary role of the MBRT is to facilitate the establishment of mitigation banks through the development of mitigation banking instruments. Because of the different authorities and responsibilities of each agency represented on the MBRT, there is a benefit in achieving agreement up front. For this reason, the MBRT will strive to obtain consensus on its actions. The MBRT will review and reach consensus on the banking instrument and final plans for the restoration, creation, enhancement, and/or preservation of wetlands and other aquatic resources. Once the banking instrument has been signed, the MBRT will not typically be involved in the operation of a bank on a project-specific basis. Periodically, the MBRT will review monitoring and accounting reports. In the event a bank

2 The term consensus as defined herein, is a process by which a group synthesizes its concerns and ideas to form a common collaborative agreement acceptable to all members. Under consensus, agreements or decisions are made without voting. An agreement is reached through a process of gathering information and viewpoints, discussion, analysis, persuasion, a combination or synthesis of the proposals and/or development of totally new solutions that are acceptable to the group. The goal of consensus is to reach an agreement or decision with which everyone can agree, but not necessarily unanimity. A consensus agreement is a recognition by a group that it has reached the best achievable solution for the parties involved.
sponsibility under Section 10/404, the Corps is responsible for making final decisions on a project-specific basis regarding the use of a mitigation bank for purposes of Section 10/404 and FSA, respectively. In the event an agency on the MBRT is concerned that a proposed use may not comply with the terms of the banking instrument, that agency may raise the issue to the attention of the Corps or NRCS through the permit evaluation process. In order to facilitate timely and effective consideration of agency comments, the Corps or NRCS, as appropriate, will advise the MBRT agencies of a proposed use of a bank and initiate discussion as necessary. The Corps will fully consider comments provided by the review agencies regarding mitigation as part of the permit evaluation process. The NRCS will consult with FWS in making its decisions pertaining to mitigation.

If, in the view of an agency on the MBRT, an issued permit or series of permits reflects a pattern of concern regarding the application of the terms of permits, the agency may initiate interagency review through written notification to, as appropriate, the Corps District Engineer, FWS Field Supervisor, NMFS Habitat Coordinator, NRCS State Conservationist and corresponding management levels within other agencies represented on the MBRT. Said notification to the MBRT, or initiate another appropriate forum for communication, typically within 10 days upon receipt of notification, to resolve concerns. If resolution is not reached, an agency may request that the issue be reviewed by higher levels within each agency consistent with the procedures described in the preceding paragraph.

Invoking this dispute resolution procedure to address concerns regarding the application of a banking instrument will not delay any permit decision pending before the authorizing agency (i.e., Corps or NRCS).

This guidance does not affect in any way the Corps statutory authorities and responsibilities under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act. The ability of an agency to elevate a particular permit or policy issue in accordance with the Section 404(q) Memorandum of Agreement between the Department of the Army and the Federal advisory agencies will not be limited in any way by this guidance. Similarly, EPA’s authority to deny or restrict authorization of a CWA permit in accordance with Section 404(c) will not be limited in any way by this guidance.

D. Criteria for Use of a Mitigation Bank

1. Project Applicability

All activities regulated under Section 10/404 may be eligible to use a mitigation bank as compensation for unavoidable impacts to wetlands and/or other aquatic resources in so far as the use complies with the terms of the banking instrument. Mitigation banks established for FSA purposes may be debited only in accordance with the mitigation and replacement provisions of 7 CFR part 12.

Mitigation banks may also be used to compensate for adverse impacts to wetlands and/or other aquatic resources authorized under other resource protection programs such as state regulatory programs. In no case may the same credits be used to compensate for more than one activity; however, the same credits may be used to compensate for an activity which requires authorization under more than one program.

2. Relationship to Mitigation Requirements

For purposes of Section 10/404, all appropriate and practicable steps must be undertaken by the applicant to first avoid and then minimize adverse impacts to aquatic resources, prior to authorization to use a particular mitigation bank. Remaining unavoidable impacts must be compensated to the extent appropriate and practicable. For both the Section 10/404 and “Swampbuster” programs, requirements for compensatory mitigation may be satisfied through the use of mitigation banks when either on-site compensation is not practicable or use of the mitigation bank is environmentally preferable to on-site compensation.

It is important to emphasize that applicants should not expect that establishment of, or participation in, a mitigation bank will ultimately lead to a determination of compliance with applicable mitigation requirements (i.e., Section 404(b)(1) Guidelines or FSA Manual), or as excepting projects from any applicable requirements.
3. Geographic Limits of Applicability

The service area of a mitigation bank is the designated area (e.g., watershed or county) wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic resources. Designation of the service area should be based on consideration of hydrologic, edaphic and biotic criteria, and be stipulated in the banking agreement.

The geographic extent of a service area should be guided by the cataloging unit of the "Hydrologic Unit Map of the United States" (USGS, 1980) and ecoregion of the "Ecoregions of the United States" (James M. Omernik, EPA, 1986) or section of the "Descriptions of the Ecoregions of the United States" (Robert G. Bailey, USDA, 1980). It may be appropriate to use other hydrologic and biotic classification and mapping systems developed at the state or regional level for the purpose of specifying bank service areas, when such systems compare favorably in their objectives and level of detail. In the interest of integrating banks with other resource management objectives, bank service areas may encompass larger watershed areas if the designation of such areas is supported by local or regional management plans (e.g. Special Area Management Plans, Advance Identification), State Wetland Conservation Plans or other Federally sponsored or recognized watershed management plans.

4. Use of a Mitigation Bank vs. On-Site Mitigation

As indicated in 1990 Memorandum of Agreement on mitigation between the EPA and DA, compensatory mitigation should be undertaken in areas adjacent or contiguous to the site of the aquatic resource impacts when practicable and environmentally preferable. This preference for on-site mitigation is established because on-site mitigation often has greater potential for compensating for particular aquatic functions. For example, on-site mitigation may be the most appropriate option for compensating for local flood control functions, habitat for a species or population with a very limited geographic range or narrow environmental requirements, or where local water quality concerns dominate.

The preference for on-site mitigation, however, should not preclude the use of a mitigation bank when there is no practicable opportunity for on-site compensation, or when use of a bank is environmentally preferable to on-site compensation. In making the latter determination, careful consideration must be given to wetland functions, landscape position, affected species population at the impact and mitigation bank sites, and potential on-site compensation areas. In general, it may be desirable to provide compensation for minor aquatic resource impacts through consolidation in a well-managed bank. There may also be circumstances warranting a combination of on-site and off-site (i.e., bank) mitigation to compensate for losses.

With respect to larger aquatic resource impacts, use of a bank may be appropriate if it is capable of replacing essential physical and/or biological functions of the aquatic resources which are expected to be lost or degraded and is environmentally preferable to on-site compensatory mitigation. Moreover, for projects that might otherwise cause or contribute to significant degradation (40 CFR part 230.10(c)), a bank may only be used when it is demonstrated that use of the bank will prevent or replace the lost functions that give rise to the significant degradation finding, and where a reasonable assurance of success is provided.

5. In-Kind vs. Out-Of-Kind Mitigation Determinations

In the interest of achieving functional replacement, in-kind compensation of aquatic resource impacts should generally be required. Out-of-kind compensation may be acceptable if it is determined to be practicable and environmentally preferable to in-kind compensation (e.g., of greater ecological value to a particular region). However, non-tidal wetlands should typically not be used to compensate for the loss or degradation of tidal wetlands, nor vice versa. Decisions regarding out-of-kind mitigation are typically made on a case-by-case basis during the permit evaluation process. The banking instrument may identify circumstances in which it is environmentally desirable to allow out-of-kind compensation within the context of a particular mitigation bank. Mitigation banks developed as part of an area-wide management plan to address a specific resource objective (e.g., restoration of a particularly vulnerable or valuable wetland habitat type) may be such an example.

6. Timing of Credit Withdrawal

The number of credits available for withdrawal (i.e., debiting) should generally be commensurate with the level of aquatic functions attained at a bank at the time of debiting. The level of function may be determined through the application of performance standards tailored to the specific restoration, creation or enhancement activity at the bank site or through the use of an appropriate functional assessment methodology.

The success of a mitigation bank with regard to its capacity to establish a healthy and fully functional aquatic system relates directly to both the ecological and financial stability of the bank. Since financial considerations are particularly critical in early stages of bank development, it may be appropriate to allow limited debiting based upon a projected level of aquatic functions at a bank (e.g., 15% of the total credits projected for the bank at maturity). However, it is the intent of this policy to ensure that those actions necessary for the long-term viability of a mitigation bank be accomplished prior to any debiting of the bank. In this regard, the following requirements should be satisfied prior to debiting: (1) Banking instrument and final mitigation plans have been approved; (2) bank site has been secured; and (3) appropriate financial assurances have been established. In addition, initial physical and biological improvements should be completed within the first full growing season following initial debiting of a bank.

Credits based solely on the preservation of existing aquatic resources may become available for debiting immediately upon implementation of appropriate legal protection accompanied by appropriate changes in land use or other physical changes, as necessary.

7. Crediting/Debiting/Accounting Procedures

Credits and debits are the terms used to designate the units of trade (i.e., currency) in mitigation banking. Credits represent the accrual or attainment of aquatic functions at a bank; debits represent the loss of aquatic functions at an impact or project site. Credits are debited from a bank when they are used to offset aquatic resource impacts (e.g., for the purpose of satisfying Section 10/404 permit or FSA requirements).

An appropriate functional assessment methodology (e.g. Habitat Evaluation Procedures, hydrogeomorphic approach to wetlands functional assessment) acceptable to all signatories should be used to assess wetland and/or other aquatic resource restoration, creation
and enhancement efforts within a mitigation bank, and to quantify the amount of available credits. The range of functions to be assessed will depend upon the assessment methodology identified in the banking instrument. The same methodology should be used to assess both credits and debits. If an appropriate functional assessment methodology is impractical to employ, credits and debits can be based on simple indices (e.g., acres) of various classes of wetlands and/or other aquatic resources (e.g., Cowardin et al., 1979, as modified for National Wetland Inventory mapping conventions).

The bank sponsor should be responsible for assessing the development of the bank and submitting appropriate documentation of such assessments to the authorizing agency(ies) and members of the MBRT for review. Alternatively, functional assessments may be conducted by a team representing involved resource and regulatory agencies and other appropriate parties.

Bank sponsors will establish and maintain an accounting system (i.e., ledger) which documents the activity of all mitigation bank accounts. Each time an approved debit/credit transaction occurs at a given bank, the bank sponsor will submit a statement to each member agency of the MBRT. The bank sponsor will also generate an annual ledger report for all mitigation bank accounts for similar distribution.

Credits may be sold to third parties. The cost of mitigation credits to a third party is determined by the bank sponsor.

8. Party Responsible for Bank Success

The bank sponsor is responsible for assuring the success of the restoration, creation, enhancement and preservation activities at the mitigation bank. This responsibility must be clearly documented in the banking instrument and in any authorization approving the use of the bank as compensatory mitigation. Where authorization under Section 10/404 and/or FSA is necessary to establish the bank, the DA permit or NRCS plan should be conditioned accordingly to ensure that provisions of the banking instrument are enforceable.

E. Long-Term Management, Monitoring and Remediation

1. Bank Operational Life

The operational life of a bank refers to the period during which the terms and conditions of the banking instrument are applicable, and signatories of the instrument are responsible for carrying out its provisions. With the exception of arrangements for the long-term management and protection in perpetuity of the bank, the operational life of a mitigation bank terminates at the point when (1) compensatory mitigation credits have been exhausted or banking activity is voluntarily terminated with written notice by the bank sponsor provided to the Corps or NRCS and other members of the MBRT, and (2) it has been determined that the debited bank is functionally mature and/or self-sustaining to the degree specified in the banking instrument.

2. Long-Term Management and Protection

Mitigation banks should be protected in perpetuity with appropriate real estate arrangements. In exceptional circumstances, real estate arrangements may be approved which dictate finite protection for a bank. However, in no case should finite protection extend for a lesser time than the duration of project impacts for which the bank is being used to provide compensation.

All banks must be protected by legal instruments which effectively prevent harmful activities (i.e., incompatible uses) that would jeopardize their continued conservation purpose. Acceptable instruments are deed restrictions, conservation easements or other enforceable legal mechanisms.

Banking instruments should identify the entity responsible for the management of the bank beyond its operational life as a means to assure the conservation purpose of the bank. The bank sponsor is responsible for securing adequate funds for the operation and maintenance of the bank during its operational life, as well as for management of the bank beyond its operational life, as necessary. Where needed, the acquisition and protection of water rights should be secured by the bank sponsor and documented in the banking instrument.

3. Monitoring Requirements

The bank sponsor is responsible for monitoring the mitigation bank in accordance with monitoring provisions identified in the banking instrument to determine the level of success and identify problems requiring remedial action. Monitoring provisions need to be set forth in the banking instrument and based on scientifically sound performance standards prescribed for the bank. Monitoring should be conducted at time intervals appropriate for the particular project type and until such time that the authorizing agency(ies), in consultation with the MBRT, are confident that success is being achieved (i.e., performance standards are attained). Annual monitoring reports should be submitted to the authorizing agency(ies) and members of the MBRT.

4. Remedial Action

The banking instrument should stipulate the procedures for identifying and implementing remedial measures at a bank, or any portion thereof. Remedial measures should be based on information contained in the monitoring reports (i.e., the attainment of prescribed performance standards), as well as site inspections. The need for remediation will be determined by the authorizing agency(ies) in consultation with the MBRT and bank sponsor.

5. Financial Assurances

The bank sponsor is responsible for securing sufficient funds to cover contingency actions in the event of bank default or failure. Accordingly, banks posing a greater risk of failure and where credits have been debited, should have comparatively higher financial sureties in place, than those where the likelihood of success is more certain. In addition, the bank sponsor is responsible for securing adequate funding to monitor and maintain the bank throughout its operational life, as well as beyond the operational life if not self-sustaining. Total funding requirements should reflect realistic cost estimates for monitoring, long-term maintenance, contingency and remedial actions.

Financial assurances may be in the form of performance bonds, irrevocable trusts, escrow accounts, casualty insurance, or other approved instruments. Such assurances may be phased-out or reduced, once it has been demonstrated that the bank is functionally mature and/or self-
III. Definitions

For the purposes of this guidance document the following terms are defined:

A. Bank sponsor. Any public or private entity responsible for establishing and, in most circumstances, operating a mitigation bank.

B. Compensatory mitigation. For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidable and minimization has been achieved.

C. Creation. The establishment of a wetland or other aquatic resource where one did not formerly exist.

D. Credit. A unit of measure representing the accrual or attainment of aquatic functions at a mitigation bank.

E. Debit. A unit of measure representing the loss of aquatic functions at an impact or project site.

F. Enhancement. Activities conducted in existing wetlands or other aquatic resources to achieve specific management objectives or provide conditions which previously did not exist, and which increase one or more aquatic functions. Enhancement may involve trade-offs between aquatic resource structure, functions, and values; a positive change in one function may result in negative effects to other functions.

G. Mitigation. For purposes of Section 10/404 and consistent with the Council on Environmental Quality regulations, the Section 404(b)(1) Guidelines and the Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, mitigation means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.

H. Mitigation bank. A mitigation bank is a site where wetlands and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources. For purposes of Section 10/404, use of a mitigation bank may only be authorized when impacts are unavoidable.

I. Mitigation Bank Review Team (MBRT). An interagency group of Federal, state, tribal, and/or local regulatory and resource agency representatives which are signatory to a banking instrument and oversee the establishment, use and operation of a mitigation bank.

J. Practicable. Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

K. Preservation. The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the aquatic ecosystem.

L. Restoration. Re-establishment of previously existing wetland or other aquatic resource character and function(s) at a site where they have ceased to exist, or exist only in a substantially degraded state.

M. Service area. The service area of a mitigation bank is the designated area (e.g., watershed, county) wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic resources.